SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 2, Honorable Mark H. Pierce Presiding
Mai Jansson, Courtroom Clerk

191 North First Street, San Jose, CA 95113
Telephone: 408-882-2120

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

LAW AND MOTION TENTATIVE RULINGS

DATE: 6-18-19 TIME: 9 A.M.

PREVAILING PARTY SHALL PREPARE THE ORDER

(SEE RULE OF COURT 3.1312 – PROPOSED ORDER MUST BE E-FILED BY COUNSEL AND SUBMITTED PER 3.1312(C))

EFFECTIVE JULY 24, 2017, THE COURT WILL NO LONGER PROVIDE OFFICIAL COURT REPORTERS FOR LAW AND MOTION HEARINGS. SEE COURT WEBSITE FOR POLICY AND FORMS.

TROUBLESHOOTING TENTATIVE RULINGS

If you do not see this week's tentative rulings, either they have not yet been posted, or your web browser cache (temporary internet files) is pulling up an older version. You may need to "REFRESH", or "QUIT" your browser and reopen it – or adjust your internet settings so you only see the current version of the web page. Otherwise, your browser may continue to show an older version of the web page even after the current tentative rulings have been posted.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	17cv306182	Easy 123 Property, Inc. vs B. Hill	Order of Examination
LINE 2	18cv335792	Aaronson, Austin, P.A vs Google LLC	Click on line 2 for tentative ruling
LINE 3	18cv335792	Aaronson, Austin, P.A vs Google LLC	Motion for Preliminary injunctions is off calendar pending Plaintiff filing an amended complaint. Future motion for preliminary injunction should be scheduled in Dept 10.
LINE 4	18cv338694	A. Young vs S. Potti	Click on line 4 for tentative ruling
LINE 5	15cv284916	P. Bailey vs C. Brown	Case settled. Off calendar
LINE 6	15cv284916	P. Bailey vs C. Brown	See above
LINE 7	15cv284916	P. Bailey vs C. Brown	See above
LINE 8	17cv309032	A. Belorousou vs Kaiser Foundation Hospitals	Click on line 8 for tentative ruling
LINE 9	17cv309032	A. Belorousou vs Kaiser Foundation Hospitals	See above
LINE 10	18cv330463	H. MacLean vs Borel Limo Co. Inc.	Plaintiff's Motion to file a first amended complaint is GRANTED.
LINE 11	18cv337951	M. Schmitz vs HealthIQ Re, Inc.	Cont to 8/2/19 at 9:00 in Dept 5

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LAW AND MOTION TENTATIVE RULINGS

LINE 12	14cv261482	Hartford Fire Insurance Co. vs K. Walker	Motion to Amend the Judgment is unopposed and is GRANTED.
LINE 13	15cv286990	O. Cisneros vs M. Elisia	Motion to be relieved as attorney of record is unopposed and is GRANTED.

Calendar line 1

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Calendar line 2

Case Name: *Aaronson, Austin, P.A., v. Google, LLC*
Case No.: 18-CV-335792

Currently before the Court is the demurrer by defendant Google, LLC ("Defendant").

Factual and Procedural Background

This action arises out of advertisements posted by non-lawyers on Defendant's search engine. Defendant is "the operator of a globally-reaching internet search engine that also operates commercially through the solicitation of funds for advertising under certain 'ad words' … ." (Complaint, ¶ 2.) Plaintiff Aaronson, Austin, P.A. ("Plaintiff") is a law firm based in Orlando Florida, practicing consumer law on behalf of aggrieved timeshare owners. (*Id*. at ¶ 1.)

"From and since 2014, … Plaintiff … had an agreement with Defendant" to "advertise online in the search engine operated by … Defendant." (Complaint, ¶ 3.) Pursuant to that agreement, Plaintiff made payments to Defendant "on a 'per-click' basis … under certain 'ad words' and/or 'search terms', particularly 'timeshare lawyers', and derivatives thereof." (*Id.* at ¶ 4.)

Defendant allegedly permitted "advertising by non-lawyers … under its own ad words 'timeshare attorneys', 'timeshare lawyers', and derivatives thereof." (Complaint, ¶ 9.) Defendant did not screen or check the credentials of the non-lawyers "to the detriment of ... Plaintiff and the consuming public at large." (*Id.* at ¶ 21.) Plaintiff alleges that Defendant, thereby, allowed non-lawyers to "tout themselves as lawyers and attorneys for commercial gain" and "engaged in 'deceptive and untrue' representation(s) concerning the licensed status and standing of [non-lawyers] … ." (*Id.* at ¶¶ 19, 21, 26, & 30.)

Plaintiff sent a letter to Defendant on August 15, 2018, putting Defendant on notice "that this falsehood was being perpetrated" at Plaintiff's expense and the expense of "other legitimate law firms similarly situated." (Complaint, ¶ 10.)

Notwithstanding this notice, Defendant "persisted in realizing commercial gain from [the non-lawyers] … while perpetrating the falsehood that they are duly qualified as licensed attorneys." (Complaint, ¶ 11.) Plaintiff alleges that "[t]here exists a reasonable probability that a number of individuals hiring [non-lawyers] would have instead hired … [Plaintiff] as a duly credentialed and legitimate law firm" and "Defendant wrongfully prevented the hiring of … Plaintiff by these individuals [by] … permitting [non-lawyers] to tout themselves as attorneys and lawyers." (*Id*. at ¶¶ 12-13.) Defendant allegedly intended to "perpetrate this wrongful arrangement as it inured to … its commercial advantage." (*Id.* at ¶ 14.)

As a result of Defendant's conduct, Plaintiff sustained financial loss, including "[t]he amount paid to [non-lawyers] … that would have otherwise gone to … Plaintiff" and "[t]he amount … Plaintiff … overpaid in competitive bidding for ad words to Defendant by virtue of

an inflated market for these search terms artificially created by the wrongful involvement of the [non-lawyers]." (Complaint, ¶¶ 15 & 23.)

Based on the foregoing allegations, Plaintiff filed a complaint against Defendant, alleging causes of action for: (1) violation of Business and Professions Code section 17200 and Civil Code section 1780; (2) unjust enrichment; and (3) injunctive relief.

On February 20, 2019, Defendant filed the instant demurrer. Plaintiff filed an opposition to the demurrer on March 27, 2019. On May 24, 2019, Defendant filed a reply.

