CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 15
HEARING DATE: 07/23/18

GENERAL INSTRUCTIONS FOR CONTESTING TENTATIVE RULINGS IN DEPT. 15

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of his or her decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).) **Department 15's telephone number is: (925) 608-1115.**

Submission of Orders After Hearing in Department 15 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. The order must include appearances. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

1. TIME: 9:00 CASE#: MSC15-01706
CASE NAME: KAHANGI VS. FINEX REAL ESTATE
HEARING ON MOTION FOR SUMMARY ADJUDICATION
FILED BY FINEX REAL ESTATE INVESTMENT, INC., JAMAL QASEM SABERI
**** TENTATIVE RULING: ****

The motion is off-calendar, at the request of the moving party.

2. TIME: 9:00 CASE#: MSC16-00396
CASE NAME: HADAR VS. LURIA
HEARING ON MOTION FOR MONETARY SANCTIONS
FILED BY GERSHON LURIA, IRIT LURIA
**** TENTATIVE RULING: ****

The motion for sanctions is denied. The Court does not find that Plaintiffs have engaged in misuse of the discovery process. Defendant has asserted the same arguments in response to Plaintiffs' discovery motions in which Plaintiffs have prevailed.

3. TIME: 9:00 CASE#: MSC16-00976
CASE NAME: SALGUERO VS. CITY OF CONCORD
HEARING ON MOTION TO SET ASIDE DISMISSAL (CCP 473)
FILED BY BLANCA SALGUERO
**** TENTATIVE RULING: ****

Plaintiff's Motion to Set Aside Dismissal is **denied**.

In pertinent part, Code of Civil Procedure section 473 (b) provides as follows: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties."

Where an attorney takes responsibility for conduct that results in dismissal of a client's case, relief from the default is mandatory so long as: (1) the attorney files for relief within six months of the default; (2) the court does not find the attorney's declaration to be false and that the dismissal did not actually occur due to the attorney's actions but rather, for example, due to the "actions of the client or an intentional strategic decision" (*see Yeap v. Leake* (1997) 60 Cal.App.4th 591, 601-602); and (3) plaintiff and/or her attorney pays compensatory legal fees.

Previously, this court indicated it found the attorney's declaration here to be insufficient, in part, because it included statements based on hearsay or that lacked foundation. The court ordered plaintiff to submit a declaration concerning her whereabouts between June and December 2017 and that she had not received any letters or telephone messages from her attorney during that period. She has failed to do so.

Therefore, the court finds that the dismissal did not actually occur due to the attorney's actions, but to plaintiff's own actions either in not responding to letters and messages she received from her attorney or in not advising her attorney of her whereabouts.

4. TIME: 9:00 CASE#: MSC16-01206
CASE NAME: GOODWIN VS. HILLIARD
HEARING ON MOTION FOR SUMMARY JUDGMENT
FILED BY SARAH GOODWIN
**** TENTATIVE RULING: ****

Defendant Renee Hilliard, M.D.'s motion for summary judgment is denied. Defendant moved for summary judgment on Plaintiff's first and second causes of action for medical negligence. This motion was withdrawn by Defendant in her Reply. In Reply, Defendant now

wishes to switch tactics and "add a summary adjudication claim" of the third cause of action for fraud or alternatively, have the court treat its motion as one for judgment on the pleadings with respect to fraud.

With respect to the alternative request, this court has already ruled on the sufficiency of the pleadings, including the fraud cause of action. See Notice of Entry of Order [overruling Renee Hilliard, M.D.'s demurrer to all three causes of action], filed May 25, 2017. As to Defendant's belated request to treat the motion for summary judgment as a motion for summary adjudication is denied. When the notice of motion seeks *only* summary judgment, as it does here, the court may *not* summarily adjudicate claims or defenses as to which no triable issue was raised unless requested in the notice of motion. See Homestead Savings v. Superior Court (1986) 179 Cal.App.3d 494, 498-499. The reason, of course, is that it would be unfair to grant a summary adjudication order unless the opposing party was on notice that particular claims or defenses in the case might be summarily adjudicated, even though summary judgment was denied. See Gonzales v. Superior Court (1987) 189 Cal.App.3d 1542, 1546. This is particularly true on this motion, as Defendant raised summary adjudication of Plaintiff's fraud claim *only* in the Reply, where Plaintiff will have no opportunity to address it.

5. TIME: 9:00 CASE#: MSC17-00616
CASE NAME: STRONG VS. SLADEK
HEARING ON MOTION FOR ADMISSION OF JENNIFER R. WILLEY *PRO HAC VICE*
FILED BY MERRILL LYNCH, PIERCE FENNER & SMITH
**** TENTATIVE RULING: ****

The motion for admission of Jennifer R. Willey Pro Hac Vice is granted.

6. TIME: 9:00 CASE#: MSC17-00616
CASE NAME: STRONG VS. SLADEK
HEARING ON MOTION TO STAY CLAIMS AND COMPEL ARBITRATION
FILED BY MERRILL LYNCH, PIERCE FENNER & SMITH
**** TENTATIVE RULING: ****

Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.'s motion to stay claims and compel arbitration is denied. The motion is moot because the case is already stayed. On June 9, 2017, Judge Weil signed the Order Granting Stipulation To Stay Case Against Merrill Lynch.

Merrill Lynch argues that the court should essentially change its Order because Plaintiff has allegedly circumvented the stay against Merrill Lynch by seeking discovery, documents and depositions from it to prosecute the other named Defendants. See Willey Decl., paragraphs 5-7 and Exhibits B, C and D.

There is nothing wrong with this. First, the parties' agreement to stay the case did not, in any way, limit discovery. Merrill Lynch never raised the issue, and it did not request any limit

or stay on discovery, and discovery has not been stayed. Indeed, this court has already sent Plaintiff and Merrill Lynch to a discovery facilitator. See Minute Order re Hearing on Motion to/for Compel Merrill Lynch to Comply with Deposition Subpoena and for Monetary Sanctions, dated June 25, 2018. In the court's June 25th Order, the court notes that "Merrill Lynch had begun producing documents on a "rolling" basis pursuant to the subpoena." Hence, the parties appear to be already engaging in discovery and working out any differences regarding overreaching.

