SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable CHRISTOPHER G. RUDY, Presiding

Courtroom Clerk: R. Belligan

DATE: 11/30/2021 TIME: 9:00 A.M.

191 North First Street, San Jose, CA 95113
Telephone: 408-882-2170

1. **To contest the ruling, call (408) 808-6856 before 4:00 P.M. Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.**
2. **The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) The proposed order must be e-filed by counsel and submitted per 3.1312(c))**
3. **In light of the lifting of shelter-in-place orders in this County, appearances by CourtCall are no longer mandatory. CourtCall appearances are encouraged. In person appearances must comply with social distancing rules per paragraph 5 below. If any party wants a court reporter, the appropriate form must be submitted. Remote reporting is encouraged.**
4. **There will be a public access line so that interested members of the public can listen in. That number is 888-363-4735, access #: 3118410.**
5. **As ordered by the Presiding Judge of the Court, any person appearing in person for the hearing must observe appropriate social distancing protocols and wear a face covering, unless otherwise authorized by the Court.**
6. **As a reminder, state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies while in the courtroom and while listening in on the public access line.**

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	18CV338821	KIRK NICHOLS vs RICHARD HILDEN et al	Order of Examination of Defendant Richard Hilden and Hilden Industrial Investments by Judgment Creditor Diana Guadalupe Chipana. No proof of service on file. If no proof of service and no appearance, the matter will be ordered OFF CALENDAR.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable CHRISTOPHER G. RUDY, Presiding
Courtroom Clerk: R. Belligan
DATE: 11/30/2021 TIME: 9:00 A.M.
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2170

1. **To contest the ruling, call (408) 808-6856 before 4:00 P.M. Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.**
2. **The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) The proposed order must be e-filed by counsel and submitted per 3.1312(c))**
3. **In light of the lifting of shelter-in-place orders in this County, appearances by CourtCall are no longer mandatory. CourtCall appearances are encouraged. In person appearances must comply with social distancing rules per paragraph 5 below. If any party wants a court reporter, the appropriate form must be submitted. Remote reporting is encouraged.**
4. **There will be a public access line so that interested members of the public can listen in. That number is 888-363-4735, access #: 3118410.**
5. **As ordered by the Presiding Judge of the Court, any person appearing in person for the hearing must observe appropriate social distancing protocols and wear a face covering, unless otherwise authorized by the Court.**
6. **As a reminder, state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies while in the courtroom and while listening in on the public access line.**

LINE 2	17CV312746	Lorie Williams et al vs David Kraft	Motion: Motion to Strike Plaintiff and Cross Defendant's Amended Complaint and Answer to Cross Complaint or in the Alternative an Order that Monetary Sanctions Issue. MOOT in light of the Court's prior rulings.
LINE 3	18CV339249	Whispering Oaks Residential Care Facility LLC et al vs Cricket Communications Inc et al	Motion: Motion to Quash Service of Summons & Complaint by Defendants Cricket Communications Inc. and New Cingular PCS LLC. Motion GRANTED. Click link at line 3 for full ruling. The Court will prepare the formal order.
LINE 4	20CV364201	CHARLIE LE vs NICK NGUYEN et al	Hearing: Demurrer to Third Cause of Action of First Amended Complaint by Defendant Nick Nguyen Demurrer SUSTAINED with leave to amend. Click link at line 4. The Court will prepare the formal order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable CHRISTOPHER G. RUDY, Presiding

Courtroom Clerk: R. Belligan

DATE: 11/30/2021 TIME: 9:00 A.M.

191 North First Street, San Jose, CA 95113
Telephone: 408-882-2170

1. **To contest the ruling, call (408) 808-6856 before 4:00 P.M. Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.**
2. **The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) The proposed order must be e-filed by counsel and submitted per 3.1312(c))**
3. **In light of the lifting of shelter-in-place orders in this County, appearances by CourtCall are no longer mandatory. CourtCall appearances are encouraged. In person appearances must comply with social distancing rules per paragraph 5 below. If any party wants a court reporter, the appropriate form must be submitted. Remote reporting is encouraged.**
4. **There will be a public access line so that interested members of the public can listen in. That number is 888-363-4735, access #: 3118410.**
5. **As ordered by the Presiding Judge of the Court, any person appearing in person for the hearing must observe appropriate social distancing protocols and wear a face covering, unless otherwise authorized by the Court.**
6. **As a reminder, state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies while in the courtroom and while listening in on the public access line.**