Discussion

I. Demurrer

Defendant demurs to the complaint, in its entirety, on the ground of failure to allege sufficient facts to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, " '[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice' [citation]." (*Hilltop, supra,* 233 Cal.App.2d at p. 353; see Code Civ. Proc., § 430.30, subd. (a).) " 'It is not the ordinary function of a demurrer to test the truth of the … allegations [in the challenged pleading] or the accuracy with which [the plaintiff] describes the defendant's conduct. … .' [Citation.] Thus, … 'the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]' [Citations.]" (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958.)

B. Analysis

Defendant argues, among other things, that it is immune from Plaintiff's claims under federal law. Specifically, Defendant asserts that the complaint is barred by section 203 of the Communications Decency Act of 1996 ("CDA"). (See 47 U.S.C. § 230.)

Congress enacted the CDA to immunize providers of interactive computer services against liability arising from content created by third parties. (See 47 U.S.C. § 230(c)(1) ["No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."]; *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1162 (*Fair Hous. Council*) ["In passing section 230, Congress sought to spare interactive computer services this grim choice by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete."].) Congress considered the fact that " '[it] would be impossible for service providers to screen each of their millions of postings for possible problems.' " (*Doe II v. MySpace, Inc.* (2009) 175 Cal.App.4th 561, 569, quoting *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 331.) Finding interactive computer services played a critical role as forums for speech and activities protected by the First Amendment to the United States

Constitution, Congress extended this immunity to encourage the continued operation of websites that might otherwise be shuttered due to the " 'specter of tort liability in an area of such prolific speech.' " (*Ibid.*)

There are three conditions that must be satisfied to invoke immunity under the CDA. The CDA bars claims if: (1) the defendant is a provider or user of an interactive computer services; (2) the information the plaintiff seeks to hold the defendant liable for is provided by another information content provider (i.e., the defendant is not an information content provider); and (3) the plaintiff's claim seeks to hold the defendant liable as the "publisher or speaker" of that information. (*Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1093-1094 (*Sikhs for Justice*).)

Notably, "[c]ourts consistently have held that [section] 230 provides a 'robust' immunity, [citation], and that all doubts 'must be resolved in favor of immunity,' [citation]. Indeed, [section] 230's 'broad immunity' extends to '*all claims stemming from* [an interactive service provider's] publication of information created by third parties.' [Citation.] The result is that '[p]arties complaining that they were harmed by a [w]eb site's publication of user-generated content ... may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online.' [Citation.]" (*Goddard v. Google, Inc.* (N.D. Cal., Dec. 17, 2008, No. C 08-2738JF(PVT)) 2008 WL 5245490, at *2 (*Goddard*); *Jane Doe No. 1 v. Backpage.com, LLC* (1st Cir. 2016) 817 F.3d 12, 18–19 (*Jane Doe No. 1*) ["There has been near-universal agreement that section 230 should not be construed grudgingly. [Citations.] This preference for broad construction recognizes that websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content 'would have an obvious chilling effect' in light of the difficulty of screening posts for potential issues. [Citation.]"].)

Here, the parties do not appear to dispute that Defendant is a provider of interactive computer services. In fact, Plaintiff sued Defendant in its capacity as an operator of its eponymous search engine. (Complaint, ¶ 2.) In similar circumstances, courts have determined that Defendant was a provider of interactive computer services. (See e.g., *Bennett v. Google, LLC* (D.C. Cir. 2018) 882 F.3d 1163, 1167 ["[A]s many other courts have found, Google qualifies as an 'interactive computer service' provider because it 'provides or enables computer access by multiple users to a computer server.' "] & *Parker v. Google, Inc.* (E.D.Pa. 2006) 422 F.Supp.2d 492, 500-501.) Consequently, the first condition is met.

With respect to the second condition, an information content provider is defined as someone who is responsible, in whole or in part, for the creation or development of the offending content. (*Goddard, supra*, 2008 WL 5245490, at *2.) There are no allegations in the complaint that Defendant created or developed the non-lawyers' advertisements. Similarly, there are no allegations that Defendant requires or encourages the non-lawyers to put certain content in their advertisements. (Cf. *Fair Hous. Council, supra*, 521 F.3d. at p. 1164 [the website was an information content provider when the objectionable content at issue, a registration questionnaire, was created by the website and users were required to provide answers to the questions].) Rather, based on the allegations of the complaint, it appears that Defendant merely provided neutral tools which the non-lawyers used to publish the allegedly

harmful content.[1] (See *Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1121 [the website was not an information content provider when the allegedly harmful content—the false implication that an individual was unchaste—was created and developed entirely by the user, without prompting or help from the website operator; although the website provided neutral tools, which the user used to publish the libel, the website did nothing to encourage the posting of defamatory content].) Thus, the second condition is met.

Regarding the third condition, courts consider "whether the duty the plaintiff alleges the defendant violated derives from its conduct as a publisher or speaker." (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1102 (*Barnes*).) "[P]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." (*Ibid.*) Consequently, decisions to exclude material that third parties seek to post online, not remove content that has been posted online, or delete user profiles on social networking sites, have all been held to be quintessential publishing activity immunized from liability under the CDA. (See *Sikhs for Justice, supra,* 144 F.Supp.3d at p. 1094; *Barnes, supra,* 570 F.3d at 1098-99; *Riggs v. MySpace, Inc.* (9th Cir. 2011) 444 Fed.Appx. 986, 987.)

Notably, courts have repeatedly rejected attempts to recharacterize claims fundamentally based on the posting of online information in order to avoid the CDA's prohibition on treating the defendant as a publisher or speaker of information.

For example, "[i]n [*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816 (*Gentry*)], the plaintiffs brought a claim under California's autographed sports memorabilia statute, [citation], seeking to hold eBay liable for its alleged failure to furnish certificates of authenticity in connection with the sale of autographed merchandise offered by users of its website. [Citation.] To avoid the application of [section] 230, the plaintiffs argued that they merely were 'seek[ing] to enforce eBay's independent duty under the statute to furnish a warranty as the "provider of descriptions," not as a publisher.' [Citation.] The court rejected this argument, holding that 'the substance of [plaintiffs'] allegations reveal they ultimately seek to hold eBay responsible for ... eBay's dissemination of representations made by the individual defendants, or the posting and compilations of information generated by those defendants and other third parties.' [Citation.] The court concluded that if it 'ultimately h[eld] eBay responsible for content originating from other parties, [it] would be treating [eBay] as the publisher' of the information. [Citation.]" (*Goddard, supra,* 2008 WL 5245490, at *4.)