Second, the Stipulation the parties entered into in June 2017 clearly stated that Plaintiff would be pursuing her claims against the other Named Defendants first. One of those Defendants is Sladek, a financial advisor at Merrill Lynch since at least 1985. Of course, Plaintiff would be expected to serve third party discovery on Merrill Lynch to flesh out its claims against Sladek. The SAC specifically alleges that Sladek was acting, at all times, as the agent, servant and employee of Merrill Lynch. (SAC, paragraph 26) The SAC also alleges the following claims against Sladek: breach of fiduciary duty; fraud; negligent misrepresentation; declaratory relief; elder financial abuse; breach of good faith and fair dealing; accounting; equitable subrogation and equitable lien.

In those claims, Plaintiff makes specific allegations that concern Sladek's employment with Merrill Lynch. For example, in the breach of fiduciary duty claim pled against Sladek, Plaintiff alleges "that in the beginning of 2006, Sladek was a fiduciary and owed various duties to both Plaintiff and to Edward Strong, including but not limited to:"

> . . .
>
> (i) the duty to insure (sic) that all investment recommendations made by Sladek were in strict compliance with, and disclosed in writing to and approved by, Merrill Lynch in accordance with its internal policies and procedures.

(SAC, paragraph 29(i))

Hence, it would make sense that discovery about Plaintiff's claims against Sladek would involve his work at Merrill Lynch. Plaintiff also reminds the court of the very broad standard for discovery in California. CCP Section 2017.010 sets out what matters may be subject to discovery. The Section reads:

> Unless otherwise limited by order of the court in accordance with this title*, any party may obtain discovery regarding any matter*, not privileged, *that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evince or appears reasonably calculated to lead to the discovery of admissible evidence*.

This broad standard would clearly enable Plaintiff to obtain discoverable information and documents from Merrill Lynch concerning Sladek and his interaction with Plaintiff and her deceased husband.

Third, Merrill Lynch has only been served with discovery as a third party witness. Defendant's counsel sets out the discovery requests made by Plaintiff to Merrill Lynch in the declaration of Jennifer Willey. Exhibits A through E attached to her declaration are supboenas

for business records of Merrill Lynch or records of an individual (Ms. Boldt-DeGunto) concerning Sladek. Hence, the scope of Plaintiff's discovery requests to Merrill Lynch is no greater than it would be if Merrill Lynch was not a party to the action.

Plaintiff's request for judicial notice is granted.

Plaintiff's evidentiary objections are ruled on as follows:

Declaration of Jennifer Willey

Willey Decl., paragraph 4, Lines 9-11: Sustained – hearsay

Willey Decl., paragraph 6, lines 14-16: Sustained – relevance

Declaration of Lynda Lee Dyer

The objections to the Dyer declaration are not truly evidentiary in nature. Plaintiff contends that the Dyer declaration attaches Exhibits A through D, which violate two previous Orders: (1) Stipulated Protective Order, filed November 9, 2017 and (2) Order Granting Plaintiff's Ex Parte Application to Seal and Permanently Redact the Declaration of Lynda Lee Dyer filed in support of Merrill Lynch's Motion to Stay Claims and Compel Arbitration and for Sanctions, filed July 6, 2018.

However, Defendant filed Ms. Dyer's redacted declaration under seal immediately, as ordered, on July 6, 2018. (The clerk should pull out the original declaration.) Hence, the objections to it are moot.

7. TIME: 9:00 CASE#: MSC17-00616
CASE NAME: STRONG VS. SLADEK
SPECIAL SET HEARING ON: ATTORNEY FEES REQUEST
SET BY DEPT. 15 ON 06/25/18
**** TENTATIVE RULING: ****

Merrill Lynch and its attorneys shall pay Plaintiff discovery sanctions in the sum of $4110, payable on or before August 23, 2018.

8. TIME: 9:00 CASE#: MSC17-00836
CASE NAME: REILAND VS. JOHN MUIR HEALTH
HEARING ON DEMURRER TO 2nd Amended COMPLAINT
FILED BY MICHAEL BANNOUT M.D.
**** TENTATIVE RULING: ****

The demurrer of Dr. Bannout is **overruled**. Dr. Bannout shall file and serve his Answer to the Second Amended Complaint ("SAC") on or before August 6, 2018.

The court overrules defendant's objection to plaintiff's Opposition papers as being

untimely. However, plaintiff is admonished that the court does not consider service by regular mail to be proper for Oppositions and Reply Briefs. (*See* CCP § 1005 (c).) In the future, plaintiff should also use more standard terminology in responding to demurrers and motions, labeling his opposing memorandum of points and authorities as an Opposition, not an Objection. This will aid the Clerk's Office in properly labeling it.

Second Cause of Action, Defamation

The demurrer to the Second Cause of Action is **overruled**.

The SAC alleges that plaintiff went to the emergency room at John Muir on January 30, 2016 for a complaint of sternum pain that had resolved by the time he arrived. (SAC, ¶ 13.) He saw an emergency room physician who ordered a CT Angiogram that Dr. Hoddick read as showing a dilation of the ascending aorta to 5.9 cm. This prompted a consultation with a heart surgeon, Dr. Dhillon. In addition, a hospitalist, Dr. Bannout, assumed control over plaintiff's healthcare. (¶ 14, 15.)

Dr. Bannout stated in plaintiff's written medical record that plaintiff had an alcohol issue/disease. That statement is false. It was communicated to other caregivers, to licensing authorities, and to judges that have requested the medial records. (¶ 46.) Dr. Bannout made it negligently. (¶ 49) It is libelous per se and/or has caused plaintiff actual damages. (¶ 47, 50.)

Dr. Bannout argues this defamation claim fails to state a cause of action because it is barred by the qualified common interest privilege.

A privilege exists for a communication, "without malice, to a person interested therein . . ." (CC § 47 (c).) Whether a communication is subject to this privilege, however, is a matter of defense under the facts alleged here and not an element of the claim. (*See* CACI 1704, 1723.) It must be raised by affirmative defense unless facts alleged in the complaint demonstrate the existence of the privilege. (*Redfearn v. Trader Joe's Co*. (2018) 20 Cal.App.5th 989, 1007.) At trial, the defendant bears the initial burden of proving that the defamatory statement was made under circumstances falling within the common-interest privilege. (*See Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1202.)

