

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 01/21/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV2203747

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER:

CLERK: ALINA ANDRES

PLAINTIFF: STEPHEN ROULAC

vs.

DEFENDANT: PROMORTGAGE, INC., ET
AL

NATURE OF PROCEEDINGS: DEMURRER

RULING

Defendant Axis Appraisal Management Solutions' demurrer to the Third Amended Complaint is sustained without leave to amend.

Allegations in the Third Amended Complaint

Plaintiff Stephen Roulac alleges that in March 2018, while represented by ProMortgage, Inc. ("ProMortgage"), Plaintiff applied for a \$3.2 million mortgage loan from Defendant Luther Burbank Savings ("LBS"). ProMortgage explained to LBS that timely loan processing was imperative because Plaintiff needed to be able to show he could purchase his wife's interest in the property in connection with pending divorce proceedings. LBS told Plaintiff it would process his loan application on an accelerated schedule and that the property had sufficient value to meet LBS's lending requirements. By early April 2018, LBS approved the loan application conditional on a satisfactory appraisal. ProMortgage advised Plaintiff that he could expect the loan would close within 15 days of LBS approving an appraisal. LBS told ProMortgage that for a premium rush fee of \$1,100, the appraisal report would be delivered within two or three days, and that its internal appraisal review would be done within 72 hours of its receipt of the appraisal report. Plaintiff paid the \$1,100 fee.

Defendant M.J. Roney ("Roney"), the appraiser, was aware of Plaintiff's need to obtain a quick and competent appraisal. Plaintiff and Roney met at the property and discussed among other things Plaintiff's need for a quick appraisal and his reason for seeking the expedited report. Roney acknowledged Plaintiff's interest in obtaining a quick appraisal, but an appraisal was not delivered until nine days after the promised two or three days. ProMortgage advised Plaintiff that the appraisal report had been submitted to Axis Appraisal Management Solutions, Inc. ("Axis"), which would then conduct its own internal review to affirm the report had no errors. LBS then advised ProMortgage that it had identified problems with the appraisal and imposed

additional conditions to funding the loan, including an inspection, a study by an engineer concerning liquefaction and the property's structural stability, and estimated costs to address defects in the property identified by Roney. LBS informed Plaintiff that the required structural study would take three weeks and cost \$2,000. ProMortgage provided Plaintiff a copy of the appraisal report, signed by Roney, on June 15, 2018. Axis was noted as the Client/Lender on the report. Plaintiff provided an inspection report that LBS required which confirmed that the condition of the property was better than what Roney determined, that the house was of sound structural stability, and that costs to remedy defects were modest. Plaintiff also provided LBS with information about the lack of seismic risk, but LBS refused to acknowledge the validity of this information. In late 2018, LBS advised Plaintiff that it would not proceed with the mortgage financing.

The First Cause of Action alleges breach of fiduciary duty against Defendants LBS, Luther Burbank Corp. ("LBC"), Roney, and Axis. The Second Cause of Action alleges breach of contract against LBS and LBC.

Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law, and it raises only a question of law." (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint "ordinarily is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the plaintiff's claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099 [citation and internal quotations omitted].) Legal conclusions are insufficient. (*Id.* at 1098–1099; *Doe*, 42 Cal.4th at 551, fn. 5.) The court "assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

Discussion

Axis demurs to the First Cause of Action for breach of fiduciary duty.

Fiduciary Relationship

Axis points out that the only three facts alleged as to Axis are that (1) ProMortgage advised Plaintiff that the appraisal report had been submitted to Axis, which would then be conducting its customary internal quality control review to confirm the report had no errors; (2) Axis' website represents that it serves lenders, borrowers and brokers by providing timely and accurate appraisals; and (3) Axis and Roney knew that Plaintiff, Plaintiff's ex-wife, and the court needed a timely and accurate appraisal report in connection with the divorce proceeding. (Third Amended Complaint ("TAC"), ¶¶22, 37.)

Axis argues that Plaintiff fails to allege sufficient facts of a fiduciary relationship between it and Plaintiff. "The allegation of a fiduciary relationship must be supported by either a contract, or a relationship that imposes it as a matter of law." (*Berryman v. Merit Prop. Mgmt.*

Inc. (2007) 152 Cal.App.4th 1544, 1558.) Plaintiff does not allege any contract or any special or heightened relationship between him and Axis. He does not allege that he retained Axis or Roney on his own behalf and his allegations acknowledge that Roney and/or Axis's dealings were with a different party (i.e., the lender LBS). (See TAC, ¶18.) Despite this lack of privity or direct dealing, Plaintiff alleges that Axis owed him a fiduciary duty to provide a competent appraisal within Plaintiff's desired expedited timeline because Axis was aware of Plaintiff's needs. (*Id.*, ¶41.)

Plaintiff still has not alleged sufficient facts to show a fiduciary relationship between him and Axis. Plaintiff's allegations indicate that the appraisal was ordered by and prepared for LBS, which required an approved appraisal before making a loan to Plaintiff. (TAC, ¶¶13, 16.) The *Soderberg* case cited by Plaintiff does not compel a contrary result. First, *Soderberg* addressed the question as to whether an appraiser could be liable to a third party for negligent misrepresentation. The plaintiff there did not assert a claim for breach of fiduciary duty and the court did not address whether a fiduciary relationship existed. (See *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, 1774-1775.) Second, even with respect to the negligent misrepresentation analysis, courts have distinguished *Soderberg* where the appraiser's intent is to influence the lender in its decision whether to lend money, even if the appraiser is also aware of the borrower and the importance of the property valuation to the parties in the lending transaction. (See *Willemsen v. Mitrosilis* (2014) 230 Cal.App.4th 622, 632; *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1253-1254.) The facts as alleged here fall within the scope of *Willemsen* and *Tindell* as they show the appraisal was intended to influence LBS in deciding whether to make a loan to Plaintiff.

Plaintiff's allegation that Axis and LBS were the agents of each other also does not compel a different result, as the facts alleged do not support this allegation. Plaintiff alleges only that LBS required an approved appraisal, an appraisal was conducted and submitted to Axis for internal review, and LBS later declined to loan the funds based at least in part on the results of an appraisal. There are no allegations that LBS had the right to control Axis's actions, or vice versa. (See *Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 855 [“Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent”] [citation omitted].)

