SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 03/11/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV2200213

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: SHOSHANA SKLARE vs. DEFENDANT: KAISER FOUNDATION HOSPITAL, INC., ET AL	

NATURE OF PROCEEDINGS: MOTION – SUMMARY JUDGMENT

RULING

Defendants Kaiser Foundation Hospitals and The Permanente Medical Group, Inc.'s motion for summary judgment, and for summary adjudication of Issue Nos. 1 and 2, is denied. Defendants' motion for summary adjudication of Issue No. 3 is granted.

Allegations in Plaintiff's First Amended Complaint

Plaintiff alleges that on her second day on the floor as a nurse at Kaiser, she was shadowing another nurse and was prohibited by Kaiser's policies from acting independently. She was also not familiar with Kaiser's particularized computer systems, charting system, and specific practices and procedures. (First Amended Complaint ("FAC"), ¶¶14-19.) A patient who presented with certain symptoms was discharged without an MRI and later died. (*Id.*, ¶¶21-24.) The family filed a wrongful death claim against Kaiser, whose legal department, through Andrew Ferguson, allowed Plaintiff to be deposed without preparation or representation. (*Id.*, ¶¶25, 26.) The family also filed a complaint with the Board of Registered Nursing ("BRN") against Plaintiff and two other Kaiser nurses, alleging among other things that Plaintiff did not speak with or help the patient. (*Id.*, ¶29.) As the BRN investigated the complaint, Kaiser Legal advised Plaintiff that there was nothing for her to worry about and that Kaiser Legal would handle it, and allowed her to meet with the investigator without preparation or legal representation. (*Id.*, ¶¶30-36.) After the BRN investigation, the Attorney General notified Plaintiff she was being charged with gross negligence. (*Id.*, ¶38.) Kaiser hired Defendant Ann Larson, an attorney with Defendant Craddick, Candland & Conti, to represent Plaintiff against the charges. (*Id.*, ¶39.) Larson was also representing one of the other nurses, telling Plaintiff there was no conflict, and did not communicate with Plaintiff regularly and failed to give Plaintiff crucial information. (*Id.*, ¶¶43, 58, 60.) Larson failed to obtain documents and evidence that would have supported Plaintiff's defenses. (*Id.*, ¶¶49, 50, 52-54, 56, 59.) Kaiser's legal department undertook to represent Plaintiff, holding itself as protecting Plaintiff's interests,

but it never advised Plaintiff that their legal interests conflicted or of any adverse risks to Plaintiff's future career, reputation or legal rights. Kaiser also never advised Plaintiff that she had the option for different counsel. (*Id.*, ¶63.) Kaiser knowingly made untrue representations to Plaintiff to contain or minimize any evidence that may flow from the best defense for Plaintiff as it could expose Kaiser to greater legal liability. (*Id.*, ¶64.)

Plaintiff's First Cause of Action alleges, among other things, that Kaiser breached its fiduciary duties to Plaintiff by failing to represent Plaintiff, by failing to provide someone to represent Plaintiff, and/or failing to advise Plaintiff to seek outside counsel for the interview with the BRN investigator and for her deposition. (*Id.*, ¶¶73, 74.) Plaintiff further alleges that Kaiser breached its fiduciary duties by advising Plaintiff not to respond to the BRN's inquiries or requests for documentation without any guidance related to the risks and ramifications to Plaintiff's interests, by advising Plaintiff to voluntarily respond to the BRN without guidance as to the risks, by advising Plaintiff not to seek outside counsel and to speak to no one but Kaiser about the investigation, and by failing to advise Plaintiff of the risks to her career, reputation and legal rights. (*Id.*, ¶¶76-79.) Plaintiff also alleges that Kaiser failed to explain the risks of continued legal representation of Plaintiff and of the conflicts of interest. (*Id.*, ¶85.)

Plaintiff's Second Cause of Action alleges, among other things, that Defendants are liable for professional negligence because they acted below the level of skill and care that a reasonably careful attorney would use in similar circumstances. (*Id.*, ¶¶93-97.) The Third Cause of Action alleges, among other things, that Kaiser falsely represented it was protecting Plaintiff's interests, that Kaiser knew its interests conflicted with Plaintiff but concealed this fact from Plaintiff, that Kaiser knew Plaintiff should have had an opportunity to obtain independent counsel but instead told Plaintiff to talk only to Kaiser, that Kaiser instructed Plaintiff to go unprepared and unrepresented in her deposition even though it knew she should be prepared and represented, that Kaiser falsely represented that there was no conflict of interest with the other nurse, that Kaiser falsely represented that Plaintiff could not respond to the BRN's communications on her own, that Kaiser falsely represented that Plaintiff could wait to respond to BRN's attempts to get her employee file, that Kaiser falsely represented that Plaintiff should voluntarily give her file to the BRN, and that Kaiser falsely represented that Plaintiff had no risks. (*Id.*, ¶108.)

Standard

Defendants Kaiser Foundation Hospitals and The Permanente Medical Group, Inc. ("Kaiser", or "Defendants") have filed a motion for summary judgment or, in the alternative, for summary adjudication.

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal. App. 4th 1110, 1119.)

"On a motion for summary judgment, the initial burden is always on the moving party to make a prima facie showing that there are no triable issues of material fact." (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) A defendant moving for summary judgment or summary adjudication "has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc. § 437c(p)(2).) "Once the defendant . . . . has met that burden, the burden shifts to the plaintiff . . . 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)(2).) "A triable issue of material fact exists if the evidence reasonably permits a trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof." (*Bakos v. Roach* (2025) 108 Cal.App.5th 390, 395.)

"When deciding whether to grant summary judgment, the court must consider all of the evidence set forth in the papers (except evidence to which the court has sustained an objection), as well as all reasonable inferences that may be drawn from that evidence, in the light most favorable to the party opposing summary judgment." (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467; Code Civ. Proc. §437c(c).) The moving party's evidence must be strictly construed, while the opposing party's evidence must be liberally construed. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.) Any evidentiary doubts are resolved in favor of the opposing party. (*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1176.)

A party who objects to evidence presented on a motion for summary judgment must either timely file separate written objections or object orally at the hearing. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 851 n. 11; Cal. Rules of Court, Rule 3.1352.) "Evidentiary objections not made at the hearing shall be deemed waived." (Code Civ. Proc. §437c(b)(5).)

Request for Judicial Notice

Defendants' request for judicial notice of the BRN Department of Consumer Affairs, State of California's Decision and Order in Case No. 2020-481 (Exhibit A) is granted. Plaintiff's request for judicial notice of the same decision (Exhibit 1), the BRN's Accusation against Plaintiff (Exhibit 3), the BRN's Decision and Order for Nurse Girly Gargar and Stipulated Settlement and Disciplinary Order in BRN Case No: 2020-205 (Exhibit 7), and the BRN's Accusation against Vipha De La Cruz, Case No. 2020-483 (Exhibit 12), is granted. (Evid. Code §§ 452, 453.)

