

**PLACER COUNTY SUPERIOR COURT  
CIVIL LAW AND MOTION TENTATIVE RULINGS  
FRIDAY, SEPTEMBER 18, 2020, AT 8:30 A.M.**

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These are the tentative rulings for civil law and motion matters set at **8:30 a.m., Friday, September 18, 2020**. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by **4:00 p.m., Thursday, September 17, 2020**. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

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Except as otherwise noted, these tentative rulings are issued by the **HONORABLE MICHAEL W. JONES** and if oral argument is requested, it will be heard in **Department 3**, located at **101 Maple Street, Auburn, California**.

**PLEASE NOTE: TELEPHONIC APPEARANCE IS REQUIRED FOR ALL CIVIL LAW AND MOTION MATTERS. (Emergency Local Rule 10.28; see also Local Rule 20.8.) More information is available at the court's website: [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov).**

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**1. M-CV-0072311      Wilmington Savings Fund Society, FSB vs. Holmes, Bobby M.**

The order to show cause re bankruptcy is continued to October 30, 2020, at 8:30 a.m. in Department 3.

**2. M-CV-0074977      Wells Fargo Bank, N.A. vs. Martinez, Christina R.**

Motion for Summary Judgment

Plaintiff's request for judicial notice is granted.

Plaintiff Wells Fargo Bank, N.A. moves for summary judgment on its claims for breach of contract and common counts against defendant Christina R. Martinez.

The party seeking summary judgment bears the burden of showing there is no triable issue of material fact and that the party is entitled to judgment as a matter of law. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. If the moving party carries its initial burden of production to make a prima facie showing that there are no triable issues of material fact, the burden shifts to the opposing party to make a prima facie

showing of the existence of a triable issue of material fact. *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at 850.

Plaintiff submits admissible evidence which establishes the existence of a written credit card agreement between the parties by which plaintiff extended credit to defendant in exchange for repayment, defendant's use of the credit card to incur charges, and defendant's default on the payment of her obligations owed pursuant to the agreement. (SSUMF 1-11.) Plaintiff has satisfied its burden as the moving party, and the burden shifts to defendant to establish a triable issue of material fact. However, as defendant filed no opposition to the motion, she fails to satisfy her burden.

Based on the foregoing, plaintiff's motion for summary judgment is granted. Plaintiff is entitled to judgment in its favor in the principal amount of \$5,462.28. Plaintiff is also entitled to reasonable attorneys' fees and costs, which shall be determined by a separate motion for fees and the timely filing of a memorandum of costs.

Motion to Deem Requests for Admissions Admitted

In light of the court's ruling on the motion for summary judgment, plaintiff's motion to deem requests for admissions admitted is dropped as moot.

**3. M-CV-0076359 Citibank, N.A. vs. Ringer, Carol**

Citibank, N.A.'s motion to enter judgment pursuant to stipulation is granted. Judgment shall be entered against defendant Carol Ringer, in favor of plaintiff Citibank, N.A., in the total amount of \$2,425.

**4. S-CV-0036159 Leichus, Richard vs. Leichus, Christopher, et al**

Appearance required on September 18, 2020, at 8:30 a.m. in Department 3.

**5. S-CV-0038613 Caputo, John and Julie vs. Connor, Martin, et al**

Plaintiff's motion to substitute Julie Caputo, as the successor in interest to John Caputo, in place of plaintiff John Caputo, is granted pursuant to Code of Civil Procedure section 377.41.

**6. S-CV-0040173 Campus Oaks Apartments 1, LLC vs. Dahlin Group, Inc., et al**

Cross-defendants' request for judgment on equitable defenses and plaintiff and cross-defendants' request for declaratory judgment is continued to October 9, 2020, at 8:30 a.m. in Department 3.