The SAC does not clearly disclose that the statement in the medical records was subject to the qualified privilege, so this cause of action is not subject to demurrer on this ground. (*See Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232.)

Dr. Bannout also argues this claim fails because the statement that plaintiff had an alcohol issue or disease is an opinion, not a provable fact. He starts this argument by assuming what he seeks to prove stating, "Dr. Bannout's *opinion* was that plaintiff *may* have an 'alcohol issue.'" (Opening Brief at 9:10.) However, the SAC alleges without equivocation that plaintiff "had an alcohol issue" and later, "alcohol disease." (SAC, ¶ 45, 46.)

Dr. Bannout provides no authority in support of the broad proposition that the statement actually alleged in the SAC is a mere opinion. Dr. Bannout may have written what he did as part of a diagnosis. Or he may have written it as part of an inaccurate history, or in some other

part of his treatment notes. The SAC does not disclose this. Further, Dr. Bannout has not provided any authority stating that whether someone has an alcohol disease is not a provable falsehood.

A demurrer must be decided on the face of the pleadings. The court cannot say at the pleading stage that the statement alleged is a mere opinion rather than a provable falsehood.

Finally, Dr. Bannout argues the statement that plaintiff had an alcohol issue or disease does not convey a defamatory meaning. The court disagrees. The SAC alleges the statement was published to other doctors, to licensing authorities, and to judges.

The statement that an attorney has a problem with alcohol could be construed by a jury to be defamatory as tending to cause the attorney to be shunned or avoided or to be injured in his profession. Attorneys are required to take continuing educations courses on substance abuse. An attorney said to have an alcohol disease may be exposed to "hatred, contempt, ridicule, or obloquy, or [caused] to be shunned or avoided . . . (CC § 45) by existing or potential clients or by others. The statement alleged is reasonably susceptible of a defamatory meaning. (*See* 5 Witkin, Summary of California Law (10th Ed. 2005), Torts, § 543, p. 796-797.)

Dr. Bannout's admission that he had three alcoholic beverages on January 30, 2016, a Friday, is not an admission of the truth of the statement. Having three drinks once on a single day is not synonymous with having an alcohol "issue" or "disease."

Paragraph 51 of the Second Cause of Action, requesting "declaratory relief to strike and remove the false statements from plaintiff's medical records and to provide a letter of retraction of the false statements," has not been alleged as a separate cause of action. No cause of action for declaratory relief has been pleaded in the SAC and it is doubtful that one could, if its object was to remove statements from plaintiff's medical record. Such a request appears to be more one for injunctive relief than for declaratory relief and no authority has been cited whether the court could grant such a request. In any event, a demurrer may not be sustained to just part of a cause of action. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.)

As it appears here, paragraph 51 is merely a remedy requested for defamation and not an element of the cause of action. It may not be attacked by a general demurrer. (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 384.)

Third Cause of Action, Violation of Business and Professions Code section 17200

The demurrer to the Third Cause of Action is **overruled**.

Business and Professions Code section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . ." Section 17200 is not restricted to claims by business competitors. (*Barquis v. Merchants Collection Association* (1972) 7 Cal.3d 94, 110-111.)

To state a cause of action under Business and Professions Code section 17200, a plaintiff must allege the unlawful, unfair, or fraudulent business practice, that he suffered injury

in fact, and that he lost money or property as a result of the unlawful, unfair, or fraudulent business act or practice. (Bus. & Prof. C. § 17200, 17204; *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321, 322.)

Dr. Bannout argues that plaintiff has failed to state a cause of action under section 17200 because while the SAC alleges that all the healthcare providers "improperly diagnosed and drugged plaintiff, scaring, threatening and intimidating him into being hospitalized in the cardiac ICU and agreeing to an unnecessary open-heart surgery," these general allegations are undermined by plaintiff's specific allegations that Dr. Bannout personally did nothing more than prescribe two medications that were unnecessary, tell plaintiff that his condition required emergency surgery, and insist that plaintiff be transported to John Muir Concord's Cardia ICU by ambulance. (Opening Brief at 12:14-26.) Thus, Dr. Bannout argues, the specific allegations contradict the general ones.

Dr. Bannout correctly summarizes what the SAC alleges about Dr. Bannout specifically and what it alleges about him generally. However, he omits the key allegation that all the healthcare providers acted "in concert to fill cardiac intensive care beds . . . with the intent to make revenue despite the fact plaintiff was not in need of surgery." (SAC, ¶ 54.) Thus, the specific allegations do not contradict the general ones. They merely describe the actions Dr. Bannout did personally as opposed to those for which he is responsible because he acted in concert with the other defendants.

Because of these actions, plaintiff traveled to John Muir in Concord by ambulance, underwent a TEE and an angioplasty. (FAC, ¶ 16, 21-23.) The angioplasty, at least, was "needless." (FAC, ¶ 34.)

The court must accept these allegations as true, no matter how unlikely. (*Del E. Webb v. Structural Materials Co*. (1981) 123 Cal.Appl.3d 593, 604.) Deliberately recommending unnecessary medical treatment, with its attendant risk of harm, could be found to be an unfair or fraudulent business practice. Any necessary fraudulent intent is supplied by the allegation that Dr. Bannout acted in concert with other healthcare providers to recommend an unnecessary treatment for a profit motive. Dr. Bannout has not cited any authority holding that physicians are categorically exempt from liability under section 17200.

Dr. Bannout also argues the SAC fails to allege a cause of action under section 17200 because plaintiff continues to allege damages rather than restitution. However, the court previously ruled the allegations were sufficient when it ruled on the demurrer of Dr. Dhillon. This cause of action is not subject to demurrer just because it may allege damages in *addition* to restitution, only if it alleges damages but *no basis* for restitution.

The restitution allowed is restoration of the money or property that passed from the plaintiff and was acquired by the defendant by means of the unfair competition. (*See* Bus. & Prof. C. § 17203; *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1144-1145; *see also Madrid v. Perot Systems Corp*. (2005) 130 Cal.App.4th 440, 455.)

Here, construed liberally (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604), the SAC alleges that plaintiff incurred the costs of unnecessary tests and procedures.

(SAC, ¶ 58.)

Fifth Cause of Action, Informed Consent

The demurrer to the Fifth Cause of Action is **overruled**.