Additionally, in *Doe v. MySpace, Inc.* (5th Cir. 2008) 528 F.3d 413, "the plaintiffs sued the online social utility website MySpace for its alleged failure to implement safety measures that purportedly would have prevented an assault on one of the plaintiffs, a thirteen-year-old girl, by another MySpace user whom she encountered online. [Citation.] To avoid [section] 230, the plaintiffs argued that their claims were 'predicated solely on MySpace's failure to implement basic safety measures,' and therefore did 'not attempt to treat [MySpace] as a "publisher" of information.' [Citation.] Rejecting this contention, the Fifth Circuit held that the allegations, no matter how they were characterized, were 'merely another way of claiming that

[1] Notably, it is of no moment that Defendant allegedly knew of the non-lawyers' postings because "even if a service provider knows that third parties are using such tools to create illegal content, the service's provider's failure to intervene is immunized." (*Goddard, supra,* 2008 WL 5245490, at *3.) Similarly, the fact that Defendant allegedly elicits online content—such as the non-lawyers' advertisements—for profit is immaterial; the only relevant inquiry is whether the interactive service provider "creates" or "develops" that content. (*Ibid.*)

MySpace was liable for publishing the communications.' [Citation.] The court emphasized that '[i]f MySpace had not published communications between Julie Doe and [the attacker], ... Plaintiffs assert they never would have met and the sexual encounter never would have occurred.' [Citation.]" (*Goddard, supra,* 2008 WL 5245490, at *4.)

Lastly, in *Goddard, supra,* the plaintiff alleged that she was injured as a result of clicking on web-based advertisements created by allegedly fraudulent providers of services for various mobile devices. (*Goddard, supra,* 2008 WL 5245490, at *1.) The plaintiff attempted to characterize her UCL claim as one merely arising from Google's receipt of "tainted funds" in connection with the advertisements. (*Id.* at *5.) But the plaintiff alleged that "[a]bsent Google's provision of AdWords services to the Fraudulent Mobile Subscription Services, the Class members would never have been damaged by the Fraudulent Mobile Subscription Services," and the sole basis for each of the plaintiff's claims was that she "suffered damages as a result of clicking on a Google AdWords advertisement for mobile subscription services which linked to a Fraudulent Mobile Subscription Services website." (*Ibid.*) As a result, the court determined that the gravamen of the plaintiff claim was that she was harmed because Google hosted certain online content and, therefore, her UCL claim effectively sought to hold Google liable for its publication of third-party content in contravention of the CDA. (*Ibid.*)

In this case, Plaintiff's claims treat Defendant as a publisher or speaker because the causes of action are based on the publication of information or hosting of content. Plaintiff expressly alleges his damages were incurred as a result of the posting of the non-lawyers' advertisements. (Complaint, ¶¶ 15 & 23.) Plaintiff also alleges that Defendant failed to adequately screen the non-lawyers' advertisements. (*Id.* at ¶ 21.) The choice of what advertisements to post and the decision to screen or review advertisements are traditional publisher functions under any coherent definition of the term. Plaintiff is ultimately alleging that the the operation of Defendant's search engine and Ad Words services contribute to the proliferation of misinformation, but it has been "held that as long as 'the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider's decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally." (See *Jane Doe No. 1, supra,* 817 F.3d at p. 20.) Therefore, the third condition is met.

In opposition, Plaintiff argues that the CDA does not apply here because his claims fall within the narrow exception for federal criminal laws set forth in section 230(e)(1). That provision declares that the CDA should not "be construed to impair the enforcement of ... any ... Federal criminal statute." (*Jane Doe No. 1, supra,* 817 F.3d at p. 23.) But case law establishes that this exception is limited to criminal prosecutions and does not apply to civil suits. (*Ibid.*; *Cohen v. Facebook, Inc.* (E.D.N.Y. 2017) 252 F.Supp.3d 140, 157.)

For these reasons, the complaint, as currently pleaded, is barred by the CDA.

C. Conclusion

Accordingly, Defendant's demurrer to the complaint on the ground of failure to allege facts sufficient to constitute a cause of action is SUSTAINED, with 10 days' leave to amend.

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Calendar line 3

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Calendar line 4

Case Name: *Andrew Young, D.D.S., et al. v. Madhavi Setty, D.D.S., et al.*
Case No.: 18-CV-338694

Currently before the Court are the demurrer and motion to strike by defendants Madhavi Setty, D.D.S. ("Setty"), Setty Dental Corporation ("Setty Dental"), and Sasikanth Potti ("Potti") (collectively, "Defendants").

Factual and Procedural Background

This is an action for breach of contract and fraud. Setty is a licensed dentist and the owner, chief executive officer, secretary, chief financial officer, and sole director of Setty Dental.[2] (Complaint, ¶¶ 3-5 & 11.) Potti "was an agent and/or employee" of Setty and Setty Dental, and performed all relevant actions in that capacity. (*Id.* at ¶ 6.) "Defendants owned and operated a dental practice located at 1705 Branham Lane Suite B4, San Jose, [California] … ." (*Id.* at ¶ 14.)

In 2015, Defendants decided to market and sell the Practice. (Complaint, ¶ 15.) They retained a broker to represent them and provided the broker with "information to use in marketing the practice in order to inform potential buyers about the nature and qualities of the practice." (*Ibid.*)

Plaintiff Andrew Young, D.D.S. ("Young") is a license dentist. (Complaint, ¶ 2.) Plaintiff Young Dental Corporation ("Young Dental") is Young's professional corporation. (*Ibid.*) Young was interested in purchasing a general dentistry practice, "which he could operate by employing one or more associate dentists to perform dentistry in that practice." (*Id.* at ¶ 16.) Young learned that Defendants were marketing their practice through materials provided by Defendants' broker, "which related the information Defendants had supplied to the broker." (*Id.* at ¶ 17.) "Based on … Defendants' representations made in the marketing [for] the practice, [Young and Young Dental (collectively, 'Plaintiffs')] became interested in purchasing the [p]ractice and entered into negotiations with Defendants to purchase the … [p]ractice." (*Ibid.*)

"During the marketing of the practice and the negotiations related to the sale," Defendants made representations of fact regarding: the practice's collections; the nature of the services provided by the practice; the truth of financial documents provided to Plaintiffs; the patients and records of the practice; the number of associate dentists and other individuals employed by the practice; and the amount of time the practice had employed associate dentists and other individuals. (Complaint, ¶ 18.) Plaintiffs relied on these representations of material fact and would not have entered into a contract to purchase the practice but for the representations. (*Id.* at ¶¶ 19 & 36.)

In reliance on Defendants' representations, Plaintiffs agreed to purchase the practice and entered into a written contract for sale on or about June 13, 2018. (Complaint, ¶¶ 20-21, 35, 40, & 47.) Under the terms of the contract, Defendants agreed to sell the practice to

[2] Setty Dental is the alter ego of Setty. (Complaint, ¶¶ 11-13.)