7. **S-CV-0041807 Boyle, Barbara vs. County of Placer, et al**

As a preliminary matter, the court notes that plaintiff's motion for leave to file second amended complaint was not filed with sufficient notice pursuant to Code of Civil Procedure section 1005(b). Further, no proof of service has been filed which demonstrates proper and timely service of the motion on all parties who have appeared in this action. Nevertheless, on its own motion, the court takes judicial notice of the declaration of Eric Brumfield in support of defendants' ex parte application for order shortening time. In that declaration, Mr. Brumfield acknowledges plaintiff's pending motion to amend the complaint, and affirmatively states that defendants do not oppose this motion.

The motion for leave to file second amended complaint is granted. The clerk is directed to file the proposed second amended complaint lodged by plaintiff.

8. **S-CV-0042129 Michael, Jerry A. vs. FCA US LLC, et al**

Motion to Compel Further Responses to Request for Production of Documents, Set Three

Plaintiff's motion to compel further responses to request for production of documents, set three, is denied.

Plaintiff's motion, which seeks to compel further responses to 51 separate requests, was filed without a separate statement, as required by California Rules of Court, rule 3.1345. Although the separate statement was finally filed on August 19, 2020, this was one day after defendant's opposition was filed, giving defendant no opportunity to respond. The failure to include a separate statement constitutes sufficient grounds to deny the motion.

In addition, plaintiff does not make a sufficient showing that he informally attempted to resolve this matter with defendant. Code Civ. Proc. §§ 2030.300(b)(1), 2016.040. "A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at informal resolution of each issue presented in the motion." Code Civ. Proc. § 2016.040. This is not a pro forma requirement. The statute requires the parties to seriously engage in negotiations and informal resolution. *Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1438. The engagement involves communication between the parties to discuss the dispute; compare their views; consult; and deliberate. *Id.* at 1439.

Plaintiff sent a meet and confer letter detailing deficiencies in the subject responses on July 10, 2020. Defendant responded on July 31, 2020. Defendant's response provided substantive discussion regarding the issues identified by plaintiff with respect to the requests for production, and included an agreement to produce some, but not all, of the requested documents. Plaintiff filed the instant motion to compel without ever responding to the July 31 letter. The foregoing does not demonstrate an effort to seriously engage in negotiations and informal resolution prior to filing the motion.

Finally, plaintiff fails to demonstrate good cause for production. A motion to compel further responses to requests for production “shall set forth specific facts showing good cause justifying the discovery sought by the demand.” Code Civ. Proc. § 2031.310(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98. This is a higher standard than relevance, as plaintiff must also set forth specific facts justifying discovery, for example, why such information is necessary for trial preparation or to prevent surprise at trial. *Glenfed Dev. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117. Neither plaintiff’s motion, nor the declaration of counsel in support of the motion, address the requirement of good cause as to the specific requests at issue.

The court notes the filing of a supplemental reply and declaration in support of the motion on September 15, 2020 – three court days prior to the hearing date. The court declines to exercise its discretion to consider the supplemental reply and declaration for several reasons. First, defendant will have had no opportunity to respond to the new and specific arguments raised in the supplemental reply. Second, the information provided by plaintiff shows that the late filing could have been avoided to a reasonable degree. The discovery responses at issue have been in plaintiff’s possession since September 4, 2020, and plaintiff filed reply briefs to two other motions on September 11, 2020, which specifically reference the new information raised in the supplemental reply.

As the parties are aware, this case is set for a jury trial on October 19, 2020. For reasons that are not readily apparent, what appears to the court to be a relatively straightforward lemon law action has suddenly generated a flurry of discovery motion practice on a very tight timeline– plaintiff has noticed six other discovery motions besides the current motion to be heard between now and October 2, 2020. Plaintiff has also obtained two ex parte orders to shorten the statutorily prescribed notice time for certain motions. The setting of multiple motions involving review hundreds of individual interrogatories, requests for admission, requests for documents, and categories of examination, particularly in conjunction with requests to shorten notice and an impending trial date, imposes a significant burden on the court and a strain on its resources. Further, the sheer volume of the discovery, and the multiple discovery motions now pending only weeks before the trial date, appear to this court to be highly out of proportion to the plaintiff’s alleged claims and damages. Against this backdrop, the court finds that good cause has not been demonstrated with respect to plaintiff’s untimely request to consider supplemental argument and evidence, especially given that the subject information was in counsel’s possession at least 10 days prior to the request being made.