This cause of action alleges lack of informed consent as an alternative to plaintiff's medical malpractice theory in the First Cause of Action. (*See Cobbs v. Grant* (1972) 8 Cal.3d 229, 239-246).

A physician has a duty to disclose to his patient "all information relevant to a meaningful decisional process." (*Cobbs, supra*, 8 Cal.3d at 242.) He must disclose "the available choices with respect to proposed therapy and . . . the dangers inherently and potentially involved in each." (*Id*. at 243.) He must disclose the "risks inherent in the procedure he is prescribing, the risks of a decision not to undergo treatment, and the probability of a successful outcome of the treatment." (*Id*. at 243.)

The minimal, core disclosure is not set by a community standard, but by what is relevant to "a meaningful decisional process" by the patient. (*Id*. at 242; *see also* CACI 532 ("as much information as [the patient] needs to make an informed decision").) Additional disclosure may be necessary if the standard of care so requires. (*Id*. at 244-245.)

Dr. Bannout argues that this cause of action fails because plaintiff does not allege a "medical procedure by Dr. Bannout." He may base this argument in part on the fact that the applicable jury instruction mentions an element of the claim being that the defendant performed a medical procedure. (*See* CACI 533.)

However, the seminal case on the informed consent theory, *Cobbs v. Grant* (1972) 8 Cal.3d 229, 243, is not so restrictive. *Cobbs* states, "we hold, as an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices with respect to *proposed therapy* and of the dangers inherently and potentially involved in each." (Emphasis added.) Thus, *Cobbs* does not state that there must be a "procedure" only proposed treatment or therapy, and it does not state that the treatment or therapy must be personally performed by the doctor. (*See, e.g*., the following passages from the case: "A medical doctor, being the expert, appreciates the risks inherent in the *procedure he is prescribing*, the risks of a decision not to undergo the treatment, and the probability of a successful outcome of the *treatment*" (*Cobbs*, *supra*, 8 Cal.3d at 243); "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to *treatment* would not have been given" (*Id*. at 245); "A person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical *treatment*" (Id. at 242.)

The SAC alleges that Dr. Bannout personally "took control" over plaintiff's healthcare; administered unnecessary medications; told plaintiff that his aorta could rupture at any moment, killing him; participated in a decision to transfer him to a cardiac ICU by ambulance; and acted in concert with the other physicians to recommend that he undergo open-heart surgery, and all

procedures preliminary to that, for a profit motive and not because surgery was necessary.

It does not matter whether the court thinks these allegations are believable. It must accept them as true on a demurrer. And they are sufficient to allege that Dr. Bannout failed to comply with his duty "of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each." A doctor who recommends only that a patient consult with a specialist probably has no obligation to disclose what the specialist does about a procedure that only the specialist recommends. A doctor who acts in concert with the specialist to recommend an unnecessary procedure may. The allegation that Dr. Bannout would have to defeat to prevail on his demurrer but can only defeat on a motion for summary adjudication is that he acted in concert with the other defendants. This is the allegation that links him to the conduct of the other defendants who actually performed or personally recommended the angioplasty and other procedures.

In addition, here (*see, e.g*., Opening Brief at 16;21-24) and throughout his demurrer, Dr. Bannout makes assertions about medical science and procedures that may be known to him or his attorneys but are not alleged in the SAC, thereby offering facts that the court may not consider on a demurrer.

Further, the SAC alleges that plaintiff would not have consented to the treatment he underwent had he been properly informed. (SAC, § 75.) That a reasonable person would not have consented to the angioplasty, for instance, had he known the true facts, is fairly inferable.

Dr. Bannout also argues this cause of action fails because it fails to allege specifically what he did or did not do. However, he fails to cite any authority stating that a negligence cause of action for failure to obtain informed consent must be pleaded any more specifically than any other negligence claim. (*See Guilliams v. Hollywood Hospital* (1941) 18 Cal.2d 97, 100-102*; Taylor v. Oakland Scavenger* Co. (1938) 12 Cal.2d 310, 316.)

9. TIME: 9:00 CASE#: MSC17-00836
CASE NAME: REILAND VS. JOHN MUIR HEALTH
HEARING ON DEMURRER TO 2nd Amended COMPLAINT
FILED BY HAL REILAND
**** TENTATIVE RULING: ****

The court **denies** plaintiff's demurrer to the Answers filed by various defendants. While it may be technically true that some additional facts should be alleged for some defenses, defendants have pleaded their defenses in the customary manner. Further, the demurrer is late as to at least some of the answers.

None of the parties do anything to materially advance the resolution of this case by demurring except as to causes of action or defenses that are clearly improper legally, where an early ruling will substantially affect the ultimate resolution of this case by settlement, motion, or trial.

The court is not overruling the demurrer to the answers on the ground that plaintiff failed to meet and confer or to establish that he did so. (*See* CCP § 430.41 (a)(4).) However, the court notes that plaintiff is subject to the meet and confer requirement (CCP § 430.20, 430.41 (a)(10) and has not established that he complied. (*See* CCP § 403.41 (a)(2) and (3).)

10. TIME: 9:00 CASE#: MSC17-00836
CASE NAME: REILAND VS. JOHN MUIR HEALTH
HEARING ON MOTION TO COMPEL FURTHER RESPONSES & FOR SANCTIONS
MICHAEL BANNOUT M.D.
**** TENTATIVE RULING: ****

Defendant's motion to compel is granted. Plaintiff shall produce all responsive documents on or before August 22, 2018. Plaintiff shall serve *objection free, verified* written responses to the Special interrogatories, Form Interrogatories and Requests for Admissions on or before August 22, 2018. Plaintiff shall serve a response to the Request for Statement of Damages on or before August 22, 2018.

The Court notes that these same discovery issues were the subject of the Court's previous ruling as set forth in the Order Granting Motion to Compel Responses to Written Discovery and Statement of Damages; Request for Sanctions filed April 12, 2018. Disobeying a Court order to provide discovery is a misuse of the discovery process. Plaintiff shall pay counsel for Defendant $2340 as monetary sanction, payable on or before August 22, 2018. The Court admonishes Plaintiff that failure to comply with the Court's order will result in greater sanctions other than monetary sanctions.

