SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/23/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2104266

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: C. GRANT

PLAINTIFF: MAKTAB TARIGHAT OVEYSSI SHAHMAGHSOUDI vs. DEFENDANT: NAPA VALLEY MEMORIAL PARK, ET AL	

NATURE OF PROCEEDINGS: MOTION TO COMPEL – DISCOVERY FACILITATOR PROGRAM

RULING

Pursuant to Marin County Rule, Civil 2.13B, on January 31, 2024, attorney Lawrence A. Strick was appointed to preside as Discovery Facilitator for the Motion to Compel Responses Without Objections to Request for Production Set No. 2 and Request for Order Awarding Monetary Sanctions filed by plaintiff Maktab Tarighat Oveyssi Shahmaghsoudi ("Plaintiff") on January 5, 2024. The Court has not received a Declaration of Non-Resolution from either party, in particular *the moving party*, five court days prior to the hearing on the motion set for February 23, 2024, as required by MCR Civ 2.13H. The Court reminds the parties that compliance with MCR Civ 2.13H not only includes the timely filing of the Declaration of Non-Resolution by each party five court days prior to the hearing, but also requires that "[t]he Declaration shall not exceed three pages and ***shall briefly summarize the remaining disputed issues and each party's contentions***." (MCR Civ 2.13H(1), emphasis added.)

The Court concludes and expects that this discovery matter is being resolved by the facilitator. The motion is therefore ordered **OFF CALENDAR**. (MCR Civ 2.13H(2).) Should the parties fail to reach resolution through the facilitator, either party may request (by ex parte application) that the Court re-set the motion for an expedited hearing.

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 February, 2024 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/23/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2201191

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: C. GRANT

PLAINTIFF: WILLIAM MCDONAGH vs. DEFENDANT: BENJAMIN GRAVES, ET AL	

NATURE OF PROCEEDINGS: MOTION TO COMPEL – THAT MATTERS SPECIFIED IN REQUEST FOR ADMISSIONS

RULING

Cross-Complainant Benjamin Graves' ("Graves") unopposed Motion for Order that Matters Specified in Request for Admissions Set Three be Deemed Admitted is granted.

Graves served requests for admission upon Cross-Defendant William McDonagh ("McDonagh"), and McDonagh failed to serve any response to said requests. McDonagh has not opposed the instant motion.

As discussed below, McDonagh may avoid the significant sanction deeming the requests admitted by serving responses without objection before the time of hearing on this motion.

The Court in *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762 described the remedy that must be awarded upon a party's failure to respond to request for admission. The Court stated,

> Under the RFA procedure postdating the Civil Discovery Act, a propounding party must take affirmative steps—by bringing a formal 'deemed admitted' motion—to have RFAs to which timely responses are not received deemed admitted. In the event responses to RFAs are not timely served, the responding party waives any objections thereto (§ 2033.280, subd. (a)), and '[t]he requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction' (*id.* subd. (b)). Unless the court determines that the responding party 'has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220,' it must order the RFAs deemed admitted. (*Id.* subd. (c).) '[A] deemed admitted order establishes, by judicial fiat, that a nonresponding party has responded to the requests by admitting the truth of all matters contained therein.' (*Wilcox, supra,*

> 21 Cal.4th at p. 979, 90 Cal.Rptr.2d 260, 987 P.2d 727.) The court must also impose monetary sanctions upon the party and/or the attorney for the failure to serve a timely response to the RFAs. (§ 2033.280, subd. (c).) But a responding party's service, prior to the hearing on the 'deemed admitted' motion, of substantially compliant responses, will defeat a propounding party's attempt under section 2033.280 to have the RFAs deemed admitted. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 827, 4 Cal.Rptr.2d 736 (*Tobin*).) As one court put it: 'If the party manages to serve its responses before the hearing, the court has no discretion but to deny the motion. But woe betide the party who fails to serve responses before the hearing. In that instance the court has no discretion but to grant the admission motion, usually with fatal consequences for the defaulting party. One might call it "two strikes and you're out" as applied to civil procedure.' (*Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 395–396, 42 Cal.Rptr.2d 260, fns. omitted (*Demyer*).)