Evidentiary Objections

Plaintiff's Objection No. 1 is overruled.

Defendants' Objection Nos. 1, 3 and 5 are overruled. Objection No. 2 is sustained as to the word "important" but overruled as to the rest of the quoted paragraph. Regardless of whether or not Plaintiff had a right to be told certain information, Plaintiff is merely stating in Paragraphs 1 and 2 that she was not provided with that information. Defendants' Objection No. 4 is overruled; the Court takes judicial notice of Plaintiff's Exhibit 7.

Issue No. 1/First Cause of Action

Defendants' Issue No. 1 states: "Summary judgment/adjudication of plaintiff's claim for breach of fiduciary duty is appropriate because plaintiff does not have, and cannot reasonably obtain, evidence to establish her burden of proof that Kaiser Defendants breached any fiduciary duty or caused her any damages due to any alleged breach of duty."

While Defendants frame Issue No. 1 as including the absence of a breach of fiduciary duty, Defendants' memorandum focuses only on Plaintiff's ability to prove resulting damages. (See e.g. MPA p. 2:25-17 ["Summary judgment should be granted as Plaintiff is unable to show that Kaiser Defendants caused her any harm, or that she suffered any damages as the result of any action or inaction by Kaiser Defendants"], p. 4:26-5:3 ["Plaintiff cannot establish that any of her claimed damage was caused by the Kaiser Defendants. While not addressed in this motion, Kaiser Defendants do not concede that the other elements of Plaintiff's causes of action are satisfied. However, with no cognizable damages, let alone no damages caused by Kaiser Defendants, Plaintiff's claims fail and the First Amended Complaint should be dismissed"].) The Court therefore addresses only Defendants' arguments regarding resulting damages.

Resulting damage is an essential element of Plaintiff's First Cause of Action for breach of fiduciary duty. (See *Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524.) Defendants suggest that a "but for" causation analysis may apply to this cause of action similar to the Second Cause of Action for legal malpractice (MPA, p. 4:21-25.) However, Plaintiff's First Cause of Action is based on intentional conduct (FAC, ¶¶83-85) and is therefore subject to the substantial factor causation standard. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1094 ["Substantial factor causation is the correct causation standard for an intentional breach of fiduciary duty"]; see also *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1095.)[1] "To demonstrate causation, a plaintiff must show that the defendant's act or omission was a substantial factor in bringing about the injury. [The] actor's negligent conduct is not a substantial factor in bringing about harm . . . if the harm would have been sustained even if the actor had not been negligent." (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1535-1536 [citations and internal quotations omitted].) "[C]ausation . . . is ordinarily a question of fact which cannot be resolved by summary judgment. The issue of causation may be decided as a question of law only if, under undisputed facts, there is no room for a reasonable difference of opinion. The question about what would have happened had [the lawyer] acted otherwise is one of fact unless reasonable minds could not differ as to the legal effect of the evidence presented." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864 [citations and internal quotations omitted]; see also *Ambriz*, 146 Cal.App.4th at p. 1532-1533.)

Defendants argue that Plaintiff "cannot" or is "unable" to establish causation and resulting damages. However, a defendant cannot shift the burden to the plaintiff merely by stating that the plaintiff cannot meet her burden. (See *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83.) "[A] defendant cannot simply 'argue' that a plaintiff lacks sufficient evidence to establish causation; the defendant must make an affirmative 'showing' that

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[1] Even if the First Cause of Action was also based in part on alleged negligent conduct, summary adjudication would be appropriate only if Defendants satisfied their burden in showing they were entitled to judgment as a matter of law on both theories (negligence and intentional conduct.) (See Code Civ. Proc. § 437c(f)(1).)

the plaintiff *cannot* do so." (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 103 [emphasis in original]; see also *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1439 ["the defendant must make an affirmative showing that the plaintiff will be unable to prove its case by any means"].)

Defendants have not submitted evidence that Plaintiff "cannot" establish resulting damages. For example, they do not submit "factually devoid" responses to discovery asking Plaintiff to identify "all facts" supporting her damage claims. (See e.g., *Andrews*, 138 Cal.App.4th at p. 107.) Therefore, the burden does not shift to Plaintiff to make an affirmative showing supporting her damages.

Plaintiff has raised triable issues of fact in any event. Plaintiff argues that as a result of Defendants' delay in providing relevant information to the BRN and Defendants' failure to provide an adequate defense for Plaintiff, which she alleges was done to protect Kaiser and/or its other employees, the BRN investigation into Plaintiff lasted longer than it should have and the BRN did not dismiss charges against Plaintiff until later than it should have. Plaintiff contends that she suffered damages in the form of lost income, inability to find new employment, being forced to sell her home, rescission of her acceptance to a graduate school, emotional distress damages, and reputational damages. (Defendants' Undisputed Material Facts ("UMF") 2-4 [undisputed by Plaintiff].) Plaintiff further contends that she applied for dozens of jobs for which she was qualified but was rejected without an interview or call back. (UMF 5 [undisputed by Plaintiff].) In response to Defendants' UMF 18, which Plaintiff disputes, Plaintiff submits her deposition testimony in which she testified that the reason she did not apply for a nurse job in the eight months before the accusation was dismissed was that she did not want it on her record that she was being denied a job because they did a license check on her and saw she was under investigation. (Pl. Resp. to UMF 18 [citing Pl. Exh. 4 at 199:20-25, 200:1-6].) In response to Defendants' UMF 19, which Plaintiff disputes, Plaintiff submits her testimony that Walden informed her it could not move forward with her application until the investigation was resolved, and states in her declaration that by the time the accusation was removed from the BRN's website, her financial situation had grown significantly worse due to Defendants' conduct and she had to focus instead on obtaining employment in the nursing field. (Pl. Resp. to UMF 19 [citing Pl. Exh. 20, Pl. Exh. 4 at 202:8-12, and the Declaration of Shoshana Sklare ("Sklare Decl.") at ¶17.) In response to Defendants' UMF 20, which Plaintiff disputes, Plaintiff submits her testimony in which she stated that the fact that an investigation was ever filed against a nurse is not a good look in the field, and she did not apply for some nursing positions after being exonerated because she did not want that on her record in her profile for each hospital. She also testified that she did apply to jobs after the accusation and did get a nursing job after the accusation. (Pl. Resp. to UMF 20 [citing Pl. Exh. 4 at 209:19-210:3].)

Thus, while Defendants argue that Plaintiff cannot recover lost income because she failed to pursue other opportunities, Plaintiff has submitted evidence that her opportunities may have been limited as a result of Defendants' conduct. The jury could potentially award Plaintiff some damages based on this evidence. Summary adjudication of Issue No. 1 is therefore denied.