11. TIME: 9:00 CASE#: MSC17-00836
CASE NAME: REILAND VS. JOHN MUIR HEALTH
HEARING ON MOTION TO STRIKE PORTIONS OF 2nd Amended COMPLAINT
FILED BY MICHAEL BANNOUT M.D.
**** TENTATIVE RULING: ****

The court rules as follows on Dr. Bannout's motion to strike. (In the future, counsel should comply with CRC 3.1322 (a) and number the items to be stricken sequentially.)
In any ruling below granting the motion to strike, the court is striking only the language quoted in Dr. Bannout's Notice of Motion from the designated line numbers, not all language on those line numbers.

Further, in ruling on any motions to strike being heard today, the court is only striking language as to the defendant who filed the motion, although the parties can logically expect the court to apply the same legal principles to other defendants in the same legal and factual position as the moving defendant. The court says this in an attempt to discourage additional motions that are not absolutely necessary. Following this ruling, the court hopes the parties will be able to tell which damages claims are not legally appropriate, which are not, and which are

not susceptible of a legal ruling at the pleading stage, and will have to be resolved by a motion under CCP § 437c (f) or (t), a motion in limine, or a motion at trial.

Page 16, lines 18-19; page 17, lines 23-24: Granted. These lines of the SAC seek the recovery of "The sum in an amount according to proof related to a judgment resulting from sanctions for failure to appear at a court hearing." Plaintiff's theory is that the medical and emotional problems he allegedly suffered due to the tests and procedures he underwent for a surgery that was unnecessary caused him to be unable to travel and attend a hearing in a legal matter, which resulted in some "costs." (SAC, ¶ 35.) Plaintiff elaborates on these "costs" in the Fourth Cause of Action, which is alleged against defendant Dhillon only. There he alleges that he suffered an adverse judgment because a Florida court struck his defenses because he did not provide a notarized letter stating he was unable to travel. (¶ 72.)

Dr. Bannout challenges the request for these damages on two grounds. The first is that they are "essentially" punitive damages that plaintiff may not seek in an action against a healthcare provider without complying with CCP § 425.13. The second is that paragraph 72 of the SAC betrays that the judgment was suffered because Dr. Dhillon did not provide a notarized letter, not because plaintiff suffered injuries from unnecessary treatment.

The court accepts the second argument but rejects the first. The court is skeptical regarding this claim for a variety of reasons, but one of them is not that plaintiff is attempting to recover punitive damages from Dr. Bannout without complying with CCP § 425.13. Just as attorney's fees may be recoverable as damages under certain circumstances (*see Prentice v. North American Title Guaranty Corp*. (1963) 59 Cal.2d 618 when they might not be recoverable as costs, the court can conceive of circumstances under which, upon appropriate proof of causation, a penalty that someone suffers due to a tortiously caused physical or emotional injury might be recoverable as damages and not as a penalty or punitive damages. As sought from the tortfeasor, the penalty is not a penalty, but damages resulting from the wrong. Further, the SAC does not allege that the judgment plaintiff suffered included punitive damages in any event, just that his defenses were struck as a remedy for contempt of court.

However, paragraph 72 does make clear that plaintiff suffered the judgment because he could not submit satisfactory proof of his inability to travel, not because of his inability to travel. Plaintiff's Opposition does argue to the contrary. Therefore, the motion to strike is granted as to this language as it pertains to the First, Third, and Fifth Causes of Action.

Page 17, lines 1-2; 18, lines 6-7: Granted. The adverse judgment that plaintiff suffered in the TCA matter is not money that passed from the plaintiff and was acquired by the defendant by means of the unfair competition. It represents claimed damages. Damages are not recoverable in an action under section 17200. (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal. 4th 1134, 1144.)

Page 16, lines 20-22: Granted. Attorney's fees are not recoverable in an action under section 17200, unless pursuant to CCP 1021.5, which is not applicable here.

Nothing stated in *Walker v. Countrywide Home Loans, Inc*. (2002) 98 Cal.App.4th 1158, 1179-1180 permits the recovery of attorney's fees here. Plaintiff has not joined a claim that

supports an award of attorney's fees, which is the only circumstance mentioned in *Walker* where attorney's fees might be recoverable in a section 17200 other than under CCP § 1021.5. Plaintiff has not alleged he had a contract with any defendant that provided for the recovery of attorney's fees.

Page 11, lines 20-23; page 17, lines 8-10: Granted, without leave to amend except pursuant to a motion under CCP § 473. Plaintiff has failed to allege a separate cause of action for declaratory relief or provide authority that, if he had, the court in a declaratory relief action could include instructions to a medical provider to strike statements from a medical record and provide a letter of retraction.

The allegations referenced on page 3, lines 2-3 of the Notice of Motion to Strike: Denied as stated. However, the law is clear that only restitution, not damages, may be recovered for a violation of section 17200. (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal. 4th 1134, 1144.) If plaintiff recovers on the Third Cause of Action, he will recover only restitution, not damages. Defendants may seek a determination as to which items alleged in the SAC are damages and which are restitution at a later stage of these proceedings, such as by a motion under CCP § 437c (t) pursuant to stipulation, a motion in limine, or a motion at trial.

12. TIME: 9:00 CASE#: MSC18-00647
CASE NAME: CUELLAR VS. CENTRAL GARDEN & PETS
HEARING ON MOTION TO TRANSFER VENUE TO LOS ANGELES COUNTY
FILED BY CENTRAL GARDEN & PETS COMPANY
**** TENTATIVE RULING: ****

No opposition has been filed. The motion to change venue to Los Angeles County is granted as prayed. Plaintiff and Defendant shall each pay one-half of the costs and fees associated with the transfer, payable on or before August 22, 2018.

13. TIME: 9:00 CASE#: MSC18-00701
CASE NAME: SLAUSON VS. FORD MOTOR COMPANY
HEARING ON PETITION TO COMPEL ARBITRATION
FILED BY FORD MOTOR COMPANY, WALNUT CREEK FORD, INC.
**** TENTATIVE RULING: ****

Defendants Ford Motor Company and Walnut Creek Ford petition the Court to compel their dispute with Dorothy and Gregory Slauson to arbitration.