Plaintiffs for $595,000 and the effective date of sale was July 6, 2018. (*Id.* at ¶ 20.) Additionally, under the terms of the contract, Defendants agreed not to induce any of the practice's employees to leave or change employment; Defendants warranted that the facts and figures provided to Plaintiffs were true and correct; Defendants represented that the amounts of gross receipts, costs, and facts provided were complete; Defendants agreed that all remote connections, login, and password information would be provided to Plaintiffs and Defendants would not access any practice computers after the close of sale; Defendants warranted that all the dental equipment would be in good working order on the close of sale; Defendants agreed to cooperate with Plaintiffs on the transfer of Defendants' employees whom Plaintiffs wished to hire after the close of sale; and Defendants warranted that the financial statements furnished to Plaintiffs fairly represented the financial position of the practice. (*Id.* at ¶ 21.)

After completion of the sale, Plaintiff discovered that Defendants' representations were false. (Complaint, ¶ 22.) Specifically, Defendants drastically inflated the value of the practice and created records for nonexistent patients. (*Id.* at ¶¶ 22-28.) Defendants also inflated the number of associate dentists and other individuals employed by the practice, and their length of employment with the practice. (*Id.* at ¶¶ 29-30.) Furthermore, Plaintiffs learned that the nature of the services provide by the practice were different from what was advertised. (*Id.* at ¶¶ 31-32.)

In addition, in violation of the parties' contract, Defendants installed programs onto the practice's computer, failed to provide Plaintiffs with the passwords and login information for these programs, failed to notify Plaintiffs that these programs had been installed and were active, and repeatedly logged into the practice's computer after the close of sale to change and/or delete information contained on the computer. (Complaint, ¶ 33.)

Based on the foregoing allegations, Plaintiffs filed a complaint against Defendants, alleging causes of action for: (1) rescission; (2) breach of written contract; (3) breach of implied covenant of good faith and fair dealing; (4) fraud; and (5) negligent misrepresentation.

On March 7, 2019, Defendants filed the instant demurrer and motion to strike. Plaintiffs filed an opposition to both matters on June 5, 2019.[3] On June 10, 2019, Defendants filed a reply in support of their demurrer and motion to strike.

Discussion

I. Procedural Issue

As a preliminary matter, Defendants argue that Plaintiffs' opposition is untimely and should be disregarded. Defendants acknowledge that they were electronically served with Plaintiffs' opposition on June 5, 2019, nine court days before the hearing date. But Defendants

[3] The Court declines to consider Setty's declaration, which was filed in support of Defendants' demurrer, because the Court's inquiry on demurrer is limited to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice. (See *Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 353 (*Hilltop*).)

contend that Plaintiffs were required to serve their opposition two days earlier under California Rules of Court, rule 2.2519(h)(2).

Defendants' argument lacks merit. First, Defendants rely on California Rules of Court, rule 2.2519(h)(2). But no such rule exists. Second, assuming for the sake of argument Defendants intended to refer to California Rules of Court, rule 2.251, which governs electronic service, section (h)(2) of that rule merely provides that a party serving a document electronically must preserve the document for a certain period of time. (See Cal. Rules Ct., rule 2.251(h)(2).) That provision does not extend the notice period by two days when a document is served electronically. Third, Code of Civil Procedure section 1005 governs the service of opposition papers. Plaintiffs complied with Code of Civil Procedure section 1005, subdivisions (b) and (c), which require all opposing papers to be filed and served at least nine court days before the hearing in a manner reasonably calculated to ensure delivery to the other party not later than the close of the next business day after the time the opposing papers are filed. (See Code Civ. Proc., 1005, subds. (b) & (c).) Furthermore, Code of Civil Procedure section 1005, subdivision (b) provides that section 1013, which references section 1010.6 regarding electronic service and extends the time within which a right may be exercised or an act may be done, does not apply to opposition papers. (Code Civ. Proc., 1005, subd. (b).)

Accordingly, the Court will consider Plaintiffs' opposition.

II. Demurrer

Defendants demur to the second through fifth causes of action of the complaint on the grounds of uncertainty and failure to allege facts sufficient to constitute a cause of action. (See Code Civ. Proc., 430.10, subds. (e) & (f).) Defendants also demur to the second cause of action of the complaint on the ground that it cannot be ascertained from the pleading whether the parties' contract is written, is oral, or is implied by conduct. (See Code Civ. Proc., 430.10, subd. (g).)

A. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, " '[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice' [citation]." (*Hilltop, supra,* 233 Cal.App.2d at p. 353; see Code Civ. Proc., § 430.30, subd. (a).) " 'It is not the ordinary function of a demurrer to test the truth of the … allegations [in the challenged pleading] or the accuracy with which [the plaintiff] describes the defendant's conduct. … .' [Citation.] Thus, … 'the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]' [Citations.]" (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958.)

B. Second and Third Causes of Action

The second and third causes of action of the complaint allege claims for breach of contract and breach of implied covenant of good faith and fair dealing, respectively.

"A cause of action for breach of contract requires pleading of a contract, plaintiff's performance or excuse for failure to perform, defendant's breach and damage to plaintiff

resulting therefrom. [Citation.]" (*McKell v. Washington Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1489 (*McKell*).)

Furthermore, "[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658.) "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation." (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031.) " 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." (*Id.* at pp. 1031-32, italics omitted.)

Defendants initially argue that Plaintiffs' contract claims fail because it cannot be ascertained from the complaint whether the alleged contract is written oral or implied by conduct. Defendants' argument lacks merit. Plaintiffs expressly allege in the complaint that the alleged contract for sale of the practice is a written contract. (See Complaint, ¶¶ 20-21, 35, 40, & 47.)

Next, Defendants argue that Plaintiffs' contract claims are uncertain because Plaintiffs do not attach a copy of the alleged contract to complaint, set forth the terms of the alleged contract verbatim, or plead the essential terms of the alleged contract.

Defendants' argument is not well-taken. First, it appears that Defendants misunderstand the nature of uncertainty as a ground for demurrer. The law is settled that "[a] special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading but is directed at the uncertainty existing in the allegations already made." (*Butler v. Sequiera* (1950) 100 Cal.App.2d 143, 145-146.) Defendants' argument that Plaintiffs have not adequately pleaded the alleged contract between the parties goes to whether Plaintiffs have alleged sufficient facts to state a claim.