Issue No. 2/Second Cause of Action

Defendants Issue No. 2 states: "Summary judgment/adjudication of plaintiff's claim for professional negligence is appropriate because plaintiff does not have, and cannot reasonably obtain, evidence to establish her burden of proof that Kaiser Defendants are liable for professional negligence or caused her any damage due to any alleged professional negligence."

While Defendants frame Issue No. 2 as including Plaintiff's inability to establish Defendants' liability for legal malpractice, their brief focuses only on resulting damage. Specifically, Defendants argue that Plaintiff cannot show that but for Defendants' alleged malpractice, Plaintiff would have obtained a more favorable outcome with the charges asserted against her. Defendants argue that Plaintiff cannot show a better result was possible because the BRN investigation against her was dropped and charges were dismissed without any requirement that Plaintiff pay investigatory costs. In contrast, Defendants contend, had the parties reached an earlier settlement, Plaintiff may have been required to pay investigation costs. Any settlement would therefore have been a worse outcome than a dismissal, even if the settlement was reached earlier than the dismissal.

Defendants' argument ignores the totality of Plaintiff's allegations. Under Plaintiff's theory, if Defendants had provided more information supporting Plaintiff's position to the BRN earlier, there could have been an earlier *dismissal* by BRN, not just an earlier settlement. (FAC, ¶¶102-104.) If there was an earlier dismissal, Plaintiff alleges, she would not have suffered the damages she did in the time between when that evidence could have been provided and when the charges against Plaintiff were eventually dismissed by the BRN. Summary adjudication is unavailable as to only part of a cause of action (Code Civ. Proc. § 437c(f)(1)), which is what Defendants seek here by requesting the Court to focus only on a potential settlement and not a potential earlier dismissal.

Defendants also argue that Plaintiff cannot establish that the BRN would have chosen not to bring the claims against her, or would have dismissed the claims at an earlier date, if Defendants had presented additional evidence to the BRN earlier than they had. Defendants also contend that Plaintiff similarly cannot establish that the investigation would have resulted in a different result had Plaintiff been represented by Defendants in the interview by the investigator.

"[T]he plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1243 [citation and internal quotations omitted]; see also *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509 ["To show damages proximately caused by the breach, the plaintiff must allege facts establishing that, but for the alleged malpractice, it is more likely than not the plaintiff would have obtained a more favorable result"] [citation and internal quotations omitted]; *Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1092 [recovery of compensatory damages in legal malpractice cases is governed by preponderance of the evidence standard].) "In legal malpractice claims, the absence of causation may be decided on summary judgment only if, under undisputed facts, there is no room for a reasonable difference of opinion." (*Knapp v. Ginsberg* (2021) 67 Cal.App.5th 504, 526 [citation and internal quotations omitted].)

Defendants argue that Plaintiff "cannot" or is "unable" to establish causation and resulting damages. However, as is the case with their Issue No. 1, Defendants fail to satisfy their initial burden in producing evidence showing that Plaintiff cannot meet her burden. Plaintiff does produce some evidence to support her damage claims in any event. In response to Defendants' UMF 11, which Plaintiff disputes, Plaintiff states that Tuss, who was prosecuting the claim against her, testified that the BRN is able to withdraw an accusation after it has been filed. (Pl. Response to UMF 11 [citing Pl. Exh. 2 at 14:3-6, 73:8-16].) In response to UMF 12, which states that Tuss testified that a stipulated settlement would require payment of investigatory costs by the investigated party "as a rule", Plaintiff states that Tuss conceded in his deposition that he did not have personal knowledge about the BRN's policies regarding standardized terms for settlement. (Pl. Response to UMF 12 [Pl. Exh. 2 at 14:7-15].) Plaintiff has adequately raised triable issues of fact to support her theory that a different result could have occurred if more information had been provided to the BRN earlier, i.e., the BRN could have withdrawn the investigation against her at an earlier point in time. Summary adjudication based on causation is therefore inappropriate. (See *Ganoe v. Metalclad Insulation Corp.* (2014) 227 Cal.App.4th 1577, 1584-1585 [plaintiff's evidence that he was present in building when defendant removed asbestos-containing insulation was sufficient to support inference he could prove causation, for purposes of opposing defendant's motion based on "no evidence" theory].)

Defendants are also not entitled to summary adjudication based on resulting damages for the reasons discussed above in connection with Issue No. 1. Summary adjudication of Issue No. 2 is therefore denied.

Issue No. 3/Third Cause of Action

Defendants' Issue No. 3 states: "Summary judgment/adjudication of plaintiff's claim for intentional misrepresentation is appropriate because plaintiff does not have, and cannot reasonably obtain, evidence to establish her burden of proof that Kaiser Defendants is liable for intentional misrepresentation, including, but not limiting, not being able to establish they caused her any damage due to any misrepresentation and/or that Kaiser Defendants acted with intent to harm her."

Resulting damage is an essential element of Plaintiff's Third Cause of Action for intentional misrepresentation cause of action. (See *Aton Center, Inc. v. United Healthcare Ins. Co.* (2023) 93 Cal.App.5th 1214, 1245.) The substantial factor causation test applies to this cause of action. (See *Knutson*, 25 Cal.App.5th at p. 1091.) The Court adopts the same analysis discussed in connection with Issue No. 1 with respect to resulting damages, and therefore Defendants' motion for summary adjudication of Issue No. 3 is denied to the extent it is based on this issue.

Defendants move for summary adjudication on the additional ground that Plaintiff cannot establish that Defendants intended to induce reliance on a misrepresentation or that an individual had knowledge of falsity. An intent to induce reliance and knowledge of falsity are elements of intentional misrepresentation and concealment claims. (See *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) The affirmative misrepresentation(s) attributed to the Kaiser Defendants, identified by Plaintiff in her First Amended Complaint, are statements made by Andrew Ferguson, Kaiser's Legal Coordinator. (See FAC, ¶¶4, 108.)

In support of this argument, Defendants cite to their UMF 25-27. UMF 25 reflects Plaintiff's response to Defendants' Special Interrogatory No.1, which asked Plaintiff to state all facts to support her allegations against Defendants. Plaintiff's response does not include information regarding Defendants' intention to induce reliance on any statement or omission by Mr. Ferguson or any other representative of Defendants, or that anyone including Mr. Ferguson had knowledge that any statement made to Plaintiff was false. In her response to UMF 25, Plaintiff states that after she served her interrogatory response in December 2022, she discovered additional information. (Pl. Resp. to UMF 25.) However, none of this information relates to Defendants' intent to induce reliance on, or Defendants' knowledge of falsity of, any representation or omission. UMF 26 reflects Plaintiff's response to Defendants' May 9, 2025 supplemental interrogatory asking Plaintiff to provide all later acquired information bearing on her previous interrogatory responses. Plaintiff provided a supplemental response only to Form Interrogatory No. 12.1, Form Interrogatory No. 14.1, and Special Interrogatory No. 4, and none of these supplemental responses addressed Defendants' intent to induce reliance or knowledge of falsity. UMF 27 refers to Mr. Ferguson's deposition transcript (the caption page only, as it is AEO), which Defendants argue shows Plaintiff had an opportunity to depose him. The Court has overruled Plaintiff's objection to this transcript. With this evidence, Defendants have satisfied their initial burden, shifting the burden to Plaintiff to raise a triable issue of fact regarding intent to induce reliance and knowledge of falsity.