Accordingly, Axis's demurrer is sustained on the ground that no fiduciary relationship is alleged by Plaintiff.

Statute of Limitations

Axis demurs to this cause of action on the additional ground that it is time-barred. In its October 15, 2025 Order, the Court concluded that the two year statute of limitations applied because Plaintiff's cause of action sounds in professional negligence. The Court adopts that ruling and its analysis here. Plaintiff alleges in his Third Amended Complaint that in around March and April 2018, ProMortgage advised Plaintiff that the appraisal report had been submitted to Axis for internal review (TAC, ¶¶7, 13, 22, 23) and that Plaintiff had reviewed the appraisal, which identified Axis as the client/lender, by June 2018 at the latest. (*Id.*, ¶¶24, 27.) Plaintiff did not file his initial Complaint in this case until four and a half years later on

November 16, 2022. The Complaint did not mention Axis. (See Complaint filed Nov. 16, 2022.) Axis was named as a defendant for the first time in Plaintiff's First Amended Complaint, filed on March 13, 2025, in which Plaintiff first asserted his breach of fiduciary duty claim against it.¹

Plaintiff's reliance on Emergency Rule 9 is unavailing, as that rule tolled the statute of limitations for civil causes of action from April 6, 2020 to October 1, 2020. Therefore, at most, the statute of limitations for Plaintiff's claim would have been tolled for a matter of months. Plaintiff did not file his initial Complaint until over two years later in November 2022 and did not file his First Amended Complaint naming Axis as a defendant until almost seven years later in March 2025.

The demurrer is therefore sustained on the additional ground that the First Cause of Action is time-barred as to Axis.

Leave to Amend

As Plaintiff has already had several opportunities to state a cause of action against Axis but has still failed to do so, the demurrer is sustained without leave to amend.

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 January, 2026 is as follows:

<https://marin-courts-ca-gov.zoomgov.com/j/1615487764?pwd=Ob4B5J7LLKcpnkxzJjEOSHnzEGafG.1>

Meeting ID: 161 548 7764

Passcode: 502070

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>

¹ The Court takes judicial notice, sua sponte, of the Complaint and First Amended Complaint. (See *Scott v. JPMorgan Chase Bank* (2013) 214 Cal.App.4th 743, 752 [“the court may take judicial notice on its own volition”].) Page 4 of 4

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 01/21/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV2300340

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER:

CLERK: ALINA ANDRES

PLAINTIFF: TAMARA WATKINS

vs.

DEFENDANT: PRICE-SIMMS, INC., ET
AL

NATURE OF PROCEEDINGS: HEARING – OTHER: FINAL APPROVAL

RULING

The unopposed motion is granted. The court has broad discretion to determine whether a class action settlement is fair, adequate, and reasonable. (*In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1389.) In exercising its discretion, the court must review the moving papers along with the entirety of the court file to determine whether the settlement, including PAGA claims is genuine, meaningful, and consistent with the underlying purposes of the PAGA-related statute. (Labor Code section 2699(1).)

On March 5, 2025 a hearing was held on Plaintiff’s unopposed motion for preliminary approval and approval was granted. Class members were given notice of the settlement, and no objections were filed to the settlement. The court determines that a sufficient showing has been made that the settlement, the attorneys’ fees, costs, and service award are fair, adequate, and reasonable. In reaching this conclusion, the court has considered amongst other factors, the amount of the settlement, the length of time litigating, and the arms-length negotiation through mediation. The court finds a sufficient showing has been made that the settlement is consistent with the purpose of PAGA. The court grants final approval of the settlement and approves the attorneys’ fees, costs, and service award. The court shall, therefore, sign the proposed order granting final approval of the class action settlement.

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: 01/21/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0001063

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER:

CLERK: ALINA ANDRES

PLAINTIFF: MAHER FAKHOURI

vs.

DEFENDANT: TAREQ FAKHOURI

NATURE OF PROCEEDINGS MOTION – COMPEL - DISCOVERY FACILITATOR PROGRAM

RULING

Cross-Defendants Mazen Fakhouri, Fawzi Habhab, and Petra Accounting and Consulting Group (“Cross-Defendants”) filed a motion to compel responses to special interrogatories against Cross-Complainant Tareq Fakhouri (“Cross-Complainant”). On November 18, 2025, Cross-Complainant asserted that he had provided substantive responses and that the remaining dispute concerned whether the court should award monetary sanctions. Cross-Defendants had asserted that the newer responses were deficient. It did not appear that the parties had attended a meeting with the discovery facilitator.

On November 25, 2025, the parties agreed to continue the motion to compel discovery to January 21, 2026. No subsequent pleadings have been filed.

Appearances required.

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: 01/21/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0002137

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER:

CLERK: ALINA ANDRES

PLAINTIFF: CAROLINE STEWART
COLVIN

vs.

DEFENDANT: BROOKS MCDONALD

NATURE OF PROCEEDINGS MOTION – ANTI-SLAPP 425.16

RULING

The special motion to strike by Defendants/Cross-Complainants and Cross-Defendants Brooks McDonald individually and dba Brooks McDonald Architecture (collectively “McDonald”) is DENIED. (Code Civ. Proc., § 425.16.)

Procedural History

Cross-Defendants and Cross-Complainants Caroline Stewart Colvin and Robb Colvin, M.D. (“Plaintiffs” or “the Colvins”) filed this action against McDonald alleging professional negligence arising out of a residential construction project at their property located at 147 Sycamore Avenue in Mill Valley. McDonald filed a cross-complaint against Golden Gate Builders, Inc. (“GGB”) and Turbin Design Associates, Inc. dba Turbin Structural Engineering (“Turbin”) asserting claims for indemnity and contribution. Turbin then filed a cross-complaint against the Colvins and GGB.

As relevant to the instant motion, the Colvins thereafter filed the instant cross-complaint against McDonald and Turbin, alleging, four causes of action, as follows: 1) breach of contract – implied contractual indemnity (against McDonald only); 2) declaratory relief (against Turbin only); 3) equitable indemnity (against McDonald only); and 4) contribution. In their cross-complaint, the Colvins deny the allegations in Turbin and McDonald’s cross-complaints, deny responsibility for McDonald’s claims against Turbin and further allege they have incurred or may incur damages and exposure in connection with McDonald’s cross-complaint against Turbin.