(*St. Mary,* supra, at p. 775–76 (internal footnote omitted).)

Here, as noted above, McDonagh has not responded. Thus, the court must deem the requests admitted unless defendant serves responses without objections by the time of the hearing on this motion.

Defendant is reminded to comply with Local Rule 2.10(B), if intending to appear and present responses to the requests for admission.

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: 02/23/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2201297

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: C. GRANT

PLAINTIFF: ANDRE MCDONALD vs. DEFENDANT: NORTHGATE POSTACUTE CARE, ET AL	

NATURE OF PROCEEDINGS: 1) DEMURRER
2) DEMURRER – THIRD AMENDED COMPLAINT

RULING

Defendant Colin Hamblin's ("Hamblin") demurrer to Plaintiffs Andre and James McDonald's ("Plaintiffs") Third Amended Complaint ("TAC") is overruled in full. Defendant Mary Patricia Headley's ("Headley") demurrer is sustained with regard to Plaintiffs' elder abuse and professional negligence claims to the extent these claims are brought in Plaintiffs' individual capacities. (*Tepper v. Wilkins* (2017) 10 Cal.App.5th 1198, 1201; Code Civ. Proc., §§ 377.60, 430.10, subd. (e).) It is likewise sustained as to Plaintiffs' wrongful death claims to the extent brought in Plaintiffs' capacities as successors in interest. (Code Civ. Proc., § 377.60.) Leave to amend is granted only with respect to the professional negligence claim. (*Tepper*, *supra*, 10 Cal.App.5th 1198, 1209.) Headley's demurrer is overruled in all other respects. To be clear, the Court's ruling on Headley's demurrer does not affect Plaintiffs' elder abuse or professional negligence claims against Headley to the extent those claims are brought as successors in interest, nor does it affect Plaintiffs' wrongful death claims to the extent brought as individuals.

BACKGROUND

This action arises out of the death of Plaintiffs' mother from COVID-19. Plaintiffs allege that their mother, the late Barbara Banks, was a resident of Northgate Postacute Care ("NPA"), a 24-hour residential care facility for the elderly. (TAC, ¶¶ 5-8.) At all times relevant to the TAC, Banks was over 65 years old. (*Id.*, ¶¶ 13, 42.) "Defendants" – a term defined in the TAC to include all defendants, expressly including Hamblin and Headley – were "the professionals at NPA that performed services and were responsible for providing care to [Ms. Banks.]." (*Id.*, p. 2, ¶ 9.) The TAC alleges that Ms. Banks was completely dependent on Defendants for "food, shelter, safety, medication administration, physical hygiene, and assistance with her [Activities of Daily Living]." (*Id.*, ¶ 14.)

The TAC alleges that amid a spike in COVID-19 cases, NPA converted its East Wing into a COVID-19 ward, requiring the relocation of certain residents, including Ms. Banks. (TAC, ¶¶ 22-23.) Ms. Banks was moved to a double room which allegedly had previously "been occupied by a resident that had tested positive for COVID-19 immediately before Ms. Bank's occupancy." (*Id.*, ¶¶ 24, 26.) Plaintiffs allege that Defendants moved Ms. Banks into her new room on the same day the COVID-positive prior resident was moved out without sanitizing the room between residents. (*Id.*, ¶¶ 27-28.) Defendants are alleged to have moved Ms. Banks into the room knowing that it was contaminated with COVID-19 and "with the intent to cause harm to Ms. Banks." (*Id.*, ¶ 32.)

Ms. Banks was allegedly placed in the double room with a roommate who had not been screened for COVID-19. (TAC, ¶ 29.) The roommate ultimately tested positive for COVID-19, and Ms. Banks herself tested positive soon thereafter. (*Id.*, ¶ 33.)

Following Ms. Banks' diagnosis with COVID-19, Defendants allegedly "intentionally abandoned Ms. Banks, failing to provide for her physical and mental health needs, and allowing her to develop a decubitus ulcer on her coccyx." (TAC, ¶ 34.) Such abandonment was allegedly done with intent to harm Ms. Banks. (*Id.*, ¶¶ 36.) Defendants did not notice, document, or treat the "severe" ulcer at any time while Ms. Banks was an NPA resident and failed to have her transferred to an emergency care facility when her condition required it. (*Id.*, ¶¶ 35, 37.) Defendants are further alleged to have failed to adhere to a several specified duties in "disregard of [Ms. Banks'] safety and the probability that severe injury would result[.]" (*Id.*, ¶ 51; see also *id.*, ¶¶ 49-50.)