Plaintiff's additional facts cite the following evidence relating to Defendants' intent to induce reliance and knowledge of falsity: (1) Mr. Ferguson was Kaiser's in house counsel's legal representative (Plaintiff's Additional Undisputed Material Fact ("AUMF") 12); (2) after Plaintiff received correspondence from the investigator and forwarded it to Mr. Ferguson, Mr. Ferguson told her that Kaiser would take care of it and not to discuss the matter with anyone (AUMF 16); (3) Plaintiff relied on Mr. Ferguson's statement and did not discuss the investigation with anyone and did not consult with outside counsel (AUMF 17); (4) Mr. Ferguson advised Plaintiff to meet with the investigator and answer his questions, which Plaintiff did (AUMF 18); (5) when Plaintiff discussed the accusation against her with Mr. Ferguson, he told her that Kaiser would take care of it and she did not have to worry about it, and further informed Plaintiff she should not discuss the case with anyone but Kaiser's attorney (AUMF 21); and (6) "Kaiser representatives" failed to disclose information to Plaintiff (AUMF 35).

While Plaintiff identifies certain statements by Mr. Ferguson and certain omissions by unidentified "Kaiser representatives" which could include Mr. Ferguson, she still fails to identify any evidence showing that Defendants had an intent to induce Plaintiff to rely on any statements or omissions or that Defendants had knowledge that any of representations made to Plaintiff were false. Plaintiff did not do so in her responses to discovery asking for "all facts" to support her claims, and she does not do so now in her Opposition to Defendants' motion. Accordingly, the Court grants Defendants' motion for summary adjudication of Issue No. 3. (See *Andrews*, 138 Cal.App.4th at p. 107 ["If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiffs' factually devoid discovery responses.[FN] In short, [the defendant's] discovery was sufficiently comprehensive, and plaintiffs' responses so devoid of facts, as to lead to the inference that plaintiffs could not

prove causation upon a stringent review of the direct, circumstantial and inferential evidence contained in their interrogatory answers and deposition testimony"].)

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 March, 2026 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615487764?pwd=Ob4B5J7LLKcpnkxzJjjEOSHNzEGafG.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: 03/11/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0001435

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: SINA SHEKOU	
vs.	
DEFENDANT: FARROKH HOSSEINYOUN	

NATURE OF PROCEEDINGS: MOTION - LEAVE

RULING

Plaintiff Shina Shekou's ("Plaintiff") motion for leave to file a First Amended Complaint is granted. (Code Civ. Proc., § 473, subd. (a)(1).)

FACTUAL BACKGROUND

This case concerns a tree and a view. Plaintiff, Sina Shekou ("Plaintiff") is the owner of real property at 94 Mount Tiburon Road in Tiburon, California. (Complaint ¶ 4.) Defendant Farrokh Hosseinyoun as Trustee for the Hosseinyoun Family Trust ("Defendant") is the owner of real property at 96 Mount Tiburon Road in Tiburon, California. (Complaint ¶ 5.) Plaintiff alleges that there was a protected mature redwood tree on her property which provided her with substantial benefits and enjoyment, and that Defendant and his agents, and/or his employees willfully and maliciously trespassed onto her property and cut and irreparably damaged the tree to obtain a better view. (Complaint ¶ 9-13.) Defendant has cross-complained against Joe Shekou ("Cross-Complainant") asserting that to the extent that Plaintiff sustained damages, that Cross-Complainant is liable for those damages. Defendant asserts that he had permission from Cross-Defendant to cut down, or trim the tree. (Cross-Complaint ¶ 23.)

Plaintiff now seeks to amend the complaint to add Defendant Farrokh Hosseinyoun as a defendant in his individual capacity, rather than just as Trustee for the Hosseinyoun Family Trust. Defendant opposes this request.

LEGAL STANDARD

Under Code of Civil Procedure section 473, subdivision (a)(1), the Court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding. As judicial policy favors resolution of all disputed matters in the same lawsuit,

courts liberally permit amendments of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.)

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

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

DISCUSSION

Defendant asserts that Plaintiff may not add Farrokh Hosseinyoun as an individual because the Probate Code prohibits a trustee who is acting in a fiduciary capacity from being personally liability unless the trustee is personally at fault outside the scope of trust administration. However, a review of the complaint alleges a variety of intentional torts which may fall within the exception. Now is not the time to challenge the merits of the amendment.

Additionally, Plaintiff has substantially fulfilled the requirements of California Rules of Court, rule 3.1324. Plaintiff attached an amended proposed pleading, along with a red lined version of the pleading. Plaintiff has also specified the reasons for the amendment and when the facts giving rise to the amended allegations were discovered.

Accordingly, the motion is granted, and Plaintiff shall file the amended complaint within ten 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.

The Zoom appearance information for March, 2026 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615487764?pwd=Ob4B5J7LLKcpnkxzJjjEOSHNzEGafG.1

Meeting ID: 161 548 7764
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 03/11/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0006100

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: DEBORAH BARIGIAN vs. DEFENDANT: MERCEDES-BENZ USA, LLC	

NATURE OF PROCEEDINGS: MOTION – COMPEL

RULING

Plaintiff Deborah Barigian's motion to compel arbitration is construed as a motion to appoint arbitrator and is granted. The parties are ordered to meet and confer in good faith and file with the Court a joint list of five proposed arbitrators, including their names, affiliations, and resumes. If the parties are unable to agree, each side shall submit the names, affiliations, and resumes of three proposed arbitrators, and the Court will provide the parties with a list of five proposed arbitrators. If only one side submits a list the Court will provide the parties with proposed arbitrators from the list provided. Within five days of receipt of notice of the nominees from the court, the parties may jointly select the arbitrator whether or not the arbitrator is among the nominees. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the list of nominees.

Procedural Background

On April 28, 2025, Plaintiff Deborah Barigian ("Plaintiff") filed her Complaint against Defendant Mercedes-Benz USA, LLC ("MB"), alleging that on December 20, 2024, she leased a 2024 Mercedes-Benz C300W as a Certified Pre-Owned Vehicle and that she received certain warranties. Plaintiff further alleges that she brought the vehicle into MB's authorized service and repair facilities on at least two occasions for repairs of defects, malfunctions, misadjustments and/or other nonconformities but these continue to exist. Plaintiff asserts causes of action for breach of implied warranty of merchantability and breach of express warranty under the Song-Beverly Act.