Finally, even if the court considered the supplemental filings, which it does not, the deficiencies identified in this ruling as the basis to deny the motion would not be cured.

Based on the foregoing, the motion to compel is denied.

#### Motion to Compel Testimony of Defendant Auburn CDJR, Inc.’s Person Most Qualified

Plaintiff’s motion to compel testimony of defendant Auburn CDJR, Inc.’s person most qualified is granted in part.

The motion is granted as Matter 3, limited to the specific line of questioning identified in plaintiff's separate statement related to warranty repair submissions.

The motion is granted as to Matters 4 and 9, limited to the specific line of questioning identified in plaintiff's separate statement related to particular Rapid Response Transmittals (RRT).

The motion is granted as to particular documents referenced in plaintiff's separate statement, which were identified by the deponent but not produced at the deposition, including documents related to warranty repair submissions, instructions for RRT repairs, the applicable service manual, and the EGR-related recall notice.

Defendant Auburn CDJR, Inc. shall produce one or more persons qualified to testify on its behalf on the foregoing matters within 14 days, and shall produce the documents identified above, to the extent they have not already been produced, at least three days prior to the deposition.

The motion is otherwise denied. Plaintiff's request for sanctions is denied.

Motion to Compel Further Responses to Special Interrogatories, Set Two

Plaintiff's motion to compel further responses to special interrogatories, set two, is granted. Defendant shall serve further verified responses to special interrogatory Nos. 130-179, without objections, on or before October 2, 2020.

Plaintiff is awarded sanctions in the amount of \$960 against defendant FCA US LLC and its counsel, jointly and severally.

Motion to Compel Further Responses to Request for Admissions, Set Two

Plaintiff's motion to compel further responses to requests for admission, set two, is granted. Defendant shall serve further verified responses to request for admission Nos. 111-166, without objections, on or before October 2, 2020.

Plaintiff is awarded sanctions in the amount of \$960 against defendant FCA US LLC and its counsel, jointly and severally.

Motion to Compel Deposition Attendance of FCA US, LLC's Person Most Qualified

Plaintiff's motion to compel deposition attendance of defendant FCA US LLC's person most qualified is granted.

Defendant FCA US LLC shall produce one or more persons qualified to testify on its behalf on the matters set forth in the Second Amended Notice of Deposition within 14

days, and shall produce responsive documents, to the extent they have not already been produced, at least three days prior to the deposition.

Plaintiff is awarded sanctions in the amount of \$960 against defendant FCA US LLC and its counsel, jointly and severally.

9. **S-CV-0042635Z Skyline Oak LLC vs. Worthington, John**  
**S-CV-0043512 Tech Services 2 U, et al vs. TRI Property Mgmt. Svcs., Inc.**

The motion to consolidate is continued to October 2, 2020, at 8:30 a.m. in Department 3.

10. **S-CV-0042787 Golson, Charles B., et al vs. Cross, Bethany Barry, et al**

Defendant's objections to evidence are overruled.

Plaintiff's motion to compel subsequent deposition of Devan Cross is granted as set forth below.

Pursuant to Code of Civil Procedure section 2025.610(b), the court finds good cause to permit a subsequent deposition of Devan Cross, under the following conditions:

- The deposition shall be no more than four hours in length
- The deposition shall be taken through remote electronic means pursuant to Emergency Rule 11
- Deponent is not required to produce any documents that have previously been produced by defendant
- The deposition shall be limited to topics arising from documents produced subsequent to the first deposition of Mr. Cross, as well as defendant's June 30, 2020 response to Special Interrogatory No. 44.

The parties shall meet and confer regarding the scheduling of the deposition.

Plaintiff's request for sanctions is denied.

11. **S-CV-0042799 Wright, Shirley vs. Likely Land & Livestock Co., Inc., et al**

The scheduled hearing is dropped as no moving papers were filed with the court.