McDonald now moves to strike portions of the Colvins cross-complaint, specifically the allegations at paragraphs 10-11 and 26-32 and the prayer for relief at paragraph 1 pursuant to Code of Civil Procedure section 425.16 and seeks recovery of attorney fees.

Legal Standard

Code of Civil Procedure section 425.16 sets forth the procedure governing anti-SLAPP motions. In pertinent part, the statute states, “A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (Code Civ. Proc., § 425.16(b)(1).) The purpose of the statute is to identify and dispose of lawsuits brought to chill the valid exercise of a litigant's constitutional right of petition or free speech. (Code Civ. Proc., § 425.16(a); *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055-1056.)

Courts employ a two-step process to evaluate anti-SLAPP motions. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) To invoke the protections of the statute, the defendant must first show that the challenged lawsuit arises from protected activity, such as an act in furtherance of the right of petition or free speech. (*Ibid.*; see also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) From this fact, courts “ ‘presume the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the plaintiff to rebut the presumption by showing a reasonable probability of success on the merits.’ ” (*Equilon Enterprises, supra*, 29 Cal.4th at 61.) In determining whether the plaintiff has carried this burden, the trial court considers “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (Code Civ. Proc., § 425.16(b)(2); see *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) If the moving party satisfies this burden, the burden shifts to the opposing party to demonstrate a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

Discussion

A. Prong One: Whether the Claims Arise From Protected Activity

There is no dispute that the filing of a complaint or cross-complaint constitutes protected petitioning activity under Code of Civil Procedure section 425.16, subdivision (e). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) However, courts must look to the gravamen of the claim and identify the conduct that forms the basis for liability. (*Navellier, supra*, 29 Cal.4th at p. 89.)

Here, the Colvins cross-complaint asserts claims for indemnity and contribution against McDonald, alleging that they are not responsible for the damages asserted by Torbin and that any such damages were primarily caused by the acts or omissions of McDonald or other parties. Although the Colvins allege they have incurred or may incur damages “with respect to” McDonald’s cross-complaint, the claim does not seek to impose liability based on the act of filing that cross-complaint. Rather, the Colvins seek equitable allocation of responsibility should liability be imposed based on comparative fault.

In *C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, the Court of Appeal held that claims for indemnity and contribution do not arise from protected activity

simply because the claims seek reimbursement for defense costs incurred in litigation. The court emphasized that the operative conduct was the defendants' alleged responsibility for the underlying harm, not the act of filing suit. (*Id.* at p. 702–703.) Similarly, in *Gumarang v. Braemer* (2025) 110 Cal.App.5th 370, the Court of Appeal rejected the argument that an indemnity claim arises from protected activity merely because it would not exist but for the filing of litigation. The Court explained that indemnity claims arise from alleged responsibility for underlying liability, not from petitioning activity itself. (*Id.* at p. 383–385.)

Here, the gravamen of the Colvins cross-complaint and the specifically challenged allegations therein is allocation of fault and equitable risk-shifting arising from alleged construction-related conduct. (See Cross-Complaint generally.) The filing of the cross-complaint is merely the context in which potential exposure arose and does not supply the basis for liability. The Colvins do not allege that McDonald's cross-complaint was false, malicious, or an abuse of process. Nor do they assert causes of action that directly target petitioning activity, such as malicious prosecution or abuse of process. Instead, the claim presumes the legitimacy of the litigation and seeks equitable indemnity should the Colvins be held liable.

Accordingly, McDonald has failed to meet their burden under the first prong of Code of Civil Procedure section 425.16.

B. Prong Two: Probability of Prevailing on the Merits

Because McDonald has not satisfied the first prong of the anti-SLAPP analysis, the Court does not reach the second prong. (*City of Cotati, supra*, 29 Cal.4th at p. 80.)

Conclusion

McDonald failed to meet their burden to show the cross-complaint arises out of protected activity. Accordingly, the motion to strike the cross-complaint is DENIED. (Code Civ. Proc. § 425.16.)

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: 01/21/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0003280

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER:

CLERK: ALINA ANDRES

PLAINTIFF: CHRISTOPHER PARRA

vs.

DEFENDANT: SAFEWAY, INC., ET AL

NATURE OF PROCEEDINGS: MOTION – COMPEL – DISCOVERY FACILITATOR PROGRAM

RULING

Defendant has moved to compel the deposition of Plaintiff Christopher Parra and for discovery sanctions. Plaintiff and Defendant participated in a meeting with the discovery facilitator and agreed to a deposition date of December 18, 2025. However, according to Plaintiff called the day before the deposition and stated he was not feeling well and did not provide a date for the deposition to be taken. Defendant avers that they incurred \$1,300 in court reporter and videographer fees in relation to the late cancellation as well as \$1,300 on July 25, 2025 related to Plaintiff's non-appearance.

Plaintiff did not file an opposition to Defendant's motion. In light of the above, the court shall award \$2,600 in costs to Defendant and against Plaintiff to be paid within 60 days of this order.

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: 01/21/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0005035

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER:

CLERK: ALINA ANDRES

PLAINTIFF: SARA KARILINE
MCEVOY

vs.

DEFENDANT: ALONSO ALVAREZ, ET
AL

NATURE OF PROCEEDINGS: MOTION – LEAVE TO FILE FIRST AMENDEND
COMPLAINT

RULING

Plaintiff Sara McEvoy (“Plaintiff”) filed a motion for leave to file a first amended complaint. No opposition was filed. Plaintiff’s motion is therefore granted. Plaintiff shall file her first amended complaint within fifteen (15) days of service of this order.

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: 01/21/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0005468

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER:

CLERK: ALINA ANDRES

PLAINTIFF: MICAELLA CRISTINA
CAPELLI

vs.