On September 16, 2020, Ms. Banks was transferred to MarinHealth Medical Center. (TAC, ¶ 38.) She died on October 2, 2020. (*Id.*, ¶ 39.) Plaintiffs have brought claims for statutory elder abuse, professional negligence, and wrongful death, both in their individual capacities and as their mother's successors in interest.

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, and all reasonable inferences from those facts must be drawn in the plaintiff's favor. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; *Carroll v. City and County of San Francisco* (2019) 41 Cal.App.5th 805, 811.) 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

Elder Abuse Act

Welfare and Institutions Code, Section 15600 *et seq.* (the "Act") was passed to provide heightened remedies for acts of egregious abuse against elder and dependent adults. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 35.) Where a plaintiff proves by clear and convincing evidence that a defendant is liable for physical abuse, neglect, or abandonment and acted with recklessness, oppression, fraud, or malice, the Act entitles the plaintiff to reasonable attorney's fees and costs and to partial relief from damages limitations otherwise applicable to a wrongful death action. (Welf. & Inst. Code, § 15657, subds. (a), (b).)

Because claims under the Act invoke statutory remedies, "'every fact material to the existence of . . . statutory liability must be pleaded with particularity.'" (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795 [quoting *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 819]; accord *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 407.)

HAMBLIN'S DEMURRER

Hamblin demurs exclusively to Plaintiffs' elder abuse claims.

Uncertainty

First, Hamblin argues that the elder abuse claims are fatally uncertain because all allegations are directed at "Defendants."

"'[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.'" (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 292 [quoting *Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 848 fn. 3].) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.)

The TAC defines "Defendants" to include all defendants, expressly including Hamblin. (TAC, pp. 1-2.) Under these circumstances, the Court disagrees with Hamblin's argument that there "no facts, pleaded with particularity, putting Hamblin on notice of the specific allegations against him[.]" (Memorandum [Hamblin], p. 7.) The allegations against Hamblin are the same ones mounted against all "Defendants," and Hamblin plainly understands what they are. His brief recounts how the TAC accuses "Defendants" of transferring Ms. Banks to a room contaminated by COVID-19 with intent to harm her, of intentionally abandoning her by failing to provide for her physical and mental health needs, of permitting her to develop an ulcer, and of failing to timely transfer her to another facility for emergency care, all in violation of numerous duties owed to Ms. Banks. (*Id.*, p. 4.)

In reality, Hamblin's complaint is not that he does not understand the allegations against him, but that those allegations do not make sense due to his particular role in Ms. Banks' care. Hamblin explains that he was Ms. Banks' treating physician. (Memorandum [Hamblin], p. 4.) The TAC does not identify him as such, but describes him only as a "professional[] at NPA that performed services and [was] responsible for providing care to [Ms. Banks]." (TAC, ¶ 9.) This allegation must be taken as true and precludes the Court from concluding, at this stage, that Hamblin had the much more limited role he describes in his brief.

Hamblin takes particular issue with the allegation that "Defendants, and each of them[,] had a duty to . . . [r]eport changes of condition to physicians so that appropriate orders and interventions [could] be implemented[.]" (TAC, ¶ 49(d); see Memorandum [Hamblin], pp. 7-8.) This allegation describes just one of many different acts of elder abuse Hamblin is accused of, making it an insufficient basis for a demurrer. (See *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119 ["A demurrer must dispose of an entire cause of action to be sustained."].)

If there are allegations against Hamblin that he believes do not make sense in light of his role in relation to Ms. Banks, he is free to deny them in his answer and explore them in discovery. The elder abuse claim against him is not subject to demurrer on grounds of uncertainty.