LINE 5	20CV368754	Wells Fargo Bank, N.A. vs ANGELA JOENKS	Motion: Motion for Summary Judgment/Adjudication by Plaintiff Wells Fargo Bank, N.A. Notice of hearing was given. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Plaintiff has submitted undisputed facts in support of each element of its causes of action. Defendant does not dispute Plaintiff's facts or raise any material triable issue of fact in opposition to Plaintiff's motion. Defendant presents no evidence to support of her affirmative defenses. Good cause appearing, summary judgment is granted in Plaintiff's favor against Defendant ANGELA K JOENKS in the principal sum of $14,252.08, plus reasonable attorney's fees and court costs. Moving party to prepare and submit a formal order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable CHRISTOPHER G. RUDY, Presiding
Courtroom Clerk: R. Belligan
DATE: 11/30/2021 TIME: 9:00 A.M.
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2170

1. **To contest the ruling, call (408) 808-6856 before 4:00 P.M. Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.**
2. **The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) The proposed order must be e-filed by counsel and submitted per 3.1312(c))**
3. **In light of the lifting of shelter-in-place orders in this County, appearances by CourtCall are no longer mandatory. CourtCall appearances are encouraged. In person appearances must comply with social distancing rules per paragraph 5 below. If any party wants a court reporter, the appropriate form must be submitted. Remote reporting is encouraged.**
4. **There will be a public access line so that interested members of the public can listen in. That number is 888-363-4735, access #: 3118410.**
5. **As ordered by the Presiding Judge of the Court, any person appearing in person for the hearing must observe appropriate social distancing protocols and wear a face covering, unless otherwise authorized by the Court.**
6. **As a reminder, state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies while in the courtroom and while listening in on the public access line.**

LINE 6	19CV360470	Jenny Rempel vs Scott Brunello	Motion: Motion to Compel Independent Medical Examination with Dr. Gordon Levin, M.D. by Defendant Scott Paul Brunello. Motion DENIED. Click link at line 6 for full ruling. The Court will prepare the formal order.
LINE 7	20CV372285	THE PEOPLE OF THE STATE OF CALIFORNIA et al vs CALVARY CHAPEL SAN JOSE et al	Motion: Motion to Compel Defendant Calvary Chapel San Jose's Further Responses to Second Set of Document Requests and for Sanctions by Plaintiffs The People of the State of California. The Court, exercising its discretion to determine the sequence of discovery, continues the hearing of this matter on its own motion to be heard after the Court has ruled on Defendant's Demurrer to the Compliant. Defendant's Demurrer is scheduled for 2/1/22. This matter is continued to 2/1/22 for further setting.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable CHRISTOPHER G. RUDY, Presiding
Courtroom Clerk: R. Belligan
DATE: 11/30/2021 TIME: 9:00 A.M.
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2170

1. **To contest the ruling, call (408) 808-6856 before 4:00 P.M. Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.**
2. **The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) The proposed order must be e-filed by counsel and submitted per 3.1312(c))**
3. **In light of the lifting of shelter-in-place orders in this County, appearances by CourtCall are no longer mandatory. CourtCall appearances are encouraged. In person appearances must comply with social distancing rules per paragraph 5 below. If any party wants a court reporter, the appropriate form must be submitted. Remote reporting is encouraged.**
4. **There will be a public access line so that interested members of the public can listen in. That number is 888-363-4735, access #: 3118410.**
5. **As ordered by the Presiding Judge of the Court, any person appearing in person for the hearing must observe appropriate social distancing protocols and wear a face covering, unless otherwise authorized by the Court.**
6. **As a reminder, state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies while in the courtroom and while listening in on the public access line.**

LINE 8	20CV372285	THE PEOPLE OF THE STATE OF CALIFORNIA et al vs CALVARY CHAPEL SAN JOSE et al	Motion: Motion for Protective Order by Defendants Calvary Chapel San Jose et al. The Court, exercising its discretion to determine the sequence of discovery, continues the hearing of this matter on its own motion to be heard after the Court has ruled on Defendant's Demurrer to the Compliant. Defendant's Demurrer is scheduled for 2/1/22. This matter is continued to 2/1/22 for further setting.
LINE 9	21CV382125	NILOUFAR SARAFAN et al vs TRACERY PROFESSIONAL BUILDERS INC et al	Motion: Motion to Compel Defendant Tracery Professional Builders, Inc. Further Responses to Request for Prod of Docs, Set One, and to Compel the Deposition of Tracery Professional Builders, Inc. Motions DENIED without prejudice. This matter has been ordered to binding arbitration. Any discovery disputes must be heard by the appointed neutral arbitrator. The Court will prepare the formal order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable CHRISTOPHER G. RUDY, Presiding
Courtroom Clerk: R. Belligan
DATE: 11/30/2021 TIME: 9:00 A.M.
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2170