DEFENDANT: MARIN HEALTH, ET AL

NATURE OF PROCEEDINGS: 1) DEMURRER
2) DEMURRER

RULING

Defendant Sonoma Valley Health Care District d/b/a Sonoma Valley Hospital's ("Sonoma"), and Marin Health's demurrers to Plaintiff Micaella Cristina Capelli's ("Plaintiff") complaint are SUSTAINED with leave to amend as to the Second (negligence), Third (NIED), and Fourth (IIED) Causes of Action. The demurrers are sustained without leave to amend as to the Fifth Cause of Action ("Punitive Damages"). (Code Civ. Proc., § 430.10, subd. (e); *Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1135.)

BACKGROUND

This is a medical malpractice case. Plaintiff, a resident of Italy, visited the Bay Area in September 2024. (Complaint, ¶ 3.) During her stay, she began experiencing fatigue, back pain, and swelling in her leg. (*Id.* at ¶ 9.) She sought medical care at Marin Health where she alleges that a doctor failed to properly assess the severity of her condition. (*Id.* at ¶¶ 10, 11.) She alleges that after being discharged from Marin Health, her symptoms worsened, and she sought further medical treatment from Sonoma. (*Id.* at ¶ 12.) She asserts that another physician at Defendant's facility also failed to recognize the severity of her condition and treat her properly. (*Id.* at ¶¶ 12, 13.)

As to all defendants, Plaintiff asserts causes of action for medical malpractice, negligence, negligent infliction of emotional distress ("NIED"), intentional infliction of emotional distress ("IIED"), and "punitive damages." The Court now considers the demurrers to the complaint.

LEGAL STANDARD

The function of a demurrer is to test the legal sufficiency of the challenged pleading. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) As a general rule, in testing a

pleading against a demurrer, the facts alleged in the pleading are deemed to be true, however improbable they may be. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; *Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568.) A complaint must be liberally construed, and all reasonable inferences must be drawn in favor of its allegations. (*Teva Pharmaceuticals USA, Inc. v. Superior Court* (2013) 217 Cal.App.4th 96, 102; see also Code Civ. Proc., § 452.) The court gives the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Moore v. Regents of Univ. of Calif.* (1990) 51 Cal.3d 120, 125.)

In a demurrer proceeding, the defects must be apparent on the face of the pleading or via proper judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) The face of the complaint includes matters shown in exhibits attached to the complaint and incorporated by reference. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) “The only issue involved in a demurrer hearing is 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.)

If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 317.)

DISCUSSION

First, Second, and Third Causes of Action: Medical Malpractice, Negligence, and NIED

Plaintiff’s Second Cause of Action (negligence), alleges that Defendants breached their duty “to exercise reasonable care in providing medical treatment to Plaintiff.” (Complaint, ¶¶ 20, 21.) This describes a cause of action for medical malpractice. This cause of action is duplicative of Plaintiff’s First Cause of Action (medical malpractice), which alleges that Defendants breached “the standard of care required of healthcare providers.” (Complaint, ¶ 15.)

Courts have sustained demurrers on the ground that when compared to another cause of action pleaded, the claim subject to demurrer reflects “merely duplicative pleading which adds nothing to the complaint by way of fact or theory.” (*Award Metals, supra*, 228 Cal.App.3d 1128, 1135 [as modified]; accord *Palm Spring Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 290; *Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 501.) Plaintiff argues that one is allowed to plead in the alternative, but the complaint does not do so. These causes of action plead the same theory, based on the same facts, using different language. Whether a plaintiff is permitted to “plead a professional negligence claim (health-care specific duty/breach) and a general negligence claim (broader conduct, including non-medical operational decisions)” (Opposition, p. 3) is irrelevant, because both of these causes of action assert breach of the duty to adhere to the standard of care applicable to provision of medical services. (See Complaint, ¶¶ 15-18, 20-22.)

The Third Cause of Action (NIED) is likewise duplicative of the First and Second Causes of Action. NIED is a species of liability for negligence wherein the alleged injury consists of emotional distress. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205; *Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 129; *Christensen v.*

Superior Court (1991) 54 Cal.3d 868, 884.) Plaintiff's Third Cause of Action alleges that the negligent conduct set forth in the First and Second Causes of Action "caused Plaintiff to suffer severe emotional distress." (Complaint, ¶ 24.) That her alleged injury consists in part of emotional distress does not mean it provides a basis for a separate cause of action. The Court notes that the First and Second Causes of Action assert that Plaintiff's injuries include emotional distress. (Complaint, ¶¶ 18, 22.)

The Court sustains both demurrers as to the Second and Third Causes of Action with leave to amend.

Fourth Cause of Action: IIED

To plead IIED, a plaintiff must plead (1) extreme and outrageous conduct by the defendant, (2) intent to cause emotional distress or reckless disregard of the risk of causing the same, (3) severe emotional distress, and (4) causation. (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.) To qualify as "extreme and outrageous," the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Id.*, p. 496 [quoting Rest.2d Torts, § 46, com. d, p. 73].) "Liability for intentional infliction of emotional distress 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [quoting *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1122 (overruled on another ground by *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19)].) That allegations are insufficiently extreme and outrageous as a matter of law is a proper ground on which to sustain a demurrer. (*Cochran, supra*, 65 Cal.App.4th 488, 494.)

Plaintiff's complaint sets forth a garden-variety claim for medical malpractice. The conduct she has alleged is simply too different in kind and degree from the sort of egregious behavior that has been held sufficiently "extreme and outrageous" to support a claim for IIED. (See, e.g., *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1488 [television camera crew entered private residence without consent to film paramedics' ultimately unsuccessful attempts to save the life of heart attack victim, later broadcasting the footage]; *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1226 [48-year-old doctor sexually abused plaintiff, his underage coworker, for an extended period while plying her with alcohol and drugs]; *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 809 [repeated, graphic threats of physical harm].)

Both demurrers to this cause of action are sustained with leave to amend. The court previously granted Defendants' motion to strike punitive damages, which should eliminate the fifth cause of action. This cause of action would otherwise be sustained without leave to amend, as punitive damages "are mere incidents to the cause of action and can never constitute the basis thereof." (*Clark v. McClurg* (1932) 215 Cal. 279, 282.) Nothing in this order prevents Plaintiff from bringing a motion to amend her complaint to include punitive damages allegations under Section 425.13 within the statutory time limit to do so.