Failure to State a Claim[1]

Neglect

The Elder Abuse Act defines "neglect" to refer to "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (Welf. & Inst. Code, § 15610.57, subd. (a)(1).) It specifically includes, but is not limited to "[f]ailure to provide medical care for physical and mental health needs" and "[f]ailure to protect from health and safety hazards." (Welf. & Inst. Code, § 15610.57, subd. (b).) "[W]hen the medical care of an elder is at issue, 'the statutory definition of "neglect" speaks not of the *undertaking* of medical services, but the failure to *provide* medical care.'" (*Carter*, *supra*, 198 Cal.App.4th 396, 404 [quoting *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783] [emphasis in original].)

Hamblin argues that the TAC "contains no allegations that any physician failed to provide decedent with medical services" and so does not adequately plead "neglect." But the TAC pleads that "Defendants" "fail[ed] to provide for [Ms. Banks'] physical needs . . . allowing her to develop a decubitus ulcer on her coccyx." (TAC, ¶ 34.) It further asserts that "Defendants" "failed to notice, document, *or treat* the severe decubitus ulcer on Ms. Banks' coccyx at any time while she was a resident." (*Id.*, ¶¶ 35.) These allegations amount to "neglect" within the meaning of the Act. (Welf. & Inst. Code, § 15610.7, subd. (b)(2); see also *Delaney v. Baker* (1999) 20 Cal.4th 23, 41 [substantial evidence that "defendants failed, over an extended period of time, to

[1] When NPA demurred to Plaintiffs' elder abuse claim as stated in the original complaint, it challenged Plaintiffs' neglect and scienter allegations, just as both Hamblin and Headley do in the present demurrers. The Court rejected both arguments. (See Strickland Dec., Ex. C [Nov. 18, 2022 Order], p. 5.) Plaintiffs urge the Court to rely on its prior ruling and reject these arguments without further analysis. The Court declines to do so because the prior demurrer, in addition to addressing only those allegations against NPA, addressed an earlier version of the complaint. The Court will not assume that the relevant language of the TAC is the same language the Court held sufficient in its prior demurrer ruling.

attend to [elder's] advanced bedsores" supported finding of neglect].) Even if they didn't, Hamblin's demurrer would still fall short. His argument assumes that if Plaintiffs are to state a claim against him for neglect under the Act, it must be for failure to provide Ms. Banks with medical services. "Neglect" within the meaning of the Act also includes "[f]ailure to protect from health and safety hazards" (Welf. & Inst. Code, § 15610.57, subd. (a)(3)), and Plaintiffs allege that "Defendants . . . transfer[red] . . . Ms. Banks from a safe single-occupancy room to a crowded unit that Defendants knew was contaminated with Covid[.]" (TAC, ¶ 32.)

Scienter

Hamblin further argues that Plaintiffs do not sufficiently plead that he acted with recklessness, oppression, fraud, or malice in the commission of the alleged neglect. "'Recklessness' refers to a . . . 'deliberate disregard' of the 'high degree of probability' that an injury will occur." (*Delaney, supra*, 20 Cal.4th 23, 31 [quoting BAJI No. 12.77]; see also *Carter, supra*, 198 Cal.App.4th 396, 407.) It "involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions[,]' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.'" (*Id.*, pp. 31-32 [quoting Rest.2d Torts, § 500, com. (g), p. 590].) "Malice" refers to "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others." (Civ. Code, § 3294, subd. (c) [defining "malice" and "oppression" for purposes of availability of punitive damages]; see *Covenant Care, supra*, 32 Cal.4th 771, 789 ["In order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages."].) "Oppression" refers to "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c).)

The TAC alleges that "Defendants," including Hamblin, transferred Ms. Banks "to a crowded unit that Defendants knew was contaminated with Covid" and did so "with the intent to cause harm to Ms. Banks." (TAC, ¶ 32.) It further alleges that "Defendants" abandoned Ms. Banks by failing to provide for her physical needs and did so with intent to harm her. (*Id.*, ¶¶ 34-36.) Finally, the TAC alleges that "Defendants" failed to adhere to a several specified duties in "disregard of [Ms. Banks'] safety and the probability that severe injury would result[.]" (*Id.*, ¶ 51; see also *id.*, ¶¶ 49-50.) These allegations are sufficient to plead scienter.