As a preliminary matter, the Court notes that on June 8, 2018, the Slausons dismissed all but one of their causes of action as against WCF. All the remains in this case as against WCF is the fifth cause of action, for breach of the implied warranty of merchantability under Civil Code section 1791.1 and 1794. As against Ford, all of the causes of action pled in the complaint remain pending.

As a second preliminary matter, the Court notes that the Slausons do not oppose the petition as

it pertains to WCF. That is, the Slausons agree that their dispute with WCF ought to be arbitrated. However, they do not agree that their dispute with Ford ought to be arbitrated, and they contend that their dispute with Ford should be litigated in superior court before any arbitration with WCF commences.

Accordingly, the Court considers it must resolve two questions: (1) must the Slausons' dispute with Ford be referred to arbitration? (2) If not, should the Slausons' dispute with Ford be resolved before, after, or concurrently with the Slausons' dispute with WCF?

Arbitration with Ford

Equitable Estoppel

It is undisputed that Ford is not a signatory to the relevant arbitration agreement. Ford contends that the doctrine of equitable estoppel requires the Court to compel its dispute with the Slausons to arbitration.

Under the doctrine of equitable estoppel, "a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are intimately founded in and intertwined with the underlying contract obligations." *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 20 (internal quotes and citation omitted). The Court's focus is on the "nature of the claims asserted by the plaintiff against the nonsignatory defendant." *Id.* This is because the very purpose of equitable estoppel is "to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of that same agreement." *Id.*

Ford also argues that the Slausons' claims against it are "based on the same facts and are inherently inseparable" from their claims against WCF, relying on *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705. There, the Court of Appeal said that "claims that are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants" can be sent to arbitration under the doctrine of equitable estoppel. *Id.* at p. 1713. But this analysis is not separable from the "intimately founded in and intertwined with the underlying contractual obligations" analysis.

Indeed, *Metalclad* says that to apply equitable estoppel against a signatory plaintiff (such as the Slausons), the Court should look at

> the relationships of persons, wrongs and issues, in particular whether the claims that the nonsignatory sought to arbitrate were ***intimately founded in and intertwined with the underlying contract obligations***

Id. at p. 1713 (quotations and citations omitted; emphasis added).

The parties appear to agree that the Federal Arbitration Act controls. However, the question of whether Ford (a nonsignatory to the RISC) can invoke arbitration under the RISC is governed by California state contract law. *Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 632.

Kramer v. Toyota Motor Corp. (9th Cir. 2013) 705 F.3d 1122 is not binding on the Court. However, it is illuminating, as it involves similar claims.

In *Kramer*, the Ninth Circuit affirmed the denial of Toyota's motion to compel arbitration. *Id.* at p. 1124. As here, Toyota sought to rely on the arbitration clauses found in purchase agreements

between dealers and customers, and was not a signatory to those agreements. *Id.* at p. 1125. As here, Toyota contended that equitable estoppel applied to compel arbitration of the customers' claims. *Id.* at p. 1128.

The Ninth Circuit identified the claims at issue in *Kramer* as:

- Count I – an allegation that "Toyota violated California consumer protection law" arising from "Toyota's unfair or deceptive practices, including failure to disclose and actively concealing the risk of the loss of brake control. Plaintiffs also allege material misrepresentations involving the characteristics, uses, benefits, and qualities of Toyota vehicles." (*Id.* at p. 1130.)
- Count II – an allegation that "Toyota violated California unfair competition law by fraudulent misrepresentations and omissions regarding the safety of Plaintiffs' vehicles." (*Id.* at p. 1130.)
- Count III – an allegation that Toyota violated "California false advertising law. For example, Plaintiffs allege Toyota disseminated false or misleading statements about vehicle safety through Toyota's advertising." (*Id.* at p. 1131.)
- Count IV – an allegation that Toyota breached "the implied warranty of merchantability because the brake defect rendered the vehicles unfit for their ordinary purposes." (*Id.* at p. 1131.)
- Count V – an allegation that, "in the alternative," Toyota breached a contract "to the extent Toyota's repair or adjustment commitment is deemed not to be a warranty under California's Commercial Code. Plaintiffs allege the breach arises from Toyota's failure to adequately repair Plaintiffs' vehicles." (*Id.* at p. 1132.)

The Ninth Circuit found that none of those claims were intimately founded in the relevant purchase agreements. With respect to the warranty claim, the Court specifically noted that dealer warranties and manufacturer warranties were differentiated under the purchase agreements, and found that the implied warranty claim arose "independently from the Purchase Agreements, rather than intimately relying on them."

Here, Ford contends that the Slausons' claims are intimately founded in and intertwined with the underlying contractual obligations. It points to the Slausons' fraud cause of action and the Slausons' implied warranty cause of action to support that contention.

With respect to the fraud cause of action, Ford says that it is premised on Ford's alleged involvement in the sales transaction, pointing to paragraphs 44 and 48 of the complaint. Paragraph 44 alleges that Ford committed fraud by allowing the vehicle to be sold without disclosing that its components were subject to failure. Paragraph 48 alleges that Ford had knowledge of the defective components and failed to disclose them at the time of sale and thereafter, and that the Slausons would not have purchased the vehicle if not for Ford's fraud. Neither paragraph references the RISC. Indeed, paragraph 48 alleges that the RISC never would have existed but for Ford's fraud. The sales transaction was not the only time Ford had an opportunity or forum to make representations to the Slausons concerning the Sync system. The Court does not conclude that the fraud cause of action in this case is intimately founded in and intertwined with the obligations created by the RISC.

As to the implied warranty claim, the Court first notes that such a claim is not required to be tied

to a contract, as a general matter. *See, e.g., American Suzuki Motor Corp. v. Super. Ct.* (1995) 37 Cal.App.4th 1291, 1295-1296. And, like in *Kramer*, the RISC in this case specifically differentiates between the warranties given by Ford and the warranties given by WCF. Although Ford says this is a "red herring," the Court disagrees. The source of the warranty matters for the present analysis, since the Court is considering whether the warranty claim is intimately founded in or intertwined with the RISC. It does not appear that the warranty the Slausons allege Ford breached arises from the RISC.

The Court does not find that either the fraud claim or the implied warranty claims are intimately founded in or intertwined with the underlying contractual obligations, because those claims stand apart from any obligations the parties may have under the contract.

Ford's petition to compel the Slausons' dispute with it to arbitration is denied.