1. **To contest the ruling, call (408) 808-6856 before 4:00 P.M. Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.**
2. **The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) The proposed order must be e-filed by counsel and submitted per 3.1312(c))**
3. **In light of the lifting of shelter-in-place orders in this County, appearances by CourtCall are no longer mandatory. CourtCall appearances are encouraged. In person appearances must comply with social distancing rules per paragraph 5 below. If any party wants a court reporter, the appropriate form must be submitted. Remote reporting is encouraged.**
4. **There will be a public access line so that interested members of the public can listen in. That number is 888-363-4735, access #: 3118410.**
5. **As ordered by the Presiding Judge of the Court, any person appearing in person for the hearing must observe appropriate social distancing protocols and wear a face covering, unless otherwise authorized by the Court.**
6. **As a reminder, state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies while in the courtroom and while listening in on the public access line.**

LINE 10	20CV374446	Harlan Graves, Jr. vs Li Shusen et al	Continued from 11/23/21 for a mandarin interpreter. **Tentative ruling by Judge Hayashi:** Plaintiff's Motion for Terminating Sanction (filed 9/3/2021) On August 25, 202 the court made an Order for production of videotapes or declaration under penalty of perjury that tapes did not exist. Plaintiff's motion was filed before Defendant filed declaration in compliance with 8/25/21 order, and is based on an incorrect assumption that Defendant would not comply. As a motion for terminating sanctions requires proof of a willful violation of a court order for discovery, and no such proof of noncompliance with the 8/25/21 order has been presented, the motion is denied without prejudice. The Court will prepare the formal order.
LINE 11			
LINE 12			

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable CHRISTOPHER G. RUDY, Presiding
Courtroom Clerk: R. Belligan
DATE: 11/30/2021 TIME: 9:00 A.M.
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2170

1. **To contest the ruling, call (408) 808-6856 before 4:00 P.M. Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.**
2. **The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) The proposed order must be e-filed by counsel and submitted per 3.1312(c))**
3. **In light of the lifting of shelter-in-place orders in this County, appearances by CourtCall are no longer mandatory. CourtCall appearances are encouraged. In person appearances must comply with social distancing rules per paragraph 5 below. If any party wants a court reporter, the appropriate form must be submitted. Remote reporting is encouraged.**
4. **There will be a public access line so that interested members of the public can listen in. That number is 888-363-4735, access #: 3118410.**
5. **As ordered by the Presiding Judge of the Court, any person appearing in person for the hearing must observe appropriate social distancing protocols and wear a face covering, unless otherwise authorized by the Court.**
6. **As a reminder, state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies while in the courtroom and while listening in on the public access line.**

LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			
LINE 18			
LINE 19			
LINE 20			
LINE 21			
LINE 22			
LINE 23			
LINE 24			
LINE 25			
LINE 26			
LINE 27			
LINE 28			
LINE 29			

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable CHRISTOPHER G. RUDY, Presiding

Courtroom Clerk: R. Belligan

DATE: 11/30/2021 TIME: 9:00 A.M.

191 North First Street, San Jose, CA 95113
Telephone: 408-882-2170

1. **To contest the ruling, call (408) 808-6856 before 4:00 P.M. Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.**
2. **The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) The proposed order must be e-filed by counsel and submitted per 3.1312(c))**
3. **In light of the lifting of shelter-in-place orders in this County, appearances by CourtCall are no longer mandatory. CourtCall appearances are encouraged. In person appearances must comply with social distancing rules per paragraph 5 below. If any party wants a court reporter, the appropriate form must be submitted. Remote reporting is encouraged.**
4. **There will be a public access line so that interested members of the public can listen in. That number is 888-363-4735, access #: 3118410.**
5. **As ordered by the Presiding Judge of the Court, any person appearing in person for the hearing must observe appropriate social distancing protocols and wear a face covering, unless otherwise authorized by the Court.**
6. **As a reminder, state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies while in the courtroom and while listening in on the public access line.**

LINE 30			

Calendar line 1

- oo0oo -

Calendar line 2

- oo0oo -

Calendar line 3

Case Name: *Whispering Oaks Residential Care Facility LLC et al v. Cricket Communications Inc. et al*
Case No.: 18CV339249

Specially Appearing Defendants Cricket Communications Inc. ("Cricket") and New Cingular PCS LLC ("New Cingular")(collectively, "Defendants") move to quash service of Whispering Oaks Residential Care Facility LLC ("Whispering Oaks"), Whispering Oaks RCF Management Co Inc ("RCF Management"), and Naren Chaganti ("Chaganti")(collectively, "Plaintiffs") summons and complaint based on the ground that the complaint purportedly served on Defendants was the superseded initial complaint, which was of no legal effect as a pleading, and did not include a copy of the operative complaint, the First Amended Complaint ("FAC").