On November 19, 2025, this Court granted MB's motion to compel arbitration and stayed the matter pending resolution of same.

Plaintiff has now filed a motion styled a "Motion to Compel Arbitration pursuant to Code of Civil Procedure §1281.2." In the body of the notice and memorandum of points and authorities, Plaintiff clarifies that she is seeking an order to arbitrate this action before an arbitration forum other than AAA, specifically before any one of three arbitration agencies proposed by Plaintiff: JAMS, Signature Resolution and/or ADR Services, Inc. She also seeks an order for MB to promptly pay all arbitration fees as they become due.

Discussion

Despite the title of the motion, and in light of the Court's prior order granting arbitration, the Court construes Plaintiff's motion here as one for an order appointing an arbitrator. Code of Civil Procedure section 1281.6 provides:

If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.

When a petition is made to the court to appoint a neutral arbitrator, the court shall nominate five persons from lists of persons supplied jointly by the parties to the arbitration or obtained from a governmental agency concerned with arbitration or private disinterested association concerned with arbitration. The parties to the agreement who seek arbitration and against whom arbitration is sought may within five days of receipt of notice of the nominees from the court jointly select the arbitrator whether or not the arbitrator is among the nominees. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

This section provides the sole statutory regulation concerning the appointment of arbitrators. (*Atlas Plastering, Inc. v. Superior Court* (1977) 73 Cal.App.3d 63, 69.) It provides a "statutory method for resolving breakdowns in the arbitration selection process." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal. 4th 951, 980.)

Here, the operative arbitration agreement states, "The arbitration shall be administered by the American Arbitration Association, or by any other organization that you may choose, subject to our or a Third Party Beneficiary's approval. You may get a copy of the rules of the American Arbitration Association by visiting its website at www.adr.org." Plaintiff asserts MB refuses to consider any organizations other than American Arbitration Association ("AAA") for arbitration. Plaintiff argues that under the agreement, AAA is not required and she may choose an arbitrator other than AAA. In opposition, MB asserts that the agreement requires the parties use AAA unless MB agrees otherwise.

The plain language of the agreement states arbitration shall proceed under AAA, or any other organization Plaintiff chooses subject to MB's approval. This language does

not require that the parties only use AAA. That MB can approve a different organization does not provide it with ultimate authority over the choice of arbitrator. It merely requires the parties agree on the organization which is a standard condition in countless arbitration agreements. Under the covenant of good faith and fair dealing, MB must at minimum consider arbitral forums other than AAA. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1214 [a contractual provision that vests discretion in one party carries with it the duty to exercise the contractual right "fairly and in good faith"].) It appears to the Court from the pre-motion meet and confer and the opposition that MB did not consider any other organization.

Given that the parties agreed upon method for choosing an arbitrator has failed, the Court grants Plaintiff's motion. The parties are ordered to meet and confer in good faith and no later than by April 1, 2025, each side shall file with the Court—and provide a courtesy copy by email to Department H--the names, affiliations, and resumes of three proposed arbitrators. The Court will thereafter provide the parties with a list of three of those proposed arbitrators from the lists provided. If only one side submits a list the Court will provide the parties with proposed arbitrators from the list provided. Within five days of receipt of notice of the nominees from the court, the parties may jointly select from the three arbitrators on the court's list, or may select an alternative arbitrator. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the list of nominees.

The court shall set a case management conference on May 19, 2026 at 9:00 am in Department H to ensure an arbitrator is selected.

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 March, 2026 is as follows:
https://marin-courts-ca-gov.zoomgov.com/j/1615487764?pwd=Ob4B5J7LLKcpnkxzJjjEOSHNzEGafG.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: 03/11/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0006275

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: JENNIFER OWENS vs. DEFENDANT: SUTTER HEALTH NOVATO COMMUNITY HOSPITAL	

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

RULING

Defendant Dr. Henry Chen's ("Dr. Chen") demurrer to Plaintiff Jennifer Owens' ("Plaintiff") Second Amended Complaint ("SAC")[1] is OVERRULED. Defendant Sutter Bay Hospitals d/b/a Novato Community Hospital's ("Hospital") motion to strike the SAC is GRANTED without leave to amend as to the punitive damages material only. (Code Civ. Proc., § 436.)

BACKGROUND

This is a medical battery case. Plaintiff alleges that she is a breast cancer survivor and double mastectomy recipient with the BRCA2 gene mutation, which elevates her risk for a recurrence of cancer. (SAC, ¶¶ 6, 13.) Plaintiff alleges that her oncologist, a Dr. Jeske, advised her that she needed to avoid exposure to radiation and told her she should never have a mammogram again. (*Id.* at ¶¶ 9, 13.)

Plaintiff alleges that on March 6, 2024, she visited Hospital's facility to have what was supposed to be a routine post-operative ultrasound. (SAC, ¶ 7.) During the appointment, Plaintiff allegedly had a "contentious back and forth" with the ultrasound technician regarding the need for a mammogram. (*Id.* at ¶ 8.) When Plaintiff resisted, she was introduced to Dr. Chen, the head of the Radiology Department. (*Ibid.*) Dr. Chen allegedly "pressured Plaintiff to undergo a mammogram" over her repeated objections and her statements that her oncologist had told her never to have a mammogram again. (*Id.* at ¶ 9.) Dr. Chen suggested that he should call Dr. Jeske and left the room. (*Id.* at ¶¶ 10-11.) Plaintiff alleges that the ultrasound technician refused to do the ultrasound unless Plaintiff submitted to the mammogram, so she began packing her things to leave. (*Id.* at ¶ 11.) Dr. Chen returned to the room and allegedly told Plaintiff "that he spoke to Dr. Jeske and she had authorized the procedure." (*Ibid.*) Plaintiff was skeptical and suggested

[1] Dr. Chen's requests for judicial notice are granted. (Evid. Code, § 452, subd. (d).)

that Dr. Chen had spoken to a receptionist or a nurse, but Dr. Chen repeatedly told her that he had personally spoken directly to Dr. Jeske. (*Ibid.*) As a result, Plaintiff agreed to the mammogram. (*Ibid.*) Plaintiff subsequently spoke to Dr. Jeske, who told her that she had never spoken to Dr. Chen and had never authorized the procedure. (*Ibid.*) Plaintiff asserts causes of action for medical battery, negligence, intentional misrepresentation, intentional infliction of emotional distress ("IIED"), and violation of the UCL.

The Court now considers Dr. Chen's demurrer and Hospital's motion to strike.

DR. CHEN'S DEMURRER[2]

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

<u>First (Medical Battery), Third (Intentional Misrepresentation), and Fourth (IIED) Causes of Action, Collectively</u>

Dr. Chen contends that all three of these reflect improper "splitting" of a single cause of action.