Sequencing

Having denied Ford's petition to compel arbitration, the Court must now decide whether to stay (i) the Slausons' claim against Ford in superior court; (ii) the Slausons' claim against WCF in arbitration; or (iii) neither.

The parties seem to agree that the FAA governs here. Even if they did not, it is manifest to the Court that this is a transaction involving interstate commerce. The FAA does not permit the Court to stay an arbitration pending resolution of litigation. The FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1263 (citation omitted); *compare* FAA with CCP section 1281.2 (California Arbitration Act identifies circumstances where arbitration can be stayed pending litigation; no similar provision in FAA).

As a result, the Court stays the litigation of the Slausons' claim against Ford in this Court, pending the resolution of the Slausons' arbitration against WCF.

Choice of Arbitrators

In the opposition, the Slausons ask the Court to order the arbitration to proceed before JAMS. The reply does not address this point, and the Court can think of no reason why an arbitration before JAMS would not fulfill the contractual agreement to arbitrate. However, the petition does not ask the Court to choose an arbitrator, and in any event, there is no dispute before the Court concerning the arbitration between WCF and the Slausons. Further, it is not obvious from the present record, the present procedural posture of the case, and/or the face of the arbitration agreement that the Court has the authority to do what the Slausons ask, to say nothing of the problems with requesting affirmative relief in opposition papers for a separate (though related) proceeding. It will be for WCF and the Slausons to determine how to proceed in arbitrating their dispute. If a true dispute concerning the specific arbitral forum persists, and the Court has jurisdiction to rule, a further motion needs to be brought. To be clear, the Court is not here considering or ruling on whether it would have jurisdiction to decide such a dispute, given that the Slausons do not contest that their dispute with WCF must be arbitrated.

Ford shall prepare an appropriate form of order and circulate it for approval as to form, as required by Local Rule 3.54 and California Rule of Court 3.1312.

14. TIME: 9:00 CASE#: MSL18-01126
CASE NAME: MACKENZIE REALTY VS. CARR
HEARING ON PETITION TO COMPEL ARBITRATION OF ALL DISPUTES
FILED BY MACKENZIE REALTY CAPITAL, INC.
**** TENTATIVE RULING: ****

No opposition has been filed. The petition to compel arbitration is granted as prayed. The matter is stayed pending arbitration. Plaintiff's request for attorney's fees and costs is reserved.

15. TIME: 9:00 CASE#: MSL18-01127
CASE NAME: MACKENZIE REALTY VS. GAMBRELL-CARR
HEARING ON COMPEL ARBITRATION OF ALL DISPUTES
FILED BY MACKENZIE REALTY CAPITAL, INC.
**** TENTATIVE RULING: ****

No opposition has been filed. The petition to compel arbitration is granted as prayed. The matter is stayed pending arbitration. Plaintiff's request for attorney's fees and costs is reserved.

16. TIME: 9:01 CASE#: MSC17-00836
CASE NAME: REILAND VS. JOHN MUIR HEALTH
HEARING ON DEMURRER TO 2ND AMENDED COMPLAINT OF REILAND
FILED BY JOHN MUIR HEALTH
**** TENTATIVE RULING: ****

The demurrer of John Muir Health is **overruled**. John Muir Health shall file and serve its Answer to the Second Amended Complaint ("SAC") on or before August 6, 2018.

Demurrer to Entire SAC for Uncertainty

This demurrer is **overruled**. A complaint is sufficient to withstand a special demurrer for uncertainty "where the allegations of the complaint are sufficiently clear to apprise the defendant of the issues which he is to meet." (*Gressley v. Williams* (1961) 193 Cal.App.2d 636, 643-644. The allegations here are. Further details can be developed through discovery. (*See Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 616.)

First Cause of Action, Negligence

The demurrer to the First Cause of Action is **overruled**. A claim for medical negligence may be pleaded generally. (*See Taylor v. Oakland Scavenger* Co. (1938) 12 Cal.2d 310, 316 ("It is elementary that negligence may be pleaded generally. This means that after what was done has been stated, it is sufficient to allege that it was negligently done, without stating the particular omission which rendered the act negligent"); *Guilliams v. Hollywood Hospital* (1941) 18 Cal.2d 97, 100-102.)

Here, the SAC alleges that John Muir provides healthcare services (SAC, ¶ 2); plaintiff received treatment at the John Muir Emergency room (¶ 13, 16) and later at John Muir Concord's Cardiac ICU (¶ 18) which was unnecessary and caused him harm (¶ 23, 27, 28, 34, 35); John Muir and other healthcare providers undertook the care and treatment of plaintiff and did so negligently (¶ 38, 39); and each defendant was the agent and employee of the others. (¶ 11.) These allegations sufficiently state a cause of action for medical negligence.

John Muir argues that there must be "at least some type of description of a particular negligent act or omission by an employee of the hospital as opposed to an independent contractor." However, the SAC alleges each of the doctors is an employee of John Muir. (SAC, ¶ 11; *see also* ¶ 54 (acted in concert).) Whether that is true is for summary judgment or trial. It cannot be resolved on a demurrer.

John Muir also argues that the SAC does not sufficiently link its conduct to the claimed damages, but does not cite any persuasive authority requiring detailed allegations in a negligence claim. In essence, the SAC alleges that plaintiff underwent unnecessary treatment in preparation for a surgery that was not warranted, suffered physical symptoms and emotional distress, and consequently missed time from work and suffered various losses. He alleges all defendants are responsible for the damages because of what they did personally and what they are responsible for because they were the agents and employees of the other defendants. John Muir Health may have strong grounds to argue factually that it is not responsible for the acts of some or all of the other defendants. However, that is for summary judgment or trial. On a demurrer the court must accept the allegations of the complaint as true.

The authorities that defendant cites are distinguishable. *Blain v. Doctor's Co*. (1990) 222 Cal.App.3d 1048 was a case where a physician was sued for malpractice and lied at his deposition on the advice of his insurance company attorney. Based on the lie, the plaintiff in the medical malpractice case moved to amend his complaint to add a claim for punitive damages. The insurance company then settled the medical malpractice case for policy limits. The doctor paid nothing. Nevertheless, he sued his insurance company lawyer for legal malpractice, arguing the lawyer's advice to lie exposed him to greater liability, caused him emotional distress, and precluded his further work as a physician. The court had many problems with this claim, starting with the fact that the doctor had unclean hands. One of its lesser concerns was his damages claims. Regarding these, the court said, "There is no cognizable harm attributable to the mere exposure to liability"; the claim that he suffered emotional distress resulting from exposure either to greater liability or to a delay in settling the medical malpractice case is barred by the defense of unclean hands"; and the claim that the settlement paid may make him uninsurable was barred for the same reasons or because of the particular lie involved rather than because of the advice to lie.