Custodial Relationship[2]

To be liable for elder abuse under the Act, the defendant must have had a caretaking or custodial relationship with the elder. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 165; see also Welf. & Inst. Code, § 15610.57, subd. (a)(1).) "Caretaking or custodial relationship" refers to a "robust" relationship, "entail[ing] more than casual or limited interactions[,]" and characterized by the defendant having "assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Winn, supra*, pp. 158, 155.)

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[2] Hamblin raised this argument for the first time in his reply brief. A court has discretion to consider arguments made for the first time in reply. (*Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1009.)

The TAC alleges that Ms. Banks was in the custody of NPA, a "24-hour residential care facility for the elderly[.]" (TAC, ¶¶ 7-8.) "Defendants[,]" including Hamblin, are alleged to be "the professionals at NPA that performed services and were responsible for providing care to Decedent." (*Id.*, ¶ 9.) It further alleges that Ms. Banks was completely dependent on Defendants for "food, shelter, safety, medication administration, physical hygiene, and assistance with her [Activities of Daily Living]." (*Id.*, ¶ 14.) These allegations sufficiently assert the existence of the caretaking or custodial relationship required to state an elder abuse claim under *Winn*. While Hamblin characterizes his duties with regard to Ms. Banks as being more limited than the TAC suggests, the Court is required to accept Plaintiffs' allegations as true at this stage. Accordingly, the Court overrules Hamblin's demurrer in full.

HEADLEY'S DEMURRER

Elder Abuse Claim

Uncertainty

Like Hamblin, Headley argues that the TAC is fatally uncertain because "there is no mention anywhere . . . of any specific actions or omissions by Defendant Headley, NP that caused harm to the decedent." (Memorandum [Headley], p. 3.) This is incorrect. As with Hamblin, the term "Defendants" is defined to expressly include Headley. (TAC, pp. 1-2.) To the extent Headley contends that Plaintiffs' allegations against her are false or do not make sense in light of her role in Ms. Banks' care, she can explore them through discovery and challenge them at a later stage.

Failure to State a Claim

Headley argues that the TAC sufficiently pleads neither scienter nor the existence of a custodial relationship. The Court rejects these arguments for the reasons stated above in relation to Hamblin's demurrer. The Court is not permitted to consider Headley's argument that she was "merely an outside consultant" of NPA at this stage because it relies on facts not stated in the TAC. (*Thornburn v. Department of Corrections* (1998) 66 Cal.App.4th 1284, 1287-88 [in ruling on a demurrer, court is confined to the four corners of the complaint and any material subject to judicial notice].)

Standing

Headley additionally argues that Plaintiffs do not have standing to bring elder abuse claims as individuals because they are not alleged to have personally suffered the alleged neglect. She concedes that Plaintiffs have standing to bring an elder abuse claim on behalf of their mother as her successors in interest. (Memorandum [Headley], p. 4; see also Welf. & Inst. Code, § 15657.3, subd. (d)(1) [after the death of an elder or dependent adult, the right to commence or maintain an action for elder abuse passes to the decedent's personal representative, or, if there is no personal representative, successor in interest].)

The Court agrees that Plaintiffs do not have standing to sue in their personal capacities for elder abuse allegedly perpetrated against their mother. (See *Tepper v. Wilkins* (2017) 10 Cal.App.5th 1198, 1201 [affirming dismissal of elder abuse claim brought by the elder's daughter in her personal capacity for lack of standing where plaintiff was not alleged to have been personally aggrieved or to be entitled to sue on her mother's behalf as conservator or attorney-in-fact].) Headley's demurrer is sustained without leave to amend, but only as to Plaintiffs' claims as individuals. (*Id.*, p. 1209 [demurrer is properly sustained without leave to amend where based on lack of standing].)

Professional Negligence Claim

Headley argues that Plaintiffs do not have standing to bring their professional negligence claims in their individual capacities because, since "Plaintiff[s] . . . were not patients of Defendant HEADLEY . . . Defendant owed no duty to either Plaintiff[.]" (Reply, p. 3.) She does not challenge the professional negligence claims to the extent brought as Ms. Banks' successors in interest. (Memorandum [Headley], p. 9.) The Court reads this as an argument based on failure to state a claim, not standing, but agrees that the TAC does not plead facts to support that Headley owed a duty of care to Plaintiffs individually, as opposed to Ms. Banks. Headley's demurrer to the professional negligence claim is thus sustained with leave to amend.