12. **S-CV-0043237 Calder, Robin Elizabeth vs. Jarvis, Todd**

Motion for Summary Judgment, or in the Alternative, Summary Adjudication

Rulings on Request for Judicial Notice and Objections to Evidence

Defendant's request for judicial notice is granted.

Plaintiff's objections to evidence are ruled on as follows: Objection Nos. 1-8, 11-12, and 14 are sustained. **On its own motion the court directs the clerk to redact the Social Security Number of plaintiff which is set forth in Exhibits 3 and 4 of defendant's Compendium of Evidence filed April 13, 2020.** The remaining objections are overruled.

Defendant's objections to evidence are ruled on as follows: Objection Nos. 1, 3-14, 21-23, 25, 30 and 35 are sustained. The remaining objections are overruled.

### Ruling on Motion

Defendant Todd Jarvis moves for summary judgment, or alternatively summary adjudication, as to claims alleged in plaintiff Robin Calder's complaint.

Summary judgment may be granted where there is no triable issue as to any material fact, and moving party is entitled to judgment as a matter of law. Code Civ. Proc. § 437c(c). A party may move for summary adjudication as to one or more causes of action. Code Civ. Proc. § 437c(f)(1). Moving defendants bear the burden of persuasion that one or more elements of the causes of action in question cannot be established, or that there is a complete defense thereto. Code Civ. Proc. § 437c(p)(2). If the moving party carries its initial burden of production to make a prima facie showing that there are no triable issues of material fact, the burden shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, at 850.

Plaintiff's claims for breach of written contract, open book account, reasonable value of services, indemnity and declaratory relief, arise from a written fee agreement between the parties dated January 1, 2009 ("the Fee Agreement"). Defendant argues that the Fee Agreement is void because it violates the California Rules of Professional Conduct ("RPC"). In the moving papers, defendant argues that the Fee Agreement violates former RPC 3-410(A), requiring written disclosure if the attorney does not have professional liability insurance. However in the reply brief, defendant apparently concedes that RPC 3-410(a) is inapplicable, as it was not effective until one year after the Fee Agreement was entered into.

Plaintiff alternatively argues that the indemnity provision of the Fee Agreement violates former RPC 3-400 and 3-300, rendering the Fee Agreement invalid. Former RPC 3-400 states that an attorney shall not "[c]ontract with a client prospectively limiting the member's liability to the client for the member's professional malpractice." The indemnity provision in question states:

The parties to this agreement acknowledge that James Jarvis and John McDonnel, Jr., Trustee of the Jarvis Replacement Trust, among others, are extremely litigious. In consideration for taking on these responsibilities, You as the Client also agreed to indemnify, defend, protect and hold me harmless from and against any and all liabilities

(including alleged negligence), damages, lawsuits or other proceedings not otherwise protected by sufficient malpractice insurance, with legal counsel acceptable to me, filed against me or my firm personally or through any intermediary or entity directed by James Jarvis, John McDonnell, Jr., the Trust, Jarvis Properties, Your nieces and nephews, Your sister-in-law or any other persons or entities arising out of or related to my work for You or otherwise.

(Complaint, Exh. A.) The Fee Agreement identifies defendant Todd Jarvis as “You” or “the Client”. Defendant argues that the language of the indemnity provision is broad enough to also include any malpractice claims brought by defendant based on plaintiff’s work.

The court disagrees with defendant’s interpretation of the Fee Agreement. The Fee Agreement consistently refers to defendant as “You” or “the Client” or “You as the Client”. The indemnity provision also refers to “my work for You”. If the parties had intended the indemnity provision to also encompass defendant’s future claims against plaintiff for malpractice, this intention could have easily been made clear by including language referencing claims filed by “You” or the “Client”. The omission of such a reference, in the same paragraph where reference is made to “my work for You”, supports the conclusion that the indemnity provision does not include, and was not intended to include, claims by the defendant for malpractice.