I. Background

A. Factual

According to the allegations of the Complaint, on September 12, 1996, New Cingular (then known as AT&T PCS Services Inc.) entered into a commercial lease agreement with Whispering Oaks Heath Care Center Inc. ("Landlord"). The lease called for Landlord to leave certain space on a water tank on its premise for use in New Singular's telecommunication network. The lease provided, among other things, that Landlord would be held harmless from and against injury arising from the installation, use, maintenance, repair, or removal of the Antenna Facilities or the breach of the lease. (FAC, p. 3, ¶ 14.)

On April 24, 2008, Cricket entered into a commercial lease agreement with Landlord. The lease provided for Landlord to lease certain space on a water tank on its premise for use in Cricket's telecommunication network. The lease provided, among other things, that Landlord would be held harmless against any and all claims arising out of or resulting from that is based "upon (a) Lessee's breach of this lease, (b) the conduct or actions of Lessee within or outside the scope of this lease…" (*Id* at p. 4, ¶ 21.)

A water pipe froze as a result of an act or omission by Defendants, which subjected Plaintiffs to numerous civil proceedings and criminal investigations and caused them to sustained substantial losses. The most recent item of damage was in 2018, when Defendants sought attorneys' fees for claiming that they injured Plaintiffs' business.

B. Procedural

Based on the foregoing allegations, Plaintiff initiated this action on December 10, 2018 with the filing of the Complaint which asserted breach of written contract for failure to defend, indemnify, and hold harmless, among other things. Plaintiffs filed their FAC on February 9, 2019, which asserted the following: (1) breach of written contract for failure to defend, indemnify, and hold harmless, (2) breach of duty of good faith and fair dealing, (3) conspiracy to injury, and (4) violation of privacy rights. On July 28, 2021, Defendants filed the instant

motion to quash and a request for judicial notice. On November 11, 2021, Plaintiffs filed an opposition. On November 18, 2021, Defendants filed a reply.

II. Request for Judicial Notice

Judicial notice may be taken of records of any court of this state or any court of record of the United States or of any state of the United States. (See Evid. Code § 452, subd. (d).) Although a court may individually notice a variety of matters, only relevant material may be noticed. (*Mangini v. R. J. Reynolds Tobacco* (1994) 7 Cal.4th 1057, 1063; overruled on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1258; see also *Gbur v. Cohen,* (1979) 93 Cal.App.3d 296, 301 [information subject to judicial notice must be relevant to the issue at hand].)

In support of their motion to quash, Defendants request judicial notice of two items. These are:

(1) Plaintiffs' Complaint, filed on December 10, 2018,
(2) Plaintiffs' First Amended Complaint, filed on February 8, 2019.

Defendants' request is GRANTED as to all items because the documents are court records, which are properly subject to judicial notice under Evidence Code section 452, subdivision (d). However, with respect to any and all court records, the law is settled that "the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375.)

III. Motion to Quash

Defendants move to quash on the basis that the complaint purportedly served on Defendants was the superseded initial complaint, which was of no legal effect as a pleading, and did not include a copy of the operative complaint, which is the FAC.

A. Legal Standard for Motion to Quash

Where a defendant moves to quash based on improper service of the summons and complaint, the burden is on the plaintiff to prove the validity of service by a preponderance of the evidence. (See *Boliah v. Superior Court (Bijan Fragrances, Inc.)* (1999) 74 Cal.App.4th 984, 991.) In meeting this burden, the filing of a proof of service creates a rebuttable presumption that service was proper, so long as the proof of service complies with applicable statutory requirements. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1442; see also *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205.)

"A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with statutory requirements for service of summons." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466.) Notice does not substitute for proper service; until statutory requirements are satisfied, the court lacks jurisdiction over a defendant. (*Ruttenberg*

v. Ruttenberg (1997) 53 Cal.App.4th 801, 808.) The statutory provisions regarding service of process are liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant; substantial compliance is sufficient. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1436.) Substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute. (*Id.* at 1439.)

A summons may be served by personal delivery. (Code Civ. Proc. § 415.10.)[1] A summons may be serviced on a corporation by delivering a copy of the summons and complaint by any of the following methods: (a) To the person designated as agent for service of process as provided by any provision in Section 202, 1502, 2105, or 2107 of the Corporations Code..., (b) To the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process, (c) If the corporation is a bank, to a cashier or assistant cashier or to a person specified in subdivision (a) or (b), (d) If authorized by any provision in Section 1701, 1702, 2110, 2111 of the Corporations Code…. as provided by that provision. (Code Civ. Proc. § 416.10.)