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 January, 2026 is as follows:

<https://marin-courts-ca-gov.zoomgov.com/j/1615487764?pwd=Ob4B5J7LLKcpnkxzJjEOSHnzEGafG.1>

Meeting ID: 161 548 7764

Passcode: 502070

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: 01/21/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0006078

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER:

CLERK: ALINA ANDRES

PLAINTIFF: JOSHUA THOMPSON

vs.

DEFENDANT: MILLER CREEK SCHOOL
DISTRICT, ET AL

NATURE OF PROCEEDINGS: 1) DEMURRER
2) MOTION - STRIKE

RULING

Defendants Miller Creek School District (“District”), Susan Dorville (“Dorville”), Derek Lecy (“Lecy”), and Julia Ries’ (“Ries”; collectively “Defendants”) demurrer to Plaintiff Joshua Thompson’s (“Plaintiff”) First Amended Complaint (“FAC”) is SUSTAINED. The demurrer to the First (negligence) and Sixth (negligent supervision and training) Causes of Action is sustained with leave to amend as to the District, Lecy, and Ries. (Code Civ. Proc., § 430.10, subd. (e).) The demurrer to the Fifth Cause of Action (violation of the Bane Act) is sustained with leave to amend as to Dorville and the District. (*Ibid.*)

BACKGROUND

This case concerns an alleged assault by a teacher against a student. The FAC alleges that during the period relevant to this case, Plaintiff was a student at Mary E. Silveira Elementary School in San Rafael. (FAC, ¶ 18.) Plaintiff has attention deficit hyperactivity disorder (“ADHD”), anxiety, depression, and post-traumatic stress disorder (“PTSD”). (*Id.* at ¶ 9.) Plaintiff alleges that he possesses various legal rights specific to the educational setting due to his disabilities. (*Ibid.*)

The FAC alleges an incident in Plaintiff’s classroom in April 2023 in which Dorville “forcefully grabbed” Plaintiff’s arm, “physically hurt[ing] him” and leaving “red marks[.]” (FAC, ¶ 23.) All of Plaintiff’s causes of action arise out of this incident and the manner in which the school administration subsequently handled it. The individual defendants in this case are (or were at the relevant time) faculty and staff at the school, including substitute teacher Dorville, the principal (Lecy), and a special education teacher doubling as Plaintiff’s case manager (Ries). (FAC, ¶¶ 11-13.)

The Court now considers Defendants’ demurrer to three of Plaintiff’s causes of action.

LEGAL STANDARD

The function of a demurrer is to test the legal sufficiency of the challenged pleading. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) As a general rule, in testing a pleading against a demurrer, the facts alleged in the pleading are deemed to be true, however improbable they may be. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; *Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568.) This treatment applies only to facts. A court does not assume the truth of contentions, deductions, or conclusions of fact or law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 147.) The complaint must be liberally construed and all reasonable inferences must be drawn in favor of its allegations. (*Teva Pharmaceuticals USA, Inc. v. Superior Court* (2013) 217 Cal.App.4th 96, 102; see also Code Civ. Proc., § 452.) The court gives the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Moore, supra*, 51 Cal.3d 120, 125.)

In a demurrer proceeding, the defects must be apparent on the face of the pleading or via proper judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) The face of the complaint includes matters shown in exhibits attached to the complaint and incorporated by reference. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) “The only issue involved in a demurrer hearing is 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.)

If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 317.)

DISCUSSION

First (Negligence) and Sixth (Negligent Supervision and Training) Causes of Action

Plaintiff brings these cause of action against Lecy, Ries, the District, and (in the case of the First Cause of Action) ten Does. He does not assert either claim against Dorville. The First Cause of Action (negligence) alleges that the named defendants owed Plaintiff a duty to take reasonable measures to protect him from foreseeable injury at the hands of third parties. (FAC, ¶ 58.) Plaintiff alleges that the named defendants breached this duty and failed to protect him from Dorville. (*Id.* at ¶ 59.) The Sixth Cause of Action (negligent supervision and training) alleges that Lecy and Ries were “responsible for ensuring staff that work with [Plaintiff] are appropriately trained to implement positive behavior interventions and avoid aversive and abuses [sic] responses to behavior[,]” and that their failure to train Dorville accordingly and supervise her interactions with Plaintiff was a breach of the duty of reasonable care. (*Id.* at ¶¶ 81-82.) The District’s alleged liability on both causes of action is vicarious under Government Code, section 815.2 (vicarious liability of a public entity for conduct by an employee acting within the scope of her employment). (*Id.* at ¶¶ 60, 85.)

The elements of any negligence cause of action are the existence of a legal duty, a breach of that duty, and injury proximately caused by such breach. (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687.)

Statutory Immunity

“Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person.” (Gov. Code, § 820.8.) Public employees may be liable “for injury proximately caused by his own negligent or wrongful act or omission.” (*Ibid.*) Defendants argue that both Lecy and Ries are immune under this statute. From this, they reason that neither cause of action states a claim against the District, as the District’s liability is vicarious and so dependent on Lecy’s and Ries’ liability.

Government Code, section 820.8 renders a public employee immune from *vicarious* liability. (*Weaver By and Through Weaver v. State* (1998) 63 Cal.App.4th 188, 208 [statute affords immunity as to theories of “vicarious liability” based on the actions of subordinates]; see also *Ross v. Campbell Union School Dist.* (1977) 70 Cal.App.3d 113, 120 [Section 820.8 provides “immunity from vicarious liability for the acts of others”]; *Furumoto v. Lyman* (N.D. Cal. 1973) 362 F. Supp. 1267, 1275, fn. 8 [applying California law] [section 820.8 “specifically precludes” liability under the “theory of respondeat superior”].) That is not the nature of Plaintiff’s First or Sixth Cause of Action to the extent those claims are asserted against Lecy and Ries. As pleaded, these claims seek to hold Lecy and Ries liable based on *their own conduct*, not Dorville’s. The conduct underlying the First Cause of Action is not Dorville’s act of grabbing Plaintiff, but Lecy’s and Ries’ own omissions in failing to take reasonable measures to protect Plaintiff from harm. That the “harm” at issue here consists of Plaintiff being physically assaulted by a third party does not transform this into a vicarious liability claim. This is a direct liability claim based on actions Lecy and Ries themselves omitted to take. The same applies to the Sixth Cause of Action. The conduct allegedly subjecting Lecy and Ries to liability is their own omissions in the realm of training and supervision. Section 820.8 expressly states that its immunity does not apply in such a case. (Gov. Code, § 820.8 [“Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission.”].)