Defendant also fails to establish that the indemnity provision violates former RPC 3-300, which prohibits business transactions between a lawyer and client resulting in the lawyer obtaining an ownership, possessory, security or other pecuniary interest adverse to the client. A lawyer obtains a “pecuniary interest adverse to the client” within the meaning of the rule when the lawyer possesses a legal right to significantly impair or prejudice the client’s rights or interests without court action. *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68; Rule 1.8.1, Comment [1]. The right to indemnity conferred by the Fee Agreement “does not give the attorney a present interest in the client’s property which the attorney can summarily realize.” *Fletcher v. Davis, supra*, 33 Cal.4th at 68. Consequently the indemnity provision does not violate the terms of RPC 3-300.

As defendant does not establish that the Fee Agreement is invalid based on a violation of the Rules of Professional Conduct, defendant does not satisfy his burden of showing that he is entitled to judgment as a matter of law. Accordingly, the motion for summary judgment is denied. Defendant’s requests for summary adjudication as to the first, second and third causes of action, premised on the invalidity of the Fee Agreement, are also denied.

The motion for summary adjudication is granted as to plaintiff’s fourth cause of action for indemnity. In a separate action, plaintiff was personally assessed sanctions under Code of Civil Procedure section 396b(b)(2), which expressly provides that the sanctions are to be charged to the attorney, and not to the client. Plaintiff alleges that the indemnity provision of the Fee Agreement requires that defendant indemnify her for the

sanctions assessed against her. Enforcing a provision of the Fee Agreement to shift liability of the sanctions to the client would violate the language and intent of the statute, and “may violate the lawyer’s ethical duties arising from the lawyer’s fiduciary relationship with the client, and may constitute contempt of court for ignoring the court’s order regarding against whom the court imposed the sanctions.” (State Bar Formal Opinion No. 1997-151.) Plaintiff fails to establish a triable issue of material fact with respect to the claim for indemnity. The court is aware that a motion for leave to amend the complaint is set for hearing after the hearing on this motion. The court takes no position at this time regarding the propriety of that motion.

Finally, plaintiff concedes that the fifth cause of action for declaratory relief is moot. Plaintiff asserts that this cause of action was previously dismissed. As the court has no record of the dismissal, summary adjudication is granted as to the fifth cause of action.

In summary, defendant’s motion for summary judgment is denied. Defendant’s motion for summary adjudication is granted as to plaintiff’s fourth and fifth causes of action, and is otherwise denied.

**13. S-CV-0043593 Anthes, George vs. Carroll, Michael, et al**

The motion for summary judgment, or in the alternative, summary adjudication, is continued to October 9, 2020, at 8:30 a.m. in Department 3.

**14. S-CV-0044007 Kostyuk, Alex vs. Young, Julia Mary**

Defendant Olympia Law Group’s demurrer to first amended complaint is overruled.

There is no proof of service in the court’s file demonstrating proper and timely service of the demurrer on plaintiff. Further, the demurrer was not timely filed pursuant to Code of Civil Procedure section 430.40(a), as it was filed more than 30 days after service of the first amended complaint. The proof of service attached to the first amended complaint indicates that it was served on Olympia Law Group on May 4, 2020. The current demurrer was not filed until August 18, 2020.

**15. S-CV-0044537 Graves, Lee, et al vs. Karfiol, Sylan**

The motion to quash is dropped in light of the notice of settlement filed September 3, 2020.

**16. S-CV-0044635 Helena Agri-Enterprises, LLC vs. Singh, Sumanpreet, et al**

Plaintiff’s application for writ of attachment and right to attach order is continued to October 9, 2020, at 8:30 a.m. in Department 3.

17. **S-CV-0044833**      **Harding, Patrick vs. General Motors LLC**

Demurrer to Complaint

Defendant General Motors LLC demurs to plaintiff's complaint.

A party may demur where the pleading does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). A demurrer tests the legal sufficiency of the pleadings, not the truth of the allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. The allegations in the pleadings are deemed true no matter how improbable they may seem. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.