B. Merits of the Motion to Quash

Defendants argue that when Plaintiffs filed their FAC, their initial complaint was superseded and rendered without any legal effect. The initial complaint named two defendants, Cricket and New Cingular and alleged four causes of action. The FAC added three new defendants and an entirely new cause of action against all five defendants. Defendants argue that proper service on corporations require "delivering a copy of the summons and the complaint" in accordance with various methods provided for proper service under Code of Civ. Proc. section 416.10 et seq. Defendants further argue that service of a complaint that has no legal effect because it has been superseded by an amended complaint does not comply with the statutory mandate for proper and effective service.

Defendants' arguments are well taken because it is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. (*Meyers v. State Bd. Of Equalization,* (1954) 42 Cal.2d 376, 384.) The complaint served on Defendants was not the operating pleading at the time of service because the FAC had been filed over two years prior. As such, service was not proper. (See Code Civ. Proc. section 471.5(a), which states that if a complaint is amended then the amended pleading must be served upon the defendants affected thereby.)

Plaintiffs argue that Defendants provide no statutory basis for the motion. This is incorrect because under Code of Civ. Proc. section 418.10(a)(1), a motion to quash may be filed on the basis of lack of personal jurisdiction, among other things. Defendants argue that they were served with a complaint that had no legal effect and thus the court lacks jurisdiction over Defendants.

[1] All further undesignated statutory references are to the Code of Civil Procedure.

Plaintiffs also argue that the declaration of Raymond Bolanos' ("Bolanos") submitted in support of Defendants' motion to quash is defective because it lacks personal knowledge. The Court disagrees because Bolanos states that he received a copy of the documents served on CT Corporations and if any additional documents had been included, they would have been forwarded to him. (Declaration of Raymond Bolanos, p. 2, ¶ 4.) This means that he did have personal knowledge of the documents attached because he received them personally.

Next, Plaintiffs argue that Defendants admit that they are on notice of the suit, which is the purpose of summons. Defendants respond that "actual notice" is not an available cure to Plaintiffs' defective service because the complaint served had no legal effect. (Defendants' Reply, p. 4, ln. 15-19.) The Court agrees because having notice of the suit does not dispense with the statutory requirements of service of the summons and operative complaint.

Plaintiffs further argue that Defendants have not shown any damage or prejudice. Defendants argue that prejudice is not an element for motion to quash for lack of jurisdiction due to defective service. Defendants' argument here is well taken because Plaintiff's failed to cite any authority to support that assertion and the statute authorizing motions to quash does not state that prejudice is required.

Lastly, Plaintiffs argue that the service is substantially compliant because it placed Defendants on notice of the suit. As stated above, being placed on notice does not dispense with the statutory requirements of service of the summons and complaint. Plaintiffs contend that the issue of which version was served becomes an issue only when a default judgment is taken on the amended pleading but service was done on the prior pleading. However, this argument has no application here because no default was sought or taken by Plaintiffs. Defendants argue that Plaintiffs offer no explanation as to how service of a superseded complaint with no legal effect instead of the operative, amended complaint could possible constitute "substantial service". Defendants contend that Plaintiffs completely failed to comply with the fundamental requirement of serving Defendants with a copy of the operative complaint. The Court finds this argument to be persuasive because the FAC was filed on February 8, 2019 and Defendants were served on June 28, 2021. Plaintiffs have offered no explanation as to why the initial complaint, not the FAC, was served on Defendants even though the FAC has been the operative pleading for over two years.

Plaintiffs request to serve Defendants through their counsel via email. Plaintiffs have not given any reasons why they are unable to serve Defendants through any of the means to serve corporate defendants provided by Code. Civ. Proc. section 416.10, *supra*. As such, the request to serve Defendants through their counsel via email is DENIED.

IV. Conclusion

The motion to quash service is GRANTED. Defendants' request for judicial notice is GRANTED as to all items. The request to serve Defendants through their counsel via email is DENIED.

- oo0oo -

Calendar line 4

Case Name: *Le v. Nguyen, et al.*
Case No.: 20CV364201

Defendant Nick Nguyen ("Nguyen" or "Defendant") demurs to the First Amended Complaint ("FAC") filed by plaintiff Charlie Le ("Plaintiff").