Insufficient Factual Allegations

To hold a school district vicariously liable under Government Code, section 815.2 for negligence of its employees in carrying out supervisory tasks, a plaintiff must prove (and, first, plead) that the employees at issue “ ‘knew or should have known’ of the bad actor’s ‘dangerous propensities, but nevertheless . . . failed to properly supervise’” them. (*Roe v. Hesperia Unified School Dist.* (2022) 85 Cal.App.5th 13, 25 [quoting *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 875].) Similarly, to hold a public school *employee* individually liable for harm against a student at the hands of a third party, the plaintiff must assert that the employee knew or had reason to know the third party was prone to committing the act complained of. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861 [“*Hart*”], 871.) This is required to adequately allege the duty element of a negligence cause of action in the context of such a case. Generally speaking, “there is no duty to protect against the criminal conduct of a third party, but an important exception exists where there is a special relationship between the plaintiff and defendant.” (*D.G. v. Orange County Social Services Agency* (2025) 108 Cal.App.5th 465, 471.) The Supreme Court has recognized such a special relationship between “a school district and its employees” on the one hand, and “the district’s pupils” on the other. (*Hart, supra*, (2012) 53 Cal.4th 861, 870.) That special relationship confers

upon school personnel “the duty to use reasonable measures to protect students from *foreseeable* injury at the hands of third parties acting negligently or intentionally.” (*Ibid.* [emphasis added].) In other words, to allege that Lecy and Ries owed him a duty to protect him from Dorville in anything other than a conclusory fashion, Plaintiff must allege foreseeability in the form of actual or constructive knowledge of Dorville’s dangerous propensity.

Plaintiff does not allege that Lecy, Ries, or anyone else knew or had reason to know that Dorville had a propensity to physically assault students. Nor does he allege the existence of any facts that would give anyone constructive notice that she had such a tendency.

Plaintiff argues¹ that the FAC asserts that Lecy and Ries were aware that Plaintiff has various disabilities that render him “uniquely vulnerable to being harmed by educators who are unfamiliar with his individual needs and who lack training in positive behavior intervention strategies.” (Opposition, p. 5.) From this, he reasons that the FAC pleads that it was reasonably foreseeable that any substitute teacher “not trained in the specific needs of [Plaintiff] and appropriate positive behavior intervention strategies” would “harm” him. (*Ibid.*)

Plaintiff does not present any legal authority for the idea that knowledge of the plaintiff’s particular vulnerability to harm by a category of third party actor, generally speaking, is a viable substitute for knowledge of the particular third party’s dangerous propensities, which is what *Roe* and *Hart* say is required here. (*Roe, supra*, 85 Cal.App.5th 13, 25-26; *Hart, supra*, 53 Cal.4th 861, 871.)

Moreover, in review of this demurrer, the Court is not required to accept as true the allegation that any substitute teacher not trained in Plaintiff’s individual needs presents a foreseeable risk of physically harming him. That is a contention, deduction, or conclusion of fact that is not credited against a demurrer. (*Moore, supra*, 51 Cal.3d 120, 147.) The fact that a person is not trained in a student’s special needs, by itself, does not support a conclusion that there is a foreseeable risk that the person will end up physically harming the student.

If Plaintiff had alleged that his special needs, or interventions carried out in response to his behavior at school, had resulted in physical altercations with school staff in the past – physical altercations of such a nature that his or even a staff member’s physical safety was at risk – *then* he might have enough to support the idea that a lack of training equates to a foreseeable risk of physical harm. The Court notes the allegation that on a single occasion, a staff member “physically removed a glue stick” from Plaintiff. (FAC, ¶ 19.) This allegation is insufficient to close the gap between “lack of training in Plaintiff’s special needs” and “foreseeable risk of physical harm.” A teacher’s bare act of removing an item from a child does not constitute a physical altercation that poses any safety risk to the teacher or the child. Not only does Plaintiff not allege that this incident threatened to escalate into a risky physical altercation, he alleges the opposite – that when he “voiced his frustration” at what the staff member did, “staff evacuated the classroom and excluded him from activities.” (FAC, ¶ 19.) Nothing about this incident would

¹ Defendants filed this demurrer on November 21, 2025. It was set for hearing on January 21, 2026. This means Plaintiff’s opposition was due on January 7. (See Code Civ. Proc., § 1005, subd. (b).) Plaintiff filed his opposition on January 8. The Court will nevertheless exercise its discretion to consider late-filed papers. (See *Haydon v. Elegance at Dublin* (2023) 97 Cal.App.5th 1280, 1289.)

have placed anyone on notice that a lack of training in Plaintiff's special needs would create a risk of physical harm to him or anyone else.

The demurrer to both negligence causes of action is sustained as to the District, Lecy, and Ries.

Fifth Cause of Action – Violation of the Bane Act

The Tom Bane Civil Rights Act (Civ. Code, § 52.1) provides that “[i]f a person . . . interferes” (or attempts to interfere) “by threat, intimidation, or coercion” with a plaintiff’s “exercise or enjoyment” of any rights secured by federal or state law, the plaintiff may bring an action for damages and injunctive relief. (Civ. Code, § 52.1, subds. (b), (c).) “The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., ‘threats, intimidation or coercion’) tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.” (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 883.)

Plaintiff brings this cause of action against only Dorville and the District. Plaintiff’s theory, as pleaded in his FAC, is that when Dorville grabbed Plaintiff’s arm, she “threatened” his “state constitutional right to protection from bodily restraint, harm, or personal insult.”² (FAC, ¶ 76.) Plaintiff changes theories in his opposition, arguing that the pleading sufficiently alleges that Dorville’s conduct interfered with his “right to attend a safe school[.]” (Opposition, p. 7.) The District’s asserted liability is, again, vicarious under Government Code, section 815.2, subdivision (a), (FAC, ¶ 78.)