The demurrer is overruled as to plaintiff's first cause of action for breach of implied warranty, and second cause of action for breach of express warranty. Based on a review of the complaint as a whole, plaintiff adequately alleges these claims. Contrary to the argument of defendant, plaintiff is not required to plead the terms of the Purchase Agreement, as the first and second causes of action do not arise from a breach of the Purchase Agreement.

The demurrer is sustained as to plaintiff's third cause of action for fraudulent inducement – concealment. To support this claim, plaintiff must allege (1) defendant intentionally concealed or suppressed a material fact; (2) defendant was under a duty to disclose the fact to plaintiff; (3) defendant intended to defraud plaintiff; (4) plaintiff was unaware of the fact, and would not have acted as he did had he known of the fact; and (5) as a result, plaintiff sustained damage. *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 310-311. Absent a fiduciary relationship between the parties, a duty to disclose arises only where (1) defendant had exclusive knowledge of the fact; (2) defendant actively concealed the fact; or (3) defendant made partial representations while also suppressing the fact. *Id.* at 311. These three circumstances still require an existing relationship created by a transaction between the parties. "Such a transaction must necessarily arise from direct dealings between the plaintiff and defendant; it cannot arise between the defendant and the public at large." *Id.*

The complaint does not allege an existing relationship caused by a transaction between plaintiff and defendant. In opposition, plaintiff argues that no such transaction is necessary in cases where the nondisclosure relates to a safety issue, citing *Daugherty v. American Honda Motor Co.* (2006) 144 Cal.App.4th 824 and *Bardin DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255. However, in both of the cited cases, the claims under examination by the appellate court involved failure to disclose under the CLRA or the UCL, and neither case analyzed the propriety of a common law claim for fraudulent concealment. The third case cited, *Falk v. General Motors Corp.* (N.D. Cal. 2007) 496 F.Supp.2d 1088, is a federal district court case which is not binding on this court.

Plaintiff is granted leave to amend. Any amended complaint shall be filed and served on or before October 9, 2020.

Motion to Strike

Defendant General Motors, LLC moves to strike punitive damage allegations in plaintiff's complaint.

To support a prayer for punitive damages, plaintiff must allege ultimate facts supporting a finding of oppression, fraud or malice on the part of the defendant. Civil Code § 3294(a). Malice includes conduct which is intended by the defendant to cause injury to the plaintiff, or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. Civ. Code § 3294(c)(1). Oppression includes despicable conduct which subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. Civ. Code § 3294(c)(2). Fraud includes intentional misrepresentation, deceit or concealment of a material fact with the intention of depriving a person of property or legal rights or otherwise causing injury. Civ. Code § 3294(c)(3).

In light of the court's ruling on the demurrer to complaint, plaintiff fails to adequately allege fraud as a basis to support punitive damages. Further, the allegations of the complaint do not support a finding of malice or oppression. Accordingly, the motion to strike is granted.

Plaintiff is granted leave to amend. Any amended complaint shall be filed and served on or before October 9, 2020.

**18. S-CV-0044933 Portz, Maribeth, et al vs. Teixeira, Donald, et al**

The order to show cause re: sale of dwelling is dropped in light of the dismissal of the action entered September 9, 2020.

**19. S-CV-0044957 Auguscik, Robert D., et al vs. Costco Wholesale Corporation**

The demurrer to complaint is continued to October 9, 2020, at 8:30 a.m. in Department 3.

**20. S-CV-0044965 Vicara Homeowners Association vs. Chiurlia, Christal**

The demurrer to complaint is continued to October 9, 2020, at 8:30 a.m. in Department 3.

**21. S-PR-0010311 In re Huguette N. Burnett Revocable Trust**

This tentative ruling is issued by Commissioner Glenn M. Holley. If oral argument is requested, it will be heard in Department 40 (together with the probate calendar). Department 40 is located in the Hon. Howard G. Gibson Courthouse at 10820 Justice Center Drive, Roseville.