None of this has anything to do with this case. There is certainly an implication in John Muir's papers that plaintiff's damages claims are tenuous, remote, or even fantastical. However, that cannot be resolved on a demurrer. So long as a complaint states *some* damages caused by negligence it states a cause of action for negligence. Other damages that are too remote or are not recoverable for other reasons must be attacked by a different procedural device or at a different stage of the case. The difference between *Blain* and this case is that the plaintiff in

Blain alleged *no* recoverable damages, so he *did not* state a cause of action. Here, plaintiff has alleged at least *some* recoverable damages, so he *has* stated a cause of action.

John Muir's other two cases are also distinguishable. In *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 528, a widow sued after healthcare providers wanted to "pull the plug" on her husband who was in the last stages of a final illness, whereas she wanted them to provide further testing and rehabilitative services. Plaintiff was not alleging the healthcare providers acted beneath the standard of care. She sought to allege a novel duty to provide care pursuant to a contract even if her husband's deteriorating condition medically justified ending all care. The court disagreed there was any such duty and then, in dicta, added comments about damages stating, "there is no description of any particular negligent acts or omissions which were allegedly the proximate cause of the unnamed injury or death," even though the very case it cited, *Guilliams v. Hollywood Hospital* (1941) 18 Cal.2d 97, 101 states that "negligence is alleged in general terms, without detailing the specific manner in which the injury occurred." In any event, the critical fact is that there was an unnamed injury, whereas here the injuries are named.

Finally, *Christensen v. Sup. Ct*. (1991) 54 Cal.3d 868, 900-901 defined which family members who observed the mishandling of a relative's remains but did not sign the contract with the mortuary could recover for emotional distress. The Court cited language from *Blain* about the necessity of alleging a connection between the negligence and the injury suffered, nothing that this is normally accomplished by implication from the juxtaposition of the allegations of wrongful conduct and harm, but that more may be required "where the pleaded facts of negligence and injury do not naturally give rise to an inference of causation the plaintiff." The actual holding, however, was that the plaintiffs must have observed mishandling of the remains of their relative and not merely read or heard "[m]edia reports of a general pattern of misconduct." (*Id*. at 901.) Here, the allegations about John Muir's direct or vicarious responsibility for recommending unnecessary treatment do give rise to an inference of injury where treatment that was unnecessary resulted in complications, physical distress, or disability. Again, that some of the damages alleged seem remote, unlikely, or unforeseeable does not undermine the claim as a whole when others are obvious, natural, or expected.

Second Cause of Action, Defamation

The demurrer to the Second Cause of Action is **overruled**.

John Muir argues that this cause of action is barred by Civil Code section 47, which states that publications are absolutely privileged when made in judicial or official proceedings, and conditionally privileged when made to interested persons. John Muir then argues that the SAC alleges that the medical records with the defamatory entries in them were communicated to "other caregivers and other licensing authorities as well as judges that . . . requested them." (SAC, ¶ 46.)

It may be that the absolute privilege applies to the communications made to the judges. However, the face of the complaint does not make clear that the communications to "other licensing authorities" were made in the course of an official proceeding. And whether something is subject to a conditional privilege is a matter of defense and not an element of a claim under

the facts here. It must be raised by affirmative defense unless facts alleged in the complaint demonstrate the existence of the privilege. (*Redfearn v. Trader Joe's Co*. (2018) 20 Cal.App.5th 989, 1007.) The defendant bears the initial burden of proving that the defamatory statement was made under circumstances falling within the common-interest privilege. (*See Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1202.)

A court may not sustain a demurrer to part of a cause of action (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.) Therefore, this demurrer is overruled.

Third Cause of Action, Violation of Business and Professions Code section 17200

The demurrer to the Third Cause of Action is **overruled** for the reasons stated in the ruling on Dr. Bannout's demurrer.

Fifth Cause of Action, Informed Consent

The demurrer to the Fifth Cause of Action is **overruled**.

While the court agrees that obtaining patient consent is normally a physician function, the SAC alleges that the physicians who were to obtain the consent were the employees of John Muir. (SAC, ¶ 11.) Until that is proven false, the court has no legal basis to dismiss this cause of action.

17. TIME: 9:01 CASE#: MSC17-00836
CASE NAME: REILAND VS. JOHN MUIR HEALTH
HEARING ON MOTION TO/FOR STRIKE PORTION OF SECOND AMENDED COMPLAINT FILED BY JOHN MUIR HEALTH
**** TENTATIVE RULING: ****

The court rules as follows on the Motion to Strike filed by John Muir Health. Where the rulings parallel those on Dr. Bannout's motion to strike (line 11), the court merely states the ruling and incorporates the rationale stated in the ruling on line 11. The court's general comments in that ruling are also incorporated here.

1. Granted.
2. Denied. As used here, the language is general enough that it is not clear any of it must be stricken. However, as to recoverability, the language is subject to the court's ruling on Dr. Bannout's motion to strike concerning the language on page 16, lines 18-19.
3. Denied for same reasons as number 2 and subject to the same qualifications.
4. Denied. See no. 3.
5. Granted.
6. Granted.
7. Granted.
8. Granted.

9. Granted.
10. Granted.
11. Denied. The circumstances surrounding the loss of piloting privileges has not been established yet.
12. Denied. See no. 11
13. Denied. See no. 11.
14. Denied. See no. 11.
15. Granted.
16. Denied.
17. Granted. All language in paragraph 57 after the words “et. Seq.” is stricken.
18. Granted.
19. Granted as to the words “sanctions and judgments.”
20. Moot. Covers lines already ruled on.
21. Moot. Covers lines already ruled on.
22. Moot. Covers lines already ruled on.
23. Granted, except as to the words “or later” and “according to proof.” The court declines to make a legal ruling as to the words “or later” at this time.