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[2] Some of the titles of the papers submitted in connection with this motion suggest that Dr. Chen is also moving to strike the SAC. Dr. Chen has not filed such a motion and has not joined in Hospital's motion to strike.

"The primary right theory is a theory of code pleading that has long been followed in California." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) "It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." (*Ibid.*) "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. A pleading that states the violation of one primary right in two causes of action contravenes the rule against 'splitting' a cause of action." (*Ibid.*)

Dr. Chen insists that all of Plaintiff's claims seek to vindicate the same primary right, so she may only pursue one legal theory of recovery, which he contends should be medical malpractice. (Memorandum, pp. 4-5.) This argument conflates a "cause of action" within the meaning of the primary right doctrine with the legal theory on which the plaintiff seeks to recover. "[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered. It must therefore be distinguished from the legal theory on which liability for that injury is premised[.]" (*Crowley*, *supra*, 8 Cal.4th 666, 681 [internal citation omitted].) The violation of a single primary right may entitle a plaintiff to relief under multiple different legal theories, and seeking relief under several of those legal theories within a single pleading does not constitute impermissible "splitting." (*Ibid.*; see also *Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1257; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.)

The Court believes Dr. Chen's argument is based on a misunderstanding of the term "cause of action" as used in connection with primary right theory. Used in that context, the phrase refers to the bundle of rights and obligations "comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." (*Crowley*, *supra*, 8 Cal.4th 666, 681.) Because a "cause of action" in the primary rights sense is distinguished from the legal theory by which the plaintiff seeks to recover, a pleading may present the same "cause of action" in various separate *counts* stating different legal theories of relief. (See *People ex rel. Feuer v. Superior Court (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1377, fn. 17 ["[T]he term 'count' may refer to either a legal theory or a remedy that is intended to compensate the plaintiff for the violation of the primary right which is the subject of the litigation[.]"].) However, the phrase "cause of action" is often used to mean "counts," and it is standard practice for plaintiffs to state different counts within a pleading under separate subheadings describing them as, e.g., "First Cause of Action." (*Ibid.*; see also *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860, fn. 1.) A complaint that asserts multiple counts seeking to vindicate the same primary right under different legal theories nevertheless asserts a single cause of action within the meaning of the primary right doctrine. (See *Hindin, supra,* 118 Cal.App.4th 1247, 1257.) "The manner in which a plaintiff elects to organize his or her claims within the body of the complaint is irrelevant to determining the number of causes of action alleged under the primary right theory." (*Ibid.*; see also *Anderson v. Ford Motor Co.* (2022) 74 Cal.App.5th 946, 969 [primary right theory generally applies where a plaintiff attempts to vindicate the same primary right in *separate lawsuits*].)

Dr. Chen repeatedly invokes the following language from *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992: "As to any given defendant, only one standard of care obtains under a particular set of facts, even if the plaintiff attempts to articulate multiple or alternate theories of liability." (8 Cal.4th 992, 998.) Within the context of the full opinion, this

portion of *Flowers* means that where a medical professional is sued for negligence on a single set of facts, he is necessarily held to only a single standard of care, i.e., either the medical professional-specific one underlying medical malpractice actions or the catch-all duty of care applicable to ordinary negligence claims, but not both. (See *Flowers*, *supra*, 8 Cal.4th 992, 1000.) However, this statement of law does not mean that a patient is prohibited from suing a doctor on any theory other than medical malpractice.

First Cause of Action: Medical Battery

A plaintiff may plead a medical battery claim by asserting (1) that the medical provider performed a medical procedure without her consent; (2) that she was harmed;[3] and (3) that the medical provider's conduct was a substantial factor in causing the harm. (CACI No. 530A.) "Consent" that is induced by fraud is not legally valid consent. (See *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 375 [plaintiff stated a cause of action for battery where she pleaded that her consent was "fraudulently induced," which constituted "grounds for invalidating her consent and rendering [defendant's] act a battery"].)

Dr. Chen argues that Plaintiff has not alleged "that he performed a procedure that was substantially different than the one consented to." (Memorandum, p. 6; see also *Cobbs v. Grant* (1972) 8 Cal.3d 229, 239 [discussing this theory of medical battery].) Plaintiff alleges that she did not consent to the mammogram at all. Dr. Chen's statement that she "admits she reluctantly consented to the mammography" is incorrect. (Memorandum, p. 6.) Plaintiff does allege that she submitted to the procedure, but she further alleges that this submission was brought about by a lie and so does not legally qualify as consent, meaning she *did not consent* to the mammogram. (SAC, ¶ 17; *Barbara A.*, *supra*, 145 Cal.App.3d 369, 375.) At this stage of the pleadings, these allegations must be accepted as true and comprise a viable theory of medical battery. (CACI No. 530A.)

Dr. Chen claims that this cause of action "sounds in professional negligence" and so does not state a claim for battery, as opposed to medical malpractice. *Cobbs*, *supra*, 8 Cal.3d 229, addressed whether a consent-related theory of liability against a doctor should be treated as negligence rather than battery and concluded that it should. (8 Cal.3d 229, 240-241.) When it ruled on Hospital's demurrer to the prior version of Plaintiff's complaint, the Court held that Plaintiff is permitted to maintain her medical battery claim notwithstanding *Cobbs*. It refers the parties to that discussion. (See Oct. 24, 2025 Order, pp. 4-5.) (The relevant allegations have not changed in the SAC as compared to the prior version of the complaint.)

Dr. Chen argues that there is no allegation that he acted with intent to harm or offend plaintiff. He has not presented any authority establishing that intent to harm or offend is required to prevail on a theory of *medical* battery, as opposed to battery, and in fact acknowledges that it is not required. (Memorandum, pp. 5-6; CACI No. 530A.)

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[3] In his reply, Dr. Chen, for the first time, argues that Plaintiff has not pleaded facts sufficient to establish "harm" because she does not assert that the mammogram itself injured her. (Reply, p. 4.) "The salutory [sic] rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.)

To be clear, there is an intent requirement. *Cobbs* spoke of a "requisite element of deliberate intent to deviate from the consent given[.]" (*Cobbs*, *supra*, 8 Cal.3d 229, 240.) *Cobbs* said this in the context of a medical battery claim alleging that "the patient [gave] permission to perform one type of treatment, and the doctor perform[ed] another[.]" (*Ibid.*) Plaintiff's theory is different – she is alleging that she did not consent at all. In this case, the "intent to deviate from the consent given" should be modified to require an intent to act in the absence of consent, or, stated differently, knowledge that plaintiff did not consent to the procedure. Alternatively, one could view this as a conditional consent case on the theory that Plaintiff consented to the procedure on the condition that Dr. Jeske had approved the mammogram. (See CACI No. 530B.) In that case, the intent required is the defendant's intent to perform the procedure with knowledge that the condition had not occurred. (*Ibid.*) In either case, Plaintiff has pleaded facts sufficient to support intent by pleading that her consent was expressly conditioned on Dr. Jeske's approval and that Dr. Chen knew Dr. Jeske did not provide such approval. (SAC, ¶¶ 9-12.)