Demurrer to petition to surcharge trustee and for other relief

Respondents Gregory Beyer Esq. and Beyer, Pongratz and Rosen ("BPM") demur to the second, fourth, and fifth causes of action in the petition for negligence, intentional misrepresentation, and conversion.

A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. *Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733. All properly pleaded facts are assumed to be true as well as those that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.

The demurrer to the second cause of action for negligence is overruled. Respondents argue that the negligence claim fails as the allegations do not establish any duty to petitioner and that any alleged wrongdoing comprises only the provision of legal counsel to the trustee, which does not give rise to liability to petitioner. They argue that the allegations do not implicate an estate planning attorney's duties to a donor's intended beneficiaries because there is no allegation that settlor's intentions were frustrated or petitioner's legacy was lost by counsel's negligence. The petition alleges that Beyer inserted himself into trust administration through the restatement, which empowered him to name the successor trustee upon settlor's death, and that he abused this fiduciary power to name respondent Alex Beyer, his son, to a potentially lucrative trustee position with the immediate result that trustee retained Beyer and BPM as counsel—itsself a potentially lucrative retention. The petition further alleges that, acting in concert from the time of trustee's appointment, respondents and the trustee continually engaged in unnecessary actions and / or overcharged the trust for services. These allegations sufficiently allege a duty on the part of Beyer and BPM at least with respect to appointment of the successor trustee, breach of that duty, and resulting harm.

Respondents allege the claims of intentional misrepresentation and conversion are each insufficiently pleaded in their own right and are subject to demurrer because of petitioner's failure to comply with the prefiling requirements of Civ.C. § 1714.10.

The fourth cause of action for intentional misrepresentation is insufficiently pleaded; however, the claim is not subject to the prefiling requirements of Civ.C. § 1714.10. A claim of intentional misrepresentation requires specific pleading as to the fraudulent statements made, when and by whom they were made, and other elements of the claim. The allegations at ¶¶ 40 and 41 of the petition are imprecise and allege only generally that respondents "represented to Petitioner that they and the Trust needed to borrow certain funds from Petitioner . . . to make certain repairs" to trust property, and that statements about "the conditions of the properties, the need for the funds, the need for repairs, and the intended use of the funds" were false. These broad allegations are too vague and imprecise to sufficiently allege intentional misrepresentation by Beyer or BPM. Further, fraud claims are not generally subject to Civ.C. § 1714.10. See *Klotz v. Milbank, Tweed, Hadley & McCloy* (2015) 238 Cal.App.4th 1339, 1349 (the Legislature did not intend the "gratuitously destructive result" that "otherwise exempt causes of

action for actual fraud" be dismissed under § 1714.10 whenever conspiracy is alleged, citing *Alden v. Hindon* (2003) 110 Cal.App.4th 1502, 1508).

The demurrer to the fifth cause of action for conversion is sustained. Conversion of money is actionable where "a specific, identifiable sum [is] involved," as here. *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395. Actionable conversion of money "typically involve[s] those who have misappropriated, commingled, or misapplied specific funds held for the benefit of others." *PCO, Inc.*, at 396. The petition alleges that petitioner provided \$20,000 to the trust at respondents' urging, but respondents instead misapplied the funds to inappropriate purposes. However, the petition also alleges that the funds were a loan to the trust to be used for trust administration purposes. Petitioner complains that he was misled as to those purposes, but that is not sufficient to allege conversion, particularly where there are no allegations that the trust's obligation to repay the loan has been impaired.

The demurrer is overruled as to the second cause of action for negligence. The demurrer is sustained with leave to amend as to the fourth cause of action for intentional misrepresentation. The demurrer is sustained as to the fifth cause of action for conversion without leave to amend.

#### Motion to strike

The motion to strike is denied as to the fourth causes of action in light of the ruling on the demurrer. The motion to strike is denied as moot as to the fifth cause of action for conversion in light of the ruling on the demurrer.

#### Amended petition

Any amended petition shall be filed within 20 days of the court's ruling on the demurrer.

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