V. Background

C. Factual

This is an action for breach of contract and conspiracy, among many other claims, arising out of a failed business relationship. According to the allegations of the FAC, in 2014, Plaintiff and his brother-in-law, Defendant, discussed starting a restaurant to sell poki bowl. (FAC, ¶ 21.) During their subsequent efforts towards starting a restaurant, Plaintiff and Nguyen were jointly represented by attorney Lloyd Schmidt ("Schmidt"), whose responsibilities included, but were not limited to, drafting documents relating to the business' creation. (*Id*, ¶¶ 22-25.) Defendant Poki Bowl, Inc. ("Poki Bowl") was incorporated on July 29, 2015, with Plaintiff as the incorporator. (*Id*., ¶ 26.) Prior to Poki Bowl's formation, Nguyen repeatedly represented to Plaintiff that they would be equal owners/partners in the business and would equally split its profits; based on these representations, Plaintiff believed this to be the case. (*Id*., ¶¶ 27, 30.) A Statement of Information filed by Nguyen with the California Secretary State stated that Nguyen was the CEO, CFO and director of Poki Bowl, and that Plaintiff was the secretary and director. (*Id*., ¶ 28.)

In July 2015, Plaintiff and Nguyen opened their first Poki Bowl restaurant in San Jose (the "Almaden Restaurant") with $80,000 they had equally contributed to. (FAC, ¶ 33.) On August 10, 2015, defendant NJNJ, LLC ("NJNJ") was formed to own and operate the Almaden Restaurant; Plaintiff and Nick equally own NJNJ and prior to its formation, Nguyen verbally assured Plaintiff that they were equal owners/partners. (*Id*., ¶ 35.) Since the Almaden Restaurant's opening and NJNJ's formation, Plaintiff and Nguyen have split the resulting revenues equally. (*Id*., ¶ 36.)

On October 15, 2015, pursuant to Schmidt's advice, Plaintiff and Nguyen formed defendant PB Venture Group, LLC ("PB Venture") in order to license Poki Bowl's intellectual property to other stores and/or third parties. (FAC, ¶¶ 38-39.) Prior to the formation of this entity, Nguyen repeatedly represented to Plaintiff that the two of them would be equal owners who split everything 50/50. (*Id*., ¶ 41.)

On December 15, 2015, defendant PB Curtner/Coronado Group, LLC ("PB Curtner") was formed and its ownership structure was comprised as follows: Thuy Moss, Nguyen's aunt, owns %20; Plaintiff owns 40%, and Nguyen owns 40%. (FAC, ¶ 44.) Plaintiff alleges that this is the proper ownership makeup regardless of whether PB Curtner's purported operating agreement, which was drafted exclusively by Nguyen, indicates to the contrary. PB Venture licenses Poki Bowl's intellectual property to PB Curtner for a licensing fee in order for the latter to own and operate two quasi-Poki Bowl franchise restaurants in San Jose. (*Id*., ¶ 46.) Following payments by PB Curtner to PB Venture, the profits were evenly divided between Plaintiff and Nguyen after paying Thuy Moss her share. (*Id*., ¶ 48.)

On May 10, 2016, Plaintiff and Nguyen formed defendant PB Palo Alto, LLC ("PB Palo Alto") to own and operate a quasi-Poki Bowl franchise restaurant in Palo Alto. (FAC, ¶ 51.) The ownership structure of PB Palo Alto is as follows: Nam Hunyh owns 20%; Sang Pham owns 20%; Plaintiff owns 30%; and Nguyen owns 30%. (*Id*., ¶ 52.) Prior to PB Palo Alto's formation and during its operation, Nguyen repeatedly told Plaintiff that they would be equal owners/partners and split everything equally. (*Id*., ¶ 54.) PB Venture licenses Poki Bowl's intellectual property to PB Palo Alto to operate the Palo Alto restaurant in exchange for a fee (net profits). (*Id*., ¶ 55.)

In August 2017, Plaintiff and Nguyen explored licensing opportunities with third party vendors, and in order to do so formed defendant PB Franchise, Inc. ("PB Franchise"). (FAC, ¶ 58.) At that time, Plaintiff and Nguyen were equal owners/shareholders, and Plaintiff was designated as CEO, Secretary and director, and Nguyen was the CFO and director. (*Id*., ¶ 59.)