Second, even though Plaintiffs did not attach a copy of the contract to the complaint or plead the contractual terms verbatim, the complaint sets forth the material terms of the alleged contract and sufficiently pleads the contract by its legal effect. (See Complaint, ¶¶ 20-21, 35, 40, & 47; see also *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 199 ["[i]n an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language"]; *McKell, supra,* 142 Cal.App.4th at p. 1489 ["A written contract may be pleaded either by its terms—set out verbatim in the complaint or a copy of the contract attached to the complaint and incorporated therein by reference—or by its legal effect. [Citation.] In order to plead a contract by its legal effect, plaintiff must 'allege the substance of its relevant terms.' "].)

Finally, Defendants argue that Plaintiffs' contract claims fail because there is no allegation that Plaintiffs performed their obligations under the contract and the complaint states that "Defendants did all or substantially all of the significant things that the contract required them to do." (Complaint, ¶ 41.) In opposition, Plaintiffs admit that the complaint contains a typographical error and the allegation should state that Plaintiffs, not Defendants, did all or substantially all of the significant things that the contract required them to do. Thus, as currently pleaded, the complaint does not adequately allege that Plaintiffs performed their

obligations under the contract or were excused from performance. (See *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [a complaint for the breach of contract must plead the plaintiff's performance or excuse for non-performance].)

Accordingly, Defendants' demurrer to the second cause of action on the ground that it cannot be ascertained from the pleading whether the parties' contract is written, is oral, or is implied by conduct is OVERRULED. Defendants' demurrer to the second and third causes of action on the ground of uncertainty is OVERRULED. Defendants' demurrer to the second and third causes of action on the ground of failure to allege sufficient facts to constitute a cause of action is SUSTAINED, with 10 days' leave to amend.

C. Fourth and Fifth Causes of Action

The fourth and fifth causes of action of the complaint allege claims for fraud and negligent misrepresentation, respectively.

The elements of fraud, which give rise to the tort action for deceit, are: (1) misrepresentation (intentional misrepresentation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 638 (*Lazar*).)

Similarly, the elements of negligent misrepresentation are: (1) a misrepresentation of a past or existing material fact; (2) made without reasonable ground for believing it to be true; (3) made with the intent to induce another's reliance on the fact misrepresented; (4) justifiable reliance on the misrepresentation; and (5) resulting damage. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196; *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184 ["The elements of negligent misrepresentation are similar to intentional fraud except for the requirement of scienter; in a claim for negligent misrepresentation, the plaintiff need not allege the defendant made an intentionally false statement, but simply one as to which he or she lacked any reasonable ground for believing the statement to be true."].)

"Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) "The pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." (*Commonwealth Mortgage Assurance Co. v. Super. Ct.* (1989) 211 Cal.App.3d 508, 518.) This specificity requirement generally "necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' " (*Lazar, supra,* 12 Cal.4th at p. 645.) A plaintiff's burden in asserting a claim against a corporate defendant is even greater as the plaintiff must generally " 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Ibid.*)

Defendants initially argue that Plaintiffs' fraud claims are barred by the economic loss rule. Defendants' argument lacks merit. The economic loss rule provides that "where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." (*Robinson Helicopter Company v. Dana Corporation* (2004) 34 Cal.4th 979, 988 (*Robinson*),

internal citations and quotations omitted.) This doctrine hinges on a "distinction drawn between transactions involving the sales of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." (*Ibid*., internal citations omitted.) The rule requires a purchaser to recover solely in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise. (*Ibid*.)

In *Robinson*, the California Supreme Court carved out an exception to this rule, holding that it does not bar claims for fraud and intentional misrepresentations, which are *independent* of the contract that is alleged to have been breached. (*Robinson, supra,* 34 Cal.4th at p. 991.) The court reasoned that a breach of contract remedy assumes the parties to a contract can negotiate the risk occasioned by a breach; given this negotiation, it is "appropriate to enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive …." (*Ibid*., citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 517.) However, because a party to a contract could not "rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract," the court explained that public policy demanded that the party who is deceived be permitted to recover damages not limited to the contract. (*Ibid*.) Thus, where one party commits fraud during the contract formation or performance, the injured party may recover in contract *and* tort. (*Ibid*.; see also *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 79, 78.) Here, such conduct by Defendants *has* been alleged, with Plaintiffs pleading that they would not have entered into the contract for sale of the practice if Defendants had not made the alleged misrepresentations regarding the practice. (Complaint, ¶¶ 19, 36, 56-57, & 64-65.) Accordingly, Plaintiffs alleged that the contract was fraudulently induced and, therefore, the economic loss rule does not apply.

Next, Defendants argue that the parties' contract for sale of the practice includes an integration clause, which bars Plaintiffs' fraud claims. Defendants' argument is not well-taken. First, the Court's inquiry on demurrer is limited to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice. (See *Hilltop, supra*, 233 Cal.App.2d at p. 353.) There are no allegations in the complaint providing that the parties' contract contained an integration clause. Additionally, Defendants have not request judicial notice of any material demonstrating that the parties' contract contained an integration clause. Thus, Defendants' argument is predicated on a fact that cannot be considered on demurrer.

Second, even assuming for the sake of argument that the parties' contract contained an integration clause, the existence of an integration clause would not bar Plaintiffs' fraud claims. It is well settled that " '[a] party to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract, either that no representations have been made, or that any right that might be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, including the waiver provision. [Citations.]' " (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1500–1503; see 1 Witkin, Summary of Cal. Law (11th ed. 2018) Contracts, § 305; see also *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 300–301 ["Fraud in the inducement renders the entire contract voidable, including any provision in the contract providing the written contract is, for example, the sole

agreement of the parties, that it contains their entire agreement and that there are no oral representations (integration/no oral representations clause).”].)

Defendants further argue that Plaintiffs’ fraud claims are uncertainty and ambiguous because it is not clear whether the alleged misrepresentations were made in 2015 or 2018. In opposition, Plaintiffs acknowledge that the complaint mistakenly references 2015, when the allegations should only refer to 2018. Thus, as currently pleaded, the fraud claims are uncertain.

Finally, Defendants persuasively argue that Plaintiffs’ fraud claims are not pleaded with the requisite specificity. Plaintiffs do not allege facts showing how, where, and by what means the alleged representations were tendered to them. (See *Lazar, supra*, 12 Cal.4th at p. 645.) Similarly, to the extent the misrepresentations were made by Setty Dental, Plaintiffs do not allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, and when it was said or written. (See *ibid*.)

Accordingly, Defendants’ demurrer to the fourth and fifth causes of action on the grounds of uncertainty and failure to allege facts sufficient to constitute a cause of action is SUSTAINED, with 10 days’ leave to amend.