Finally, Dr. Chen argues that he cannot be liable for battery because he did not perform the mammogram. He asserts that a radiology technician actually performed the procedure. The Court agrees that to be directly liable for battery, Dr. Chen must have performed the procedure. (See CACI No. 530A.) Plaintiff will ultimately have to prove that he did so or otherwise amend her complaint to state a theory of vicarious liability. At this stage, though, the Court is bound by the pleadings set forth in the SAC. The SAC alleges that Dr. Chen performed the procedure (¶ 17) and that allegation is taken as true on demurrer.

The demurrer to this cause of action is overruled.

Third Cause of Action – Intentional Misrepresentation

"The elements of intentional misrepresentation 'are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage.'" (*Aton Center, Inc. v. United Healthcare Ins. Co.* (2023) 93 Cal.App.5th 1214, 1245 [quoting *Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 230-231].) Fraud must be specifically pleaded. This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered. (*Lazar v. Superior Ct.* (1996) 12 Cal.4th 631, 645.)

Plaintiff's fraud claim is based on Dr. Chen's alleged statement that Dr. Jeske had approved the mammogram. (SAC, ¶ 22.) She alleges that this was not true (*ibid.*) and facts to support that he knew it was not true (i.e., he allegedly represented that he obtained Dr. Jeske's approval in a telephone conversation with her, and Plaintiff alleges that no telephone conversation occurred). (*Id.* at ¶¶ 10-11.) The allegation that Dr. Chen pretended to obtain Dr. Jeske's opinion after Plaintiff told him she was relying on Dr. Jeske's medical advice supports the idea that Dr. Chen pretended to have obtained Dr. Jeske's approval for the procedure to get Plaintiff to rely on that assurance. (*Id.* at ¶¶ 9-11.) Plaintiff alleges that she relied on Dr. Chen's statement that Dr. Jeske had approved the mammogram when "consenting" to the procedure (*id.* at ¶¶ 11. 23) and pleads facts to support that this reliance was reasonable, including Dr. Chen's performance of suggesting he call Dr. Jeske, leaving the room, and returning saying that he had spoken to her. (*Id.* at ¶¶ 10-11.) She further alleges that she was damaged in the form of trauma, emotional harm, elevated medical risk, and medical costs. (*Id.* at ¶ 13.) These allegations meet

the "how" required by the particularity pleading rules. (*Lazar*, *supra*, 12 Cal.4th 631, 645.) Plaintiff also pleads the "when" (SAC, ¶ 7 [March 6, 2024]), the "where" (*id.* at ¶¶ 7-8 [Sutter Health Novato Community Hospital, where Dr. Chen is Head of Radiology]), the "to whom" (*id.* at ¶ 11 [Plaintiff]), and the "by what means" (*id.* at ¶ 11 [orally and in person].) This is a sufficiently pleaded fraud claim.

Dr. Chen argues that this cause of action is subject to demurrer because Plaintiff's allegations sound in medical malpractice and cannot support fraud liability. In *Stone v. Foster* (1980) 106 Cal.App.3d 334, a plaintiff brought a fraud claim based on the defendant doctor's representations about the effect of a surgery on plaintiff. (*Id.* at pp. 345-346.) The plaintiff was injured by the surgery and argued "that she would not have consented to the surgery had she been informed that the surgery might result in the injury incurred." (*Id.* at p. 346.) The court held that this theory is properly treated as one of negligence and cannot support fraud liability, saying, "[W]here a physician fails to disclose low probability inherent risks and subsequent complications arise due to those risks, the resulting cause of action is one for negligence." (*Id.* at p. 347.)

Plaintiff's case is distinguishable from *Stone* because her fraud claim does not allege that Dr. Chen failed to disclose a risk and that Plaintiff was injured due to that risk. She alleges that Dr. Chen affirmatively lied to her, and she relied on the lie when deciding to submit to a medical procedure, meaning his lie caused her to receive a medical procedure to which she did not consent. (SAC, ¶¶ 11, 22-23.) *Tell v. Taylor* (1961) 191 Cal.App.2d 266, involved similar facts – a defendant doctor made representations about the state of the plaintiff's injury and her future prognosis, those statements turned out to be wrong, and she sued him for fraud. (191 Cal.App.2d 266, 269.) *Tell* is similarly uncompelling given the substance of Plaintiff's allegations. In *Weinstock v. Eissler* (1964) 224 Cal.App.2d 212, 227, the First District stated that a cause of action against a physician for fraud "based on the physician's false representations or fraudulent concealment of the nature and extent of the injury" is properly treated as one for malpractice. Reading Plaintiff's allegations liberally, as the Court must do on demurrer (*Teva Pharmaceuticals*, *supra*, 217 Cal.App.4th 96, 102), she is not alleging that Dr. Chen made misrepresentations to her concerning the nature or extent of her medical condition.

The demurrer to this cause of action is OVERRULED.

Fourth Cause of Action – IIED

To prove 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,[4] (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.* at 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.*

[4] Again, Dr. Chen challenges this element for the first time in reply.

Atlantic Richfield Co., 25 Cal.4th 826, 853, fn. 19)].) That the facts alleged 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.)

Dr. Chen argues that the conduct alleged in the SAC is insufficiently extreme and outrageous to support a cause of action for IIED. As pled, the Court disagrees. Plaintiff alleges that Dr. Chen deliberately lied to a cancer survivor to get her to cooperate with a medical procedure that he knew the patient's treating oncologist had advised her never to receive again because of the risk that it would cause a recurrence of a potentially fatal illness. (SAC, ¶ 6, 9, 11-12, 25.) This is sufficiently extreme and outrageous to survive demurrer.

As with the other claims, Dr. Chen argues that this cause of action sounds in professional negligence and so cannot support IIED liability. This argument relies on the same case law cited in support of this argument as applied to the other claims, and the Court finds it unconvincing for reasons already discussed. That courts have sometimes precluded patients from shoehorning medical malpractice allegations into theories of intentional tort liability does not mean that a patient is invariably precluded from suing a doctor on an intentional tort theory. Plaintiff is not alleging that Dr. Chen inflicted emotional distress upon her by failing to adhere to the applicable standard of care. She is alleging that he affirmatively lied to her to trick her into submitting to a medical procedure that she was vehemently stating that she did not want. Dr. Chen has not presented any authority establishing that the facts that the defendant is a doctor, the plaintiff is his patient, and the facts at issue bear some connection to that professional relationship mean that the plaintiff is necessarily confined to theories of medical malpractice.