In 2017, Poki Bowl opened a corporate-owned Poki Bowl restaurant in Sunnyvale, which was sold approximately two years later to a franchisee. (FAC, ¶ 60.) Desiring to expand nationally by franchising the Poki Bowl brand, Plaintiff and Nguyen decided to partner with non-party HK Holdings II, LLC ("HK Holdings") in mid-2018 and agreed to add HK Holdings as a 49% shareholder of PB Franchise. (*Id*., ¶¶ 61-62.) The parties agreed that HK Holdings would be responsible for locating and contracting with franchisees to operate a Poki Bowl brand and that any franchise fees would be split according to a 51% to 49% split. (*Id*., ¶ 63.) As a result of HK Holdings' efforts, three franchise restaurants in Florida opened and a master franchise agreement was entered into with the ability to award up to fifty franchisees in New York and New Jerse, and two franchisees in California in San Jose and Aptos. (*Id*., ¶ 64.) As a result of the foregoing, Plaintiff and Nguyen received franchise fees. (*Id*., ¶ 65.)

In mid-2019, unexpectedly and for unknown reasons, Nguyen started to object to the franchising partnership with HK Holdings. (FAC, ¶ 66.) On May 30, 2019, Schmidt sent a letter to Plaintiff informing him that he had been removed as a director, vice president and secretary of Poki Bowl. (*Id*., ¶ 67.) His purported removal was done without any type of shareholder meeting, even though Plaintiff was a 50% shareholder. (*Id*., ¶ 68.) Accordingly, Plaintiff's removal was illegal and/or improper and he contends that he still maintains the foregoing positions. (*Id*.)

From approximately 2015 to 2018, Nguyen presented only signature pages of various documents to Plaintiff for his signature, but intentionally concealed the content of these documents and represented to him that they were of no significant importance. (FAC, ¶ 69.) Following the filing of the instant action, Plaintiff discovered that from 2015 to 2018 Nguyen presented him a document to sign which purportedly prejudiced his ownership interest in Poki Bowl. (*Id*., ¶ 70.) Nguyen intentionally concealed the true nature of the document and affirmatively (and falsely) represented to him that was he was signing was of no legal significance. (*Id*.)

In September 2019, Nguyen refused to cooperate with HK Holding's franchising efforts to Plaintiff's and PB Venture's damage and injury. (FAC, ¶ 72.) In September 2019, HK Holdings filed suit in federal district court in Florida against PB Ventures and Nguyen as a result of his refusal to franchise the poki bowl concept as agreed. (*Id*., ¶ 73.)

At all relevant times, Nguyen controlled and kept possession of relevant corporate and/or business records of the various poki bowl related entities and controlled relevant bank accounts, thereby preventing Plaintiff from acquiring access to these items. (FAC, ¶ 75.) Nguyen continues to do so today. (*Id.*) Starting in about January 2020 and continuing to present, Nguyen and his wife, Jasmine, stopped making any and all profit distributions from the various poki bowl entities to Plaintiff. (*Id.*, ¶ 77.) Plaintiff alleges that Nguyen formed defendant PB Asset Group, Inc. in order to replace PB Venture and PB Franchise as the licensor for Poki Bowl's intellectual properties to franchisees and/or third parties. (*Id.*, ¶ 78) In doing so, Nguyen deprived and/or interfered with franchising opportunities rightfully belonging to PB Venture and/or PB Franchise without the authorization and consent of Plaintiff, even though Plaintiff is director and/or an officer of PB Franchise. (*Id.*, ¶ 79.) Nguyen has excluded Plaintiff from participation in the management of and/or operation of the various poki bowl entities and refuses to acknowledge Plaintiff's ownership in Poki Bowl. (*Id.*, ¶ 80.)

D. Procedural

Based on the foregoing, Plaintiff initiated the instant action on February 20, 2020. Plaintiff filed the operative FAC on May 5, 2021, asserting the following causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud; (4) constructive fraud; (5) breach of fiduciary duty; (6) corporate waste; (7) breach of duty; (8) breach of duty of loyalty; (9) conversion; (10) civil conspiracy; (11) aiding and abetting; (12) resulting trust; (13) constructive trust; (14) removal of director; (15) court supervision of dissolution; (16) injunctive relief; (17) accounting; (18) declaratory relief; (19) intentional interference with prospective economic advantage; (20) negligent interference with prospective economic advantage; (21) unjust enrichment; and (22) tortious interference with contract.

On July 29, 2021, Nguyen filed the instant demurrer to the third cause of action on the ground of failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc, § 430.10, subd. (e).) Plaintiff opposes the motion.