“The Bane Act civilly protects individuals from conduct *aimed at* interfering with rights that are secured by federal or state law[.]” (*Reese v. County of Sacramento* (2018) 888 F.3d 1030, 1040 [applying California law] [emphasis added].) Consistent with this, “[t]o plead a cause of action under the Bane Act,” an allegation of “ ‘*intentional* interference or attempted interference with a state or federal constitutional or legal right’ ” is required. (*Wiley v. Kern High School Dist.* (2024) 107 Cal.App.5th 765, 774 [quoting *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 67] [emphasis added]; see also *Reese, supra*, 888 F.3d 1030, 1044 [“[T]he language of Section 52.1 . . . requires interference with rights by ‘threat, intimidation or coercion,’ words which connote an element of intent.”].)

Plaintiff has not alleged that Dorville grabbed his arm with intent to interfere with Plaintiff’s enjoyment of any legal right. His allegations, liberally interpreted, indicate that Dorville did this as an (inappropriate) method of discipline because she believed Plaintiff had thrown something in class. (FAC, ¶¶ 28, 32; see also 33-34 [faulting other defendants for failing to train Dorville in “positive behavior interventions”].) The demurrer to this cause of action is sustained with leave to amend.

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

² There is certainly no state constitutional right to “protection from . . . personal insult.”

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 January, 2026 is as follows:

<https://marin-courts-ca-gov.zoomgov.com/j/1615487764?pwd=Ob4B5J7LLKcpnkxzJjEOSHNgEGafG.1>

Meeting ID: 161 548 7764

Passcode: 502070

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: 01/21/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0007175

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER:

CLERK: ALINA ANDRES

PLAINTIFF: R. THOMAS FAIR, ET AL

vs.

DEFENDANT: ANDERSEN TAX LLC, A
DELAWARE LIMITED LIABILITY
COMPANY, ET AL

NATURE OF PROCEEDINGS: 1) DEMURRER
2) MOTION - STRIKE

RULING

Presently before the court are the demurrer and motion to strike of defendants Andersen Tax LLC (“Andersen”) and Mark Vorsatz (“Vorsatz”) directed at the complaint of plaintiffs R. Thomas Fair (“Fair”) and Folio Properties, Inc. (“FPI”).

Demurrer

First, Fourth and Fifth Causes of Action Against Andersen

The demurrer is overruled. To the extent the causes of action are based upon Plaintiffs’ payment of excessive taxes, Defendants argue that the causes of action accrued when those excessive taxes were paid and that the last excessive taxes were paid no later than the 2022 tax year, and therefore they are barred by the statute of limitations set forth in Code of Civil Procedure section 339, subdivision (1). Contrary to their argument:

A cause of action for accountant malpractice accrues when the client discovers, or should discover, the facts essential to the malpractice claim. The “discovery rule” assumes that all conditions of accrual of the action—including harm—exist, but nevertheless postpones commencement of the limitations period until the client actually discovered his injury and its negligent cause or could have discovered injury and cause through the exercise of reasonable diligence.

Van Dyke v. Dunker & Aced (1996) 46 Cal.App.4th 446, 451.) Defendants point to the court’s discussion of when the plaintiffs in that case sustained actual damages. The court noted that “[i]f the last element to occur is the element of damage, the statute of limitations begins to run upon

the occurrence of “appreciable and actual harm, however uncertain in amount,” that consists of more than nominal damages.” (*Id.* at 452.) In this case, the last element to occur was discovery, not damage. Plaintiffs allege that they discovered the facts during the fall of 2024, less than one year before they filed this action.

In their reply, Defendants argue that Plaintiffs have alleged no facts showing that they were unable to learn the facts in the exercise of reasonable diligence. “In order to rely on the discovery rule for delayed accrual of a cause of action, “a plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.” In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to “show diligence”; “conclusory allegations will not withstand demurrer.”” (*Lauckhart v. El Macero Homeowners Assn.* (2023) 92 Cal.App.5th 889, 901, citations and brackets omitted.) The court finds that Plaintiffs’ allegations are sufficient. Plaintiffs have alleged facts establishing their reliance on Defendants. (See ¶¶ 4 and 8.) Additionally, they allege that they had a fiduciary relationship with Vorsatz. “... The existence of the fiduciary relationship limits the plaintiff’s duty of inquiry by eliminating the plaintiff’s usual duty to conduct due diligence..” (*Ferguson v. Yaspan* (2014) 233 Cal.App.4th 676, 683.) Further, the injuries which Plaintiffs sustained would not be apparent without the expertise of the subsequent accountants. “Plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury...’ ...” (*Lauckhart, supra*, 92 Cal.App.5th at 901; see also *Kernan v. Regents of University of California* (2022) 83 Cal.App.5th 675, 683.)

Because Defendants have not established that the causes of action are barred by the statute of limitations to the extent they are based upon excessive payment of taxes, it is not necessary to address their argument that some of Plaintiffs’ claims are unripe. A general demurrer does not lie to part of a cause of action. (See *Elder v. Pacific Bell Telephone Co.* (2012) 205 Cal.App.4th 841, 856, fn. 14 and *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.)

First, Third and Sixth Causes of Action Against Vorsatz

The demurrer is overruled. Defendants argue that these causes of action are barred by the statute of limitations set forth in Code of Civil Procedure section 340.6. Subdivision (a) of that section provides as relevant that “[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act omission, or four years from the date of the wrongful act or omission, whichever occurs first. ...” Defendants contend that Plaintiffs rely upon the attorney-client relationship between themselves and Vorsatz to assert these claims and that the limitations period began to run in January 2024 when Plaintiffs terminated the engagement with Andersen and first requested their files and workpapers. (See complaint ¶¶42-43.)

Even if Defendants are correct that the causes of action are premised upon an attorney-client relationship, they have not shown that they are barred by the statute of limitations. In the

cases relied upon by Defendants (*Nguyen v. Ford* (2020) 49 Cal.App.5th 1 and *GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240), the plaintiffs had discovered the facts constituting the wrongful act or omission and the issue was whether the one year period was tolled by the continuous representation exception. The cases stand for the proposition that the continuous representation exception ends when representation ends, not that that is when the statute of limitations begin to run when the plaintiff has not discovered the facts.