Wrongful Death Claim

Headley argues that Plaintiffs lack standing to sue for wrongful death because they have not complied with Code of Civil Procedure, section 377.32 ("Section 377.32"). Section 377.32 provides that a person seeking "to commence an action or proceeding or to continue a pending action or proceeding as [a] decedent's successor in interest . . . shall execute and file an affidavit or a declaration under penalty of perjury" containing specified information. (Code Civ. Proc., § 377.32, subd. (a). It also requires that the declaration attach a copy of the decedent's death certificate. (Code Civ. Proc., § 377.32, subd. (c).)

Plaintiff has not presented any authority for the idea that compliance with Section 377.32 is a requirement of standing. The statute is silent as to when the declaration must be filed. It "does not require that the affidavit be filed as a condition precedent to commencing or continuing the action."[3] (*Parson v. Tickner* (1995) 31 Cal.App.4th 1513, 1523-24; see also *Aghaian v. Minassian* (2021) 64 Cal.App.5th 603, 614 [plaintiffs had standing to pursue claims as successors in interest months before they filed their Section 377.32 declarations].)

Headley additionally argues that a decedent's successors in interest do not have standing to bring a wrongful death claim. The Court agrees. Code of Civil Procedure, section 377.60 limits standing to bring a wrongful death claim to certain relatives of the decedent, who may sue in their own right, or "the decedent's personal representative on their behalf[.]" A "personal representative" of the decedent is not the same thing as a successor in interest of the decedent. (See *Monschke v. Timber Ridge Assisted Living, LLC* (2016) 244 Cal.App.4th 583, 588, fn. 2 [suggesting that successors in interest do not have standing to bring a wrongful death action under section 377.60].)

Accordingly, the Court sustains Headley's demurrer to the wrongful death claims as brought by Plaintiffs in their capacities as successors in interest. The wrongful death claims survive to the extent they are brought in Plaintiffs' individual capacities because a decedent's surviving children have standing to sue for wrongful death in their own right. (Code. Civ. Proc., § 377.60, subd. (a); *Monschke*, *supra*, 244 Cal.App.4th 583, 588, fn. 2.)

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[3] Plaintiffs are under the impression that they are in compliance with Section 377.32 based on the declaration and death certificate attached to their First Amended Complaint. (See Opposition [Headley], p. 10; Strickland Dec. [Headley], ¶ 14 & Ex. D.) The declaration attached to the FAC predates James' addition as a plaintiff and applies only to Andre, so it is not compliant with the statute. (See Code Civ. Proc., § 377.32, subds. (a), (c).)

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: 02/23/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV2204322

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: C. GRANT

PLAINTIFF: KENNETH EVANS vs. DEFENDANT: CHAIRMAN OF BOARD OF PAROLE HEARING	

NATURE OF PROCEEDINGS: DEMURRER

RULING

The following tentative was originally posted on February 8, 2024.

The California Department of Corrections and Rehabilitation's demurrer to the Petition is sustained with leave to amend.

Procedural Background

Petitioner Kenneth Evans filed his Petition for Writ of Mandate and Prohibition ("Petition") against the Chairman of Board of Parole Hearing (the "Board") on December 5, 2022, alleging that his appointed counsel for his parole hearing failed to provide effective assistance of counsel at the hearing. He alleges that his counsel did not review his C-File or psych report which he contends includes erroneous information and she did not make proper objections, and further that the Board considered false, inaccurate and/or irrelevant information at the hearing.

The Court's records reflect that the Board, the only named respondent in the Petition, has not been served with the Petition. It does appear that Petitioner has served the California Department of Corrections and Rehabilitation ("CDCR"), who is not specifically named as a respondent in the Petition.

CDCR now demurs to the Petition.

Procedural Deficiency

The Court draws CDCR's attention to Local Rule 2.8(C)(2), which requires attachment of the operative pleading as an exhibit to the demurrer.

