Tentative Rulings for June 2, 2022
Department 501

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

21CECG02727 ***Ana Lewis v. NorCal Gold, Inc.*** **is continued to Tuesday, June 29, 2022 at 3:30 p.m. in Department 501**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(35)

Tentative Ruling

Re: ***Real v. Vested Enterprises, Inc. et al.***
Superior Court Case No. 21CECG02679

Hearing Date: June 2, 2022 (Dept. 501)

Motion: by plaintiff Daniel Real for an order compelling initial responses from defendant Zachary Mikal Adams to form interrogatories, set one, and special interrogatories, set one.

Tentative Ruling:

To grant each of the motions to compel initial responses. Within ten (10) days of service of the order by the clerk, defendant Zachary Mikal Adams shall serve verified responses, without objections, to Form Interrogatories, Set One; and Special Interrogatories, Set One.

To grant monetary sanctions in the amount of $860 against defendant Zachary Mikal Adams, in favor of plaintiff. Within thirty (30) days of service of the order by the clerk, defendant Zachary Mikal Adams shall pay sanctions to plaintiff's counsel.

Explanation:

On November 18, 2021, the discovery at issue was served on defendant Zachary Mikal Adams. (Declaration of Colin Jones, ¶ 2, and Ex. 1.) As of the filing of the motions to compel, no responses have been served. (*Id.*, ¶ 3.) Plaintiff now seeks an order to compel responses.

Within 30 days of service of interrogatories, the party to whom the interrogatories are propounded shall serve the original of the response to them on the propounding party. (Code Civ. Proc. § 2030.260.) To date, plaintiff has received no response to interrogatories. Accordingly, an order compelling plaintiff to provide initial responses is warranted. (*Id.*, § 2030.290, subd. (b).) All objections are waived. (*Id.*, § 2030.290, subd. (a).) Sanctions are mandatory unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (*Id.*, § 2030.290, subd. (c).) The court finds no circumstances that would render the mandatory sanctions unjust. Plaintiff's request for monetary sanctions is granted, but in the reduced amount of $860.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DTT on 5/25/2022.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Salinas v. Kasturi et al.***
Superior Court Case No. 21CECG02007

Hearing Date: June 2, 2022 (Dept. 501)

Motion: by Defendant Mark Alson, M.D. for Summary Judgment or, in the alternative, Summary Adjudication

Tentative Ruling:

To grant summary judgment in favor of Defendant Mark Alson, M.D. Moving party is directed to submit to this court, within five days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

Defendant Mark Alson, M.D. moves for summary judgment based on the declarations of a medical expert, Fred S. Vernacchia, M.D., who has opined that Dr. Alson's care and treatment of plaintiff did not fall below the standard of care, and that nothing he did or failed to do caused plaintiff any injury.

"The standard of care in a medical malpractice case requires that physicians exercise in diagnosis and treatment that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession under similar circumstances. ' "The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman."'" (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 983–984, internal citations omitted.)

Normally, the question of whether a medical professional's care and treatment of a patient fell within the standard of care or caused the plaintiff's injuries is a matter that can only be established through expert testimony. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410.) "California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Hutchinson v. United States* (9th Cir. 1988) 838 F.2d 390, 392.)

Here, defendant Dr. Alson's expert has testified that Dr. Alson's care and treatment of plaintiff did not fall below the standard of care or cause her injuries. (Statement of Evidence, Exhibit B, Declaration of Fred S. Vernacchia, M.D., ¶¶ 14-15.) Dr. Vernacchia, a radiologist, testifies that Dr. Alson did not "miss" anything in the lumbar and thoracic spine x-ray on July 15, 2020, and that his examination of the scan results was within the

standard of care because the scan was correctly read, and that nothing from the reading delayed further treatment of plaintiff. (*Id.*, ¶¶ 13-16.) Dr. Vernacchia further testifies that the professional services rendered by Dr. Alson did not cause plaintiff's alleged injuries and damages. (*Id.*, ¶¶ 13, 15, 17, 18.)

Therefore, defendant Dr. Alson has met their burden of showing that plaintiff cannot prevail on her claim against Dr. Alson of medical negligence, as she cannot show that Dr. Alson's care and treatment of her fell below the standard of care or caused her any injury.

The burden shifts to plaintiff to come forward with conflicting expert evidence. As plaintiff, in response to the moving papers, filed a notice of non-opposition to defendant Dr. Alson's motion for summary judgment, the court finds that there are no remaining triable issues of material fact as to the only cause of action against Dr. Alson, for medical negligence, and grants summary judgment in favor of defendant Mark Alson, M.D. and against plaintiff Elidia Salinas.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DTT on 5/25/2022.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Boghosian Raisin Packing Co. v. Sterling BV, Inc.***
Superior Court Case No. 21CECG03138

Hearing Date: June 2, 2022 (Dept. 501)

Motion: by Defendant to Stay or Dismiss the Action

Tentative Ruling:

To deny defendant's motion to stay or dismiss the action. (Code Civ. Proc. §§ 410.30; 418.10.)

Explanation:

California courts will generally enforce forum selection clauses in contracts by staying or dismissing a California action under a forum non conveniens rationale. "'In California, the procedure for enforcing a forum selection clause is a motion to stay or dismiss for forum non conveniens ... , but a motion based on a forum selection clause is a special type of forum non conveniens motion. The factors that apply generally to a forum non conveniens motion do not control in a case involving a mandatory forum selection clause.' When a case involves a mandatory forum selection clause, it will usually be given effect unless it is unfair or unreasonable. Moreover, a court will normally reject any claims that the chosen forum is unfair or inconvenient. Also, '[a] court will usually honor a mandatory forum selection clause without extensive analysis of factors relating to convenience.'" (*Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 661, quoting *Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358-359.)

"Under the modern rule, 'The parties['] agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable.'" (*Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1678, quoting Rest.2d, Conf. of Laws, § 80; accord, Annot. (1984) 31 A.L.R.4th 404; 2 Witkin, *op. cit. supra,* Jurisdiction, § 289(b), p. 696.) "Although California has a public policy in favor of access to its courts by resident plaintiffs, this is not thwarted by allowing residents to surrender this right voluntarily in the course of negotiations; '[i]n so holding we are in accord with the modern trend which favors [enforcement] of such forum selection clauses.'" (*Id,* at p. 1678, quoting *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491.)

"'[A forum-selection provision] will be disregarded if it is the result of overreaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the partic[u]lar action.' (Rest.2d, Conf. of Laws, § 80, com. a.) The *Smith* court agreed with this formulation. 'No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into *freely* and *voluntarily* by parties who have negotiated *at arms' length.* For the foregoing reasons, we conclude that

forum selection clauses are valid and may be given effect[] in the court's discretion and in the absence of a showing that enforcement ... would be *unreasonable.*'" (*Id.* at p. 1679, quoting *Smith*, *supra*, at pp. 495-496.)

"A defendant may enforce a forum-selection clause by bringing a motion pursuant to sections 410.30 and 418.10, the statutes governing forum non conveniens motions, because they are the ones which generally authorize a trial court to decline jurisdiction when unreasonably invoked and provide a procedure for the motion. Significantly, the party opposing the enforcement of a forum-selection clause (generally the plaintiff) bears the burden of proof." (*Id.* at p. 1680, internal