III. Motion to Strike

Defendants move to strike the following portions of the complaint: the first cause of action for rescission; Plaintiffs’ request for emotional distress damages; and Plaintiffs’ request for punitive damages.

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, the court reads the pleading as a whole, all parts in their context, and assuming the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63, citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.)

B. First Cause of Action

Defendants argue that the Court should strike the first cause of action for rescission because rescission is a remedy, not a cause of action.

As Defendants point out, rescission is a remedy, not a cause of action. (*Nakash v. Super. Ct.* (1987) 196 Cal.App.3d 59, 69–70; Civ. Code, § 1689.) However, the fact that the first cause of action is labeled as one for rescission does not mean that it should be stricken. In fact, it would be improper to strike the first cause of action if it attempted to set forth any legally cognizable claim. (See *Quiroz v. Seventh Ave. Ctr.* (2006) 140 Cal.App.4th 1256, 1281 (“*Quiroz*”) [“[I]t is improper for a court to strike a whole cause of action of a pleading under Code of Civil Procedure section 436…. While under section 436, a court at any time may, in

its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so"]; see *Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39 [, the legal sufficiency of a claim is not determined by the label attached thereto].)

Notably, the legal sufficiency of a claim is not determined by the label attached thereto; rather, "[i]f the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.)

Here, the first cause of action attempts to state a claim for restitution based on a unilateral rescission. "The traditional equitable action to have the rescission of a contract adjudged was recognized in former [Civil Code section 3406]. … [However,] [t]he equitable action was abolished in 1961, and the remedy is now a legal action for restitution based on a completed unilateral rescission. [Citations.]" (4 Witkin, Cal. Proc. (5th ed. 2008) § 541.) The following need to be alleged in an action for restitution after completed unilateral rescission: (1) the contract or other contractual instrument; (2) the grounds for rescission; (3) if the ground is breach of contract, plaintiff's own performance. (*Id.* at § 542; see *Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304.)

Civil Code section 1689, subdivision (b) enumerates the various grounds for restitution after completed unilateral rescission. (Civ. Code, § 1689, subd. (b).) As is relevant here, subdivision (b)(1) provides that a contract may be rescinded "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was … obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." (Civ. Code, § 1689, subd. (b)(1).)

Because Plaintiffs effectively allege a claim under Civil Code section 1689, subdivision (b)(1), it would be improper to strike the first cause of action.

Accordingly, Defendants' motion to strike the first cause of action is DENIED.

C. Emotional Distress Damages

Defendants assert that Plaintiffs request an award of emotional distress damages in paragraph two of the Prayer for Relief. Defendants assert that Plaintiffs are not entitled to such damages because damages for emotional distress are generally not recoverable in an action for breach of contract.

In opposition, Plaintiffs contend that they properly seek emotional distress damages in connection with their claims for fraud and rescission.

As Plaintiffs' fraud claims do not survive demurrer, the fourth and fifth causes of action cannot form the basis of Plaintiffs' request for emotional distress damages. But Plaintiffs' first cause of action for rescission survives and Defendants do not address whether that claim may properly form the basis of Plaintiffs' request for emotional distress damages. Because Defendants have not demonstrated that the first cause of action cannot support Plaintiffs' request for emotional distress damages, the motion to strike those damages is not well-taken.

Accordingly, Defendants' motion to strike Plaintiffs' request for emotional distress damages is DENIED.

D. Punitive Damages

Defendants seek to strike Plaintiffs' request for punitive damages, arguing that punitive damages are not recoverable in an action for breach of contract.

In opposition, Plaintiffs contend that they properly seek punitive damages in connection with their claims for fraud and rescission.

As Plaintiffs' fraud claims do not survive demurrer, the fourth and fifth causes of action cannot form the basis of Plaintiffs' request for punitive damages. But Plaintiffs' first cause of action for rescission survives and Defendants do not address whether that claim may properly form the basis of Plaintiffs' request for punitive damages. Because Defendants have not demonstrated that the first cause of action cannot support Plaintiffs' request for punitive damages, the motion to strike those damages is not well-taken.

Accordingly, Defendants' motion to strike Plaintiffs' request for punitive damages is DENIED.

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Case Name: *Andrei Belorousou v. Kaiser Foundation Hospitals*
Case No.: 17CV309032

This is an employment dispute between Plaintiff Andrei Belorousou ("Plaintiff") and Defendant Kaiser Foundation Hospitals ("Defendant") primarily based on alleged discrimination and wrongful termination. Plaintiff was employed by Defendant as a nurse at Kaiser Hospital's Intensive Care Unit ("ICU") from February 2005 until his termination in October 2016.

Plaintiff's operative Second Amended Complaint ("SAC") states claims for: 1) Violation of Health & Safety Code § 1278.5; 2) Violation of Labor Code §1102.5; 3) Violation of Labor Code §98.6; 4) Violation of Labor Code §6310; 5) Defamation (alleging that false oral statements were made that Plaintiff was caught with a drug bottle in his pocket and then terminated for drug diversion); 6) False Light Invasion of Privacy (based on the same oral statements) ; 7) Disability Discrimination (FEHA) (alleging that Plaintiff was not provided reasonable accommodation for alleged high blood pressure/hypertension, cataracts, depression and anxiety); 8) National Origin Discrimination (FEHA) (alleging Plaintiff was discriminated against because of his Russian origin); 9) Retaliation (FEHA); 10) Failure to Prevent Discrimination/Retaliation (FEHA), and; 11) Wrongful Termination.

On April 25, 2019 Defendant's motion for summary judgment/adjudication was heard. The Court's April 26, 2019 Order denied that motion except as to Plaintiff's request for punitive damages. The Court granted Defendant summary adjudication of that damage claim, finding that Plaintiff had no evidence from which a reasonable inference could be drawn that anyone involved in his termination was an officer, director or managing agent. The matter is set for trial on August 19, 2019.

Currently before the Court is Defendant's two motions to compel further responses to its Special Interrogatories ("SIs"), set two, and related Requests for Production of Documents ("RFPDs"). The motions were separately noticed but are supported by a single combined memorandum of points and authorities. Plaintiff submitted a single opposition that only addresses the motion to compel further responses to SIs.

I. History of the discovery dispute

Defendant served its SIs, set two, and its related RFPDs on Plaintiff on August 23, 2018. (See Declaration of Defense Counsel Andrea Bednarova at ¶¶2-3 and attached exhibits 2-3; Declaration of Plaintiff's Counsel Kyle Pruner at ¶2.)

Plaintiff's initial responses to this discovery were provided on October 18, 2018, with signed verifications following one month later. (See Bednarova Decl. at ¶¶5-6 and exhibits 4 & 5; Pruner Decl. at ¶3.)