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

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person." (Code Civ. Proc. § 1085.) A writ of mandate "will issue against a county, city, or other public body . . . ." (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593 [citation and internal quotations omitted].)

A writ of mandate under Section 1085 is available where "the petitioner has no plain, speedy and adequate alternative remedy; the respondent has a clear, present and usually ministerial duty to perform; and the petitioner has a clear, present and beneficial right to performance." (*Conlan v. Bonta* (2002) 102 Cal.App.4th 745, 751-752.) "Mandate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment. Thus, a petition for writ of mandamus under Code of Civil Procedure section 1085 may only be employed to compel the performance of a duty which is purely ministerial in character." (*Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center* (2001) 93 Cal.App.4th 607, 618 [citation omitted].)

CDCR demurs to the Petition on the ground that it fails to allege that CDCR did not perform a mandatory or ministerial duty. CDCR argues that it is not the same as the Board, and thus Petitioner's allegations as to the Board and the Board's conduct do not apply to CDCR. (See *In re Roberts* (2005) 36 Cal.4th 575, 589 ["The Board's status as an arm of the state's correctional entity does not convert the parole decisions of the Board into decisions of correctional officials. The Board is a distinct entity, and the commissioners of the Board, who are authorized to conduct hearings and perform other duties related to parole matters, are not correctional officials"].)

The Court sustains the demurrer on the ground that Petitioner does not allege that CDCR had a ministerial duty to act in a particular manner and that it failed to do so. Petitioner does not identify any such duty in either his Petition or his Opposition to the demurrer.[1]

Because the Court sustains the demurrer on this basis, it does not address CDCR's additional arguments that the Petition fails to allege that there is no plain, speedy and adequate remedy at law and that the Petition is moot.

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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https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

[1] The Petition is titled "Writ of Mandate and Prohibition", but the first line of the Petition and the Conclusion of the Petition state only that Petitioner seeks a writ of mandate. The Petition does not allege facts sufficient to support a writ of prohibition in any event. (See Code Civ. Proc. §§ 1102, 1103.)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 02/23/24 TIME: 1:30 P.M. DEPT: E CASE NO: CV0000534

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: C. GRANT

PLAINTIFF: WELLS FARGO BANK, N.A. vs. DEFENDANT: EMILY E. WEBER	

NATURE OF PROCEEDINGS: 1) MOTION – OTHER: FOR ORDER DEEMING THE TRUTH IN THE MATTER SPECIFIED IN PLAINTIFF'S REQUEST FOR ADMISSIONS AS ADMITTED; DECLARATION OF ASHLEY MULHORN, ESQ.; NOTICE OF LODGING OF PROPOSED ORDER; PROPOSED ORDER
2) MOTION – SUMMARY JUDGMENT

RULING

MOTION TO DEEM REQUESTS FOR ADMISSIONS ADMITTED:

Plaintiff served Defendant with Request for Admissions on September 6, 2023. (Declaration of Ashley Mulhorn, ¶¶ 2-3.) Defendant's responses to the same were due on or before October 11, 2023. (Mulhorn Decl., ¶ 4.) A meet and confer letter was sent to Defendant regarding the outstanding discovery and provided her with additional time to respond. (Mulhorn Decl., ¶ 5.) To date, Defendant has failed to provide any responses. (*Ibid.*)

The motion for order that matters be deemed admitted is granted. (Code Civ. Proc., § 2033.280.)

SUMMARY JUDGMENT:

The unopposed motion for summary judgment by plaintiff Wells Fargo Bank, N.A. ("Plaintiff") is GRANTED. (Code Civ. Proc., § 437c, subds. (c) and (p)(1).) Plaintiff has met its burden showing no triable issues of material fact exist as to any of the alleged causes of action.

Facts

Plaintiff filed this action on August 2, 2023, against defendant Emily E. Weber ("Defendant") alleging causes of action for breach of contract and common counts (money lent, money paid, open book account, and account stated).