Fifth Cause of Action – UCL[5]

The UCL authorizes a court to enjoin "[a]ny person who engages, has engaged, or proposes to engage in unfair competition." (Bus. & Prof. Code, § 17203.) "Unfair competition" is defined in relevant part to "mean and include any unlawful, unfair or fraudulent business act or practice[.]" (Bus. & Prof. Code, § 17200.) To have standing to bring a claim under the UCL, the plaintiff must have "suffered injury in fact . . . [and have] lost money or property as a result" of the alleged unfair competition. (Bus. & Prof. Code, § 17204.) "Because . . . economic injury is itself a form of injury in fact, proof of lost money or property will largely overlap with proof of injury in fact." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 325 & fn. 8; *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1348.)

This cause of action is based on defendants' "performing and billing for a mammogram procedure and associated imaging without Plaintiff's informed consent, misrepresenting the necessity and nature of the procedures, and submitting charges for these procedures to Plaintiff and her health-insurance carrier." (SAC, ¶ 28.) Dr. Chen does not contest that Plaintiff has alleged the existence of an unlawful, unfair, or fraudulent business act or practice. He argues that Plaintiff has not pleaded facts sufficient to constitute injury in fact. Plaintiff alleges that she paid a $40 co-payment for the procedures she received that day, including the mammogram. (SAC, ¶ 29.) This is lost money causally connected to the practice she alleges qualifies as unfair competition. Under *Kwikset* and *Troyk*, she need not allege additional injury.

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[5] The SAC does not, as Dr. Chen's brief suggests, assert a cause of action for violation of the Consumer Legal Remedies Act.

Dr. Chen contends that "[t]he UCL does not apply to claims arising out of professional medical services." However he did not provide any legal authority supporting this position, and therefore, there is no argument for Plaintiff to rebut. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, [the court] consider[s] the issues waived."].) Dr. Chen's appeals to the Medical Injury Compensation and Reform Act ("MICRA") are unavailing because he never actually specifies what legal effect he believes MICRA has on Plaintiff's UCL claim.

The demurrer to this cause of action is overruled.

Dr. Chen's brief includes some scattered references to uncertainty that he does not develop through legal argument. "[D]emurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 848 fn. 3.) None of the causes of action to which Dr. Chen has demurred meet this bar.

MOTION TO STRIKE

LEGAL STANDARD

The court may, upon a motion, or at any time in its discretion, and upon terms it deems proper, (1) strike out any irrelevant, false, or improper matter inserted in any pleading; or (2) strike out all or any part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court. (Code Civ. Proc., § 436, subds. (a)-(b).) The grounds for moving to strike must appear on the face of the pleading or by way of judicial notice. (Code Civ. Proc., § 437.) "When the defect which justifies striking a complaint is capable of cure, the court should allow leave to amend." (*Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 768.)

DISCUSSION

Punitive Damages

"In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed." (Code Civ. Proc., § 425.13, subd. (a) ("Section 425.13").) The court may enter such an order "on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294[6] of the Civil Code." (*Ibid.*)

Hospital moves to strike a request for punitive damages in connection with Plaintiff's IIED claim. (SAC, ¶ 26.) In its October 24, 2025 order on Hospital's motion to strike the last

[6] Civil Code, section 3294 governs awards of punitive damages. It provides that in actions "for the breach of an obligation not arising from contract," a plaintiff may recover punitive and/or exemplary damages only upon proof "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice[.]" (Civ. Code, § 3294, subd. (a).)

iteration of the complaint, the Court held that given the nature of Plaintiff's claim, Section 425.13 required her to secure leave of court before pleading an entitlement to punitive damages for IIED. (Oct. 24, 2025 Order, p. 10.) The nature of her IIED claim has not changed in the latest round of pleading.

The motion to strike this material is GRANTED without leave to amend because Plaintiff cannot plead around her failure to file the motion required by Section 425.13. This does not prevent her from amending her IIED claim to request punitive damages if she files such a motion and it is granted.

Injunctive Relief

Hospital moves to strike Plaintiff's requests for injunctive relief for alleged violations of the UCL. It argues that "[i]njunctive relief is appropriate only when there is a threat of continuing misconduct." (Memorandum, p. 4 [citing *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 463].) In *Madrid*, the plaintiff pleaded a violation of the UCL, but "did not allege a continuing threat of . . . misconduct. The complaint's factual allegations referred only to acts that happened in the past[.]" (*Id.* at p. 462.) The court declined to permit the plaintiff to obtain injunctive relief absent any allegation "that another incident [was] likely to occur." (*Id.* at p. 465.) Plaintiff alleges that the conduct purportedly violating the UCL "is likely to continue unless enjoined." (SAC, ¶ 30.) This is sufficient to plead a threat of continuing misconduct. This portion of the motion to strike is denied.

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

The Zoom appearance information for March, 2026 is as follows:
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Meeting ID: 161 548 7764
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 03/11/26 TIME: 1:30 P.M. DEPT: H CASE NO: CV0006822

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: VELOCITY INVESTMENTS LLC vs. DEFENDANT: MICHAEL BRIERLEY	

NATURE OF PROCEEDINGS: MOTION – DISMISS

RULING

Defendant Michael Bierly ("Defendant") filed a motion to dismiss the Complaint filed by Plaintiff Velocity Investments ("Plaintiff"). The court shall treat this pleading as a demurrer. (*Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 299.)

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.) 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.) "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.)

Defendant attacks the pleading pursuant to section 367 of the Code of Civil Procedure on the basis that Plaintiff cannot prove it has standing to bring the complaint because Plaintiff must show that it has a valid and enforceable claim against Defendant including that Plaintiff owns the debt in question.

"Every action must be prosecuted in the name of the real party in interest." (Code of Civil Procedure §367.) In other words, the party bringing the action must be the one who has a right to prosecute an action. (*Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 955.) Nonetheless, a party's right to recover damages in contract can be assigned or transferred. (*Curtis v. Hellogg & Andelson* (1999) 73 Cal.App.4th 492, 504.)

In this case, the allegations of the Complaint state that Plaintiff Velocity Instruments is the "successor-in-interest of THEOREM SHORT DURATION LIQUIDITY FUND LP ISSUED

BY LENDINGCLUB BANK SERVICES BY LENDINGCLUB CORPORATION..." It states that Plaintiff is a debt buyer and sole owners of account. (Complaint ¶ 1.) The Complaint also states that the debt was sold on January 1, 2014 to Velocity Instruments LLC. (Complaint ¶ 8-9.) Transfer of the debt was listed on Exhibit B to the Complaint.

In light of the above, the court finds that Plaintiff has pleaded sufficient allegations in the Complaint to withstand demurrer. Accordingly, the demurrer is overruled, which effectively means this court is denying the motion to dismiss.

Defendant shall file his answer to the Complaint within 20 days of service of this order

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