After an agreement was reached extending Defendant's deadline for bringing motions to compel, Defense Counsel sent Plaintiff's counsel a meet and confer letter discussing

Plaintiff's initial responses to the SIs and RFPDs on February 15, 2019. (See Bednarova Decl. at ¶¶7-8 and exhibits 6 & 7; Pruner Decl. at ¶4 and attached exhibit A.)

On February 18, 2019 Plaintiff's Counsel sent a responding meet and confer letter, indicating that Plaintiff would provide supplemental responses to certain SIs and RFPDs. (See Bednarova Decl. at ¶9 and exhibit 8; Pruner Decl. at ¶5 and exhibit B.) At this point Mr. Pruner states "Defendant never responded to Plaintiff's letter, putting an end to the unsuccessful meet and confer efforts." (Pruner Decl. at ¶6.) This is inaccurate.

On February 22, 2019 a paralegal from Mr. Pruner's office contacted Defense Counsel seeking a two week extension of time to provide the promised supplemental discovery responses, with March 12, 2019 being the new date by which supplemental responses would be provided. The extension was agreed to on the condition that Defendant's deadline to bring a motion to compel would be extended to April 5, 2019. (See Bednarova Decl. at ¶10 and exhibit 9.)

On March 21, 2019, with Plaintiff's self-selected deadline for producing further responses having come and gone, Defense Counsel set another meet and confer letter. (See Bednarova Decl. at ¶11 and exhibit 10.) The March 21, 2019 letter stated in pertinent part, "[w]e have not received the further responses your office indicated would be served on March 12, 2019. Based on your letter dated February 18, 2019, we understand Plaintiff is going to provide further responses to Interrogatories 16-30 and Requests for Production 46, 49, 52, 54-55, 65-66, and 68, and accordingly they are not further addressed in this letter. Please understand, however, that we will move to compel if we do not receive timely further responses."

Defendant's motion to compel was filed on April 5, 2019.

Mr. Pruner states that "[o]n or about May 31, 2019 and June 3, 2019, Plaintiff requested that Defendant withdraw it motion to compel, because Plaintiff supplemented his responses, Defendant refused Plaintiff's requests." (Pruner Decl. at ¶9.) No evidence of such requests is provided.

II. Motion to compel further responses to SIs

Defendant moves to compel Plaintiff to provide further responses to SI Nos. 16, 17, 18, 20, 21, 23, 24, 27, 28, 29, 30, 31, 32, 34, 36, 37 and 38. (See Defendant's Notice of Motion to Compel further SI responses at p. 2:5-7.)

A. Effect of service of amended responses

On May 30, 2019, almost eight weeks after this motion was filed and more than two months after the date Plaintiff counsel's office had stated further responses would be provided by, Plaintiff submitted verified supplemental responses to SI Nos. 27, 28, 29, 30, 31 and 32. (See Ex. C to Pruner Decl.) Despite prior representations from Plaintiff's Counsel no supplemental response to any RFPDs were provided.

When amended discovery responses are served after a motion to compel is filed, the Court has substantial discretion in deciding how to rule in light of the particular circumstances presented. (See *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 408-409.) Through this discretion, the Court might deny the motion to

compel as moot and just impose sanctions, or examine the responses to determine if they are code-compliant. (*Id.* at p. 409.)

Here, with one exception (SI No. 27), the Court declines to examine the supplemental responses and deems the motion to compel further responses to SI Nos. 28, 29, 30, 31 and 32 to be MOOT.

Regarding SI no. 27, that interrogatory requested in pertinent part that Plaintiff identify "each physical therapy staff you reference in paragraph 53 of your SAC." Plaintiff's supplemental response, stripped of objections, states "Plaintiff does not reference any 'physical therapy' staff in paragraph 53 of his SAC. As such, Plaintiff cannot answer this interrogatory." This is plainly inaccurate, as paragraph 53 of the SAC includes the sentence "In and around May, 2016, pharmacy staff *and physical therapy staff* communicated the same story to several ICU nurses." (Court's emphasis.) The Court assumes this was an oversight by Plaintiff's Counsel rather than a deliberate false statement. In any event the motion to compel a further response is GRANTED as to SI No. 27 and Plaintiff shall serve Defendant with a verified, code-compliant further response, without objections, within 20 days of the date of filing of the final order on this motion.

B. Remaining interrogatories at issue

The remaining SIs at issue are Nos. 16, 17, 18, 20, 21, 23, 24, 34, 36, 37 and 38.

If a party demanding a response to an interrogatory deems that an answer to a particular interrogatory is evasive or incomplete, an exercise of the option to produce documents is unwarranted or inadequate, or an objection to an interrogatory is without merit or too general, that party may move for an order compelling a further response. (CCP §2030.300(a)(1)-(3).) If a timely motion to compel a further response to an interrogatory has been filed, the burden in on the responding party to justify any objection to the discovery request. (*Fairmont Ins. Co. v. Super Ct.* (2000) 22 Cal.4th 245, 255.)

As to SIs 16, 17, 18, 20, 21, 23 and 24, while the Court notes that, as to this groups of SIs, Plaintiff's opposition and separate statement only address SIs 18, 21 and 24, the Court also notes that these SIs all ask similar questions and, where Plaintiff has made a responding argument that argument is essentially the same as to SIs 18, 21 and 24. Each SI in this group asks Plaintiff to identify the date (exact or approximate) of any occasion on which he observed other ICU nurses fail to comply with a specified procedure or rule that Defendant contends are easily complied with in a normal ICU and that were part of the stated (possibly pretextual) reasons for Plaintiff's suspension and termination. Plaintiff responded to each of these SIs with unsupported boilerplate objections.

To the extent the opposition to this motion addressees any of the SIs in this group (Nos. 18, 21, and 24 only) Plaintiff now claims that it is "simply impossible" to answer them as worded. This is of course clearly untrue and the motion is GRANTED as to SIs 16, 17, 18, 20, 21, 23 and 24 as follows: If it is Plaintiff's position that he cannot recall the actual or approximate dates of any occasion he observed any of the conduct specified in these SIs, the identities of any nurses involved, or any of the other information requested, he shall state exactly that in further verified code-compliant responses to each of these SIs. To the extent Plaintiff can recall any of the information requested in any of these SIs (an approximate date he claims to have observed any of the behavior described in any of these SIs, the identity of a

nurse engaged in any of the specified behaviors, the name of a medicine or the identification information for any patient involved where requested, etc.) he shall so state in further verified code-compliant responses. Such responses shall be provided within 20 days of the date of filing of the final order on this motion. All stated objections to SIs 16, 17, 18, 20, 21 23, and 24 are waived for failure to support them.