Defendant applied to Plaintiff for a credit card account and entered into a written agreement with Plaintiff to be bound by the terms and conditions set forth in the Customer Agreement ("Agreement"), including that use of the issued card constituted acceptance of the Agreement. (Plaintiff's Separate Statement of Undisputed Material Facts ("SS") Nos. 1-3.)[1] Pursuant to the terms of the Agreement, Plaintiff would extend credit to Defendant whereby Defendant could use the credit card, making charges and Defendant would make payments plus any interest incurred. (SS Nos. 4-6.) Plaintiff provided Defendant with monthly statements reflecting all charges, payments, minimum payments due, including fees and interest incurred during that billing period. (SS Nos. 7-8.) There is no record of any unresolved disputes on the account or record of any active lawsuits against Plaintiff for unresolved disputes on the account at issue. (SS Nos. 9-10.)

The last payment applied to the account or transaction made by Defendant was on January 17, 2023. (SS No. 11.) No further payments were made by the Defendant and Defendant was in default pursuant to the terms of the Agreement. (SS No. 12.) The balance due on Defendant's account is $12,687.33, resulting in damages to the Plaintiff in the amount of the same. (SS Nos. 13-14.)

Standard for Summary Judgment

A plaintiff moving for summary judgment meets his or her burden of proof by showing there is no defense to each cause of action by proving each element of the cause of action. (Code Civ. Proc., § 437c(p)(1); see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 ["summary judgment law in this state no longer requires a plaintiff moving for summary judgment to disprove any defense asserted by defendant as well as prove each element of his own cause of action. . . . All that the plaintiff need do is to 'prove [ ] each element of the cause of action' "].) Once a plaintiff meets this burden, the burden shifts to defendant "to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c(p)(1).)

Discussion

Plaintiff claims it is entitled to summary judgment against Defendant on the grounds that there is no triable issue of material fact or issue of liability entitling it to summary judgment. (Amended Notice of Motion, pp. 1:27-2:1.) Plaintiff alleges a breach of contract based upon common counts of money lent, money paid, open book account, and account stated against Defendant.

The elements of a breach of contract cause of action are: (1) the existence of a contract; (2) the plaintiff's performance or excuse for nonperformance of the contract; (3) defendant's breach; and (4) damage to plaintiff resulting from the breach. (*State Compensation Ins. Fund v. ReadyLink Healthcare, Inc.* (2020) 50 Cal.App.5th 422, 449 ("*ReadyLink*").)

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[1] The Court refers only to the facts supporting Issue No. 1 regarding breach of contract allegations for simplicity, unless otherwise noted. Those facts likewise apply to Issue Nos. 2 -5 as set forth in the SS when applicable, but are numbered differently.

"A common count alleges in substance that the defendant became indebted to the plaintiff in a certain stated sum, for some consideration such as 'money had and received by the defendant for the use of the plaintiff,' or 'for goods, wares and merchandise sold and delivered by plaintiff to defendant,' or 'for work and labor performed by plaintiff'; and that no part of the sum has been paid." (4 Witkin, Cal. Procedure (5th ed. 2008), Pleading §557, p. 685; *Pike v. Zadig* (1915) 171 Cal. 273, 275.) The only essential allegations are the statement of indebtedness in a certain sum, the consideration—e.g. goods sold, work done, etc., and nonpayment. (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460.)

An account stated is "an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing." (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752.)

A "book account" is "a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner." (Code Civ. Proc., § 337a) A book account is "open" where a balance remains due on the account. (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708; *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, fn. 5.)

Here, Plaintiff proffers evidence of the agreement for the credit card, that Plaintiff performed its obligation under the terms of the agreement by extending funds to Defendant for various goods, services, and cash advances, that Defendant failed to honor the obligations under the terms of the credit card agreement by failing to pay the sums owed to Plaintiff, and that Plaintiff is owed a sum certain in the amount of $12,687.33. (SS Nos. 1-14.)

The Court finds that Plaintiff has met its burden establishing each element of its causes of action. (SS Nos. 1-14 as to breach of contract, SS Nos. 15-21 as to money lent, SS Nos. 22-27 as to money paid, SS Nos. 28-36 as to open book account, SS Nos. 37-44 as to account stated.) Without controverting evidence from Defendant, the Court grants Plaintiff's motion for summary judgment.

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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