VI. Nguyen's Demurrer

With the instant motion, Nguyen maintains that Plaintiff's claim for fraud is defective because it is not pleaded with the requisite specificity. In the third cause of action, Plaintiff alleges that Nguyen intentionally concealed the true contents of various documents relating to the numerous poki bowl related entities and falsely represented that such documents were administrative and of no legal significance. (FAC, ¶ 100.) He further alleges that Nguyen repeatedly represented to him that they were equal owners of all of the foregoing entities. (*Id.*)

As a general matter, the elements of a fraud claim are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage. (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1474.) Fraud must be pleaded with specificity; this necessitates pleadings facts showing "how, when, where, to whom, and by what means the representations were tendered." (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.)

Here, Nguyen insists that Plaintiff's fraud claim (even inclusive of the general allegations incorporated within) lacks the necessary level of specificity because he has not set forth facts which establish how, when, where, to whom and by what means the alleged misrepresentations were made. The Court agrees. Though various dates appear in the FAC relative to purported misrepresentations, they generally refer to a very broad stretch of time rather than to a date, or even a specific month or year. Plaintiff does not specify the manner in which the various alleged misrepresentations were made to him by Nguyen, what company they were made in relation to, or the nature of the documents which Plaintiff signed, including what those documents purportedly accomplished. While Plaintiff has supplied some detail, which he endeavors to argue in his opposition is sufficient to meet the heightened pleading standard, the Court disagrees. Consequently, Nguyen's demurrer to the third cause of action on the ground of failure to state fact sufficient to constitute a cause of action is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND.

- oo0oo -

Calendar line 5

- oo0oo -

Calendar line 6

Case Name: *Jenny Rempel vs Scott Brunello*
Case No.: 19CV360470

BACKGROUND

Before the Court is the motion of Defendant Scott Brunello to Compel Plaintiff Jenny Rempel to submit to a second Independent Medical Examination. This case arises out of a personal injury action where Plaintiff is seeking recovery for personal injuries. Plaintiff has submitted to one physical examination. Defendant seeks a second exam. The Motion is opposed by Plaintiff.

DISCUSSION

I. Applicable Law

California Code of Civil Procedure §2032.220(a) provides that "In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff..."

If any party desires to obtain more than one physical examination, the party shall obtain leave of court. California Code of Civil Procedure §2032.320(a). Good cause for ordering a second physical or mental examination requires the moving party to "produce specific facts justifying discovery and that the inquiry be relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence. Vinson V. Superior Court, (1987) 43 Cal.3d 833, 841.

California courts have recognized that multiple examinations may be necessary due to the nature and extent of the Plaintiff's claimed damages. There is no limit on the number of examinations permitted, so long as good cause for multiple examinations is demonstrated. Shapira v. Superior Court, (1990) 224 Cal.App.3d 1249, 1254.

II. Analysis

At Defendant's request, Plaintiff submitted to a physical examination with neurologist, Bruce Adornato, M.D. Dr. Adornato rendered an opinion based on his physical examination of Plaintiff. Dr. Adornato is a board certified neurologist, but he does not hold himself out as a Qualified Medical Examiner. Dr. Adornato did not make a disability rating. Defendant seeks a second physical examination with orthopedist Gordon Levin M.D. Dr. Levin is a Qualified Medical Examiner and is able to make a disability rating.

Dr. Adornato's medical report is not provided to the Court. However, based on the Court's experience, an independent neurologic exam would consist of the taking of a history followed by a comprehensive physical examination. There is nothing to suggest that Dr. Adornato's exam was limited in scope or that he did not perform the standard neurologic tests that include range of motion and muscle strength testing. Indeed Dr. Levin's declaration does not say that he cannot form an opinion as a Qualified Medical Examiner based on Dr. Adornato's examination.

The Court finds that Defendant has not met its burden of producing specific facts justifying the need for a second exam. Good Cause does not exist for the ordering of a second physical examination. Defendant's motion is DENIED.

- oo0oo -

Calendar line 7

- oo0oo -

Calendar line 8

- oo0oo -

Calendar line 9

- oo0oo -

Calendar line 10

- oo0oo -

Calendar line 11

- oo0oo -

Calendar line 12

- oo0oo -

Calendar line 13

- oo0oo -

Calendar line 14

- oo0oo -

Calendar line 15

- oo0oo -

Calendar line 16

- oo0oo --

Calendar line 17

- oo0oo -

Calendar line 18

- oo0oo -

Calendar line 19

- oo0oo -

Calendar line 20

- oo0oo -

Calendar line 21

- oo0oo -

Calendar line 22

- oo0oo -

Calendar line 23

- oo0oo -

Calendar line 24

- oo0oo -

Calendar line 25

- oo0oo -

Calendar line 26

- **oo0oo –**

Calendar line 27

- oo0oo -

Calendar line 28

- oo0oo -

Calendar line 29

- oo0oo -

Calendar line 30

- oo0oo –