As to SI no. 34, this interrogatory asks Plaintiff to "State the phone number from which YOU made calls to Richard Contreras in August 2016." Plaintiff's initial response to this SI consists of nothing but unsupported boilerplate objections. In his opposing separate statement Plaintiff argues, in pertinent part: "Plaintiff simply does not know this information. This has been communicated to Defendant . . . Plaintiff does not know which telephone number he called Richard Contreras from in August 2016. . . . Plaintiff did do a reasonable search and found that he does not have this number."

The motion to compel is GRANTED as to SI no. 34 as follows: If it is Plaintiff's position that he cannot recall what number he called Mr. Contreras from in August 2016 and that after a reasonable search he has been unable to learn that information he shall state that in a further verified response, to be provided within 20 days of the date of filing of the final order on this motion. All asserted objections are waived as unsupported.

Regarding SI Nos. 36, 37, and 38, the motion to compel is DENIED. These three SIs all seek information related to Plaintiff's PAGA damage claims. Plaintiff dismissed his claims for damages and/or penalties under the PAGA on April 11, 2019. This portion of the motion to compel should have withdrawn at that point, as the information sought was no longer relevant.

III. Motion to compel further responses to RFPDs

Defendant moves to compel further responses to RFPDs 61, 62, 63, 65, 66 and 68. (See Defendant's Notice of Motion to Compel further RFPD responses at p. 2:5-6.)

A motion to compel further responses to a request for production of documents "shall set forth specific facts showing good cause justifying the discovery sought by the inspection demand." (CCP §2031.310(b)(1); *Kirkland v. Sup. Ct.* (2002) 95 Cal.App.4th 92, 98 ("*Kirkland*").) To establish "good cause," the burden is on the moving party to show both relevance to the subject matter (e.g., how the information in the documents would tend to prove or disprove some issue in the case) and specific facts justifying discovery (e.g., why such information is necessary for trial preparation or to prevent surprise at trial). (*Glenfed Develop. Corp. v. Sup. Ct.* (1997) 53 Cal.4th 1113, 1117.) Where the moving party establishes "good cause," the burden shifts to the responding party to justify its objections. (*Kirkland*, *supra*, 95 Cal.App.4th at p. 98.)

As noted above, Plaintiff has failed to file any opposition to this motion. Rather than simply grant the entire motion as unopposed, the Court will examine the RFPDs that are the subject of this motion, particularly those that are dependent upon or related to the SIs addressed above, some of which have received supplemental responses.

The motion is DENIED as MOOT as to RFPD no. 61, seeking "ALL DOCUMENTS that support your response to Special Interrogatory 31." As Plaintiff provided a supplemental response to SI no. 31 after these motions were filed, the Court declines to further consider this RFPD. (See *Sinaiko*, *supra*.)

Regarding RFPD Nos. 62 and 63, the motion to compel is GRANTED, in part, as follows: RFPD no 62 seeks production of "all documents" identified in the response to SI no. 33. The Court notes that Defendant has not moved to compel any further response to SI no. 33, which seeks to have Plaintiff "identify" all evidence "that shows the call to Richard Contreras you allege you made in August 2016." (See exhibit 3 to the Bednarova Decl.) Accordingly, no further response to RFPD 62 is required. RFPD No. 63 requests Plaintiff's "detailed phone bill" (a term which is not further defined) for August 2016 for any phone number identified in Plaintiff's response to SI no. 34, which Defendant has moved to compel a further response to, and which is discussed above.

If, as anticipated, the further verified response to SI No. 34 that the Court has ordered Plaintiff to provide consists of nothing more than a representation from Plaintiff (under penalty of perjury) that he cannot remember what phone number he purportedly called Richard Contreras from in August 2016, than no further documents need be provided in response to RFPD No. 63. If any phone number is identified in the further response to SI 33 that the Court has ordered Plaintiff to provide, then Plaintiff shall also provide a further verified response to RFPD no. 63, including copies of responsive documents, within 20 days of the date of filing of the final order on this motion. All stated objections are waived as unsupported, but Plaintiff shall be permitted to redact phone calls to any numbers other than those phone numbers identified in the further response to SI No. 34, as well as any personal financial information, from any copies of any August 2016 phone bill produced in response to RFPD no. 63.

The Motion is DENIED as to RFPD no. 65, seeking "all documents" related to the withdrawn claim for PAGA damages or penalties. As with the related SIs, this RFPD ceased to be relevant when Plaintiff dismissed his PAGA damage and/or penalty claims on April 11, 2019 and this portion of the motion should have been withdrawn.

Regarding RFPD Nos. 66 and 68, these requests seek "all documents" regarding communications with "Mohini Chand" (RFPD no. 66) or "Frank Amag" (RFPD no. 68) regarding Defendant during the relevant time period. Plaintiff's initial response to RFPD No. 66, apart from boilerplate objections, stated that "Plaintiff will produce all responsive documents in Plaintiff's possession and control, of which Plaintiff is aware, and which may relate to this request." Plaintiff's initial response to RFPD No. 68, apart from boilerplate objections, included contradictory statements that Plaintiff would both "produce all responsive documents in Plaintiff's possession and control," and also that "Plaintiff currently has no documents responsive to this request."

The motion to compel is GRANTED as unopposed as to RFPD Nos. 66 and 68. Plaintiff shall provide further verified responses to these RFPDs within 20 days of the date of filing of the final order on this motion. These responses shall clearly state whether any responsive documents are in Plaintiff's possession or control or not and any responsive documents shall be produced. All objections are waived as unsupported. To the extent Plaintiff claims that any responsive documents in his possession or control are covered by the attorney-client privilege or contain attorney work product, Plaintiff shall produce a privilege log with the further responses.

Request for monetary sanctions

In the notice of motion to compel further responses to SIs Defendant requests monetary sanctions against Plaintiff and his counsel in the amount of $6,388.00 “for opposing the Motion without substantial justification.” The notice of motion to compel further responses to RFPDs includes a similar request in the amount of $3,676.00.

The basis for the amount of sanctions sought is set forth in the declaration of Defense Counsel Bednarova in support of both motions. (See Bednarova Decl. at ¶¶ 15-16.) Her declaration indicates that the requested amount of sanctions includes anticipated future billings and expenses. The Court does not award sanctions for anticipated expenses. (See *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1551 [the court awards sanctions only for expenses actually incurred, not for anticipated expenses].) Accordingly while monetary sanctions are GRANTED the amount awarded is reduced to $7232.00, reflecting the expenses actually incurred in preparing the initial motions.

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