In *Engel v. Pech* (2023) 95 Cal.App.5th 1227, 1236, the court did state that the one-year statute of limitations “begins to run when the attorney-client relationship ends, which happens when the attorney is ‘formally substituted out as counsel’ or ‘”completes the tasks for which he was retained.””...” (Brackets omitted.) In that case, like the cases above, the LLP client whose cause of action was determined to be time-barred unquestionably knew the facts more than one year before the action was filed because judgment had been entered against it in the fall of 2018. Defendant continued to represent the LLP until February 25, 2021, after filing an opening brief in the LLP’s appeal from the judgment, when he filed a substitution of counsel. The LLP did not file its malpractice cause of action until April 21, 2022. Although the court did not specifically mention the continuous representation tolling provision, that is clearly the basis of its holding as shown by the fact that it cites *Nguyen* in support of its statement regarding when the statute of limitations begins to run. It also cites *Michaels v. Greenberg Traurig, LLP* (2021) 62 Cal.App.5th 512, another case involving the continuous representation tolling provision.

As discussed earlier, Plaintiffs allege that they did not discover the facts until the fall of 2024, less than one year before they commenced this action. For the same reason, Defendants’ alternative argument that the claims against Vorsatz are barred under section 339, subdivision (1) fails.

Second Cause of Action – Gross Negligence

The demurrer is sustained without leave to amend. As explained in *Epochal Enterprises, Inc. v. LF Encinitas Properties, LLC* (2024) 99 Cal.App.5th 44, 55-56:

Gross negligence is defined as “either a ‘”want of even scant care”” or “”an extreme departure from the ordinary standard of conduct.””” Gross negligence “connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results.” “California does not recognize a distinct common law cause of action for gross negligence apart from negligence.” Gross negligence is different from ordinary negligence in degree, not in kind. Because gross negligence is simply a degree of negligence, the elements of a claim for gross negligence is the same as one for ordinary negligence.

“Where liability attaches only for gross negligence it is for the jury, under proper instructions by the court, to pass upon the question whether such negligence exists.” ..

(Citations omitted.)

In opposition, Plaintiffs acknowledge that “California does not recognize a distinct common law cause of action for gross negligence” and then argue that California “does distinguish between two degrees of negligence for some purposes.” While they are correct, as shown above, if liability will only attach for gross negligence, it is for the jury to decide whether such negligence exists. In *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 779-780, cited by Plaintiffs, the Supreme Court in fact stated:

We do not view our holding—that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable—as recognizing a cause of action for gross negligence. ..

Eastburn v. Regional Fire Protection Authority (2003) 31 Cal.4th 1175, another case cited by Plaintiffs, did involve a demurrer. In that case, the Supreme Court concluded that public entities employing emergency dispatchers are subject to direct or vicarious liability for injury attributable in part to a dispatcher’s failure to delay in responding to a 911 call only in cases involving gross negligence or bad faith. Plaintiffs had not alleged facts sufficient to establish gross negligence or bad faith and were unable to articulate any facts they could include in an amended complaint, and therefore the Supreme Court affirmed the judgment of dismissal. In this case, Defendants have not argued that Plaintiffs’ negligence cause of action is barred because it requires allegations of gross negligence in order to survive a demurrer. Therefore there is no reason to allow Plaintiffs to assert what is in essence a duplicate cause of action for negligence.

Fifth Cause of Action – Breach of Contract

The demurrer is sustained with leave to amend. Plaintiffs’ allegations are inconsistent as to who is the other party contracting with Andersen. In their opposition, Plaintiffs point to their allegations regarding the JALs between Andersen and FPI. However, they also allege that “Fair retained Andersen to prepare and file the tax returns” and that “Plaintiffs and Defendant Andersen entered into a contract for tax preparation services.” (§§ 28 and 121.) Additionally, Plaintiffs do not allege a contract provision requiring Andersen to provide workpapers to facilitate Plaintiffs’ transition to a successor. Rather, they describe the agreement to do so as a “promise.” (§44.)

The court finds that further specificity is not required with respect to which of the JALs was breached. Plaintiffs describe the JALs as boilerplate agreement. They obligated Andersen to do the same things every year. Therefore there is no need for Plaintiffs to identify which agreement was breached. The court also finds that Plaintiffs adequately allege that Andersen agreed to provide tax advice since they allege that Andersen’s professionals in fact rendered tax advice. (§36.)

Motion to Strike

Allegations re Vorsatz’s Status as an Attorney

The motion is denied. The court has already concluded that the causes of action arising out of Vorsatz's position as an attorney are not time-barred.

Allegations of Matters Not Ripe

The motion is denied. Defendants rely upon *Van Dyke, supra*, 46 Cal.App.4th at 452, where the court stated:

If the allegedly negligent professional conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. ...

The problem with Defendants' argument is that Plaintiffs unquestionably have causes of action against Defendants. Even if Defendants are correct that Plaintiffs would not be entitled at this stage to recover the payments, taxes, penalties, etc. they *anticipate* they will have to pay, it is certainly possible that some or all of these matters may be finally determined before this action proceeds to trial. If the court grants the motion and that happens, Plaintiffs would either be required to file one or more motions to amend or one or more separate actions. In the interest of judicial economy, the court finds that it is appropriate to leave the allegations at this point. Plaintiffs ultimately will not be able to recover for damages they cannot prove.

Punitive Damage Allegations

The motion to strike part of paragraph 101 is moot based upon the court's order sustaining Defendants' demurrer to that cause of action.

The allegations in paragraph 109 regarding withholding of the working papers does not rise to the level of "malice" as defined in Civil Code section 3294, subdivision (c)(1). Therefore the motion to strike "with malice" from that paragraph is granted.

The motion to strike the prayer for punitive damages is denied. The allegations in the constructive fraud cause of action are sufficient to establish "fraud" as defined in section 3294, subdivision (c)(3).

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 January, 2026 is as follows:

<https://marin-courts-ca-gov.zoomgov.com/j/1615487764?pwd=Ob4B5J7LLKcpnkxzJjEOSHNzEGafG.1>

Meeting ID: 161 548 7764

Passcode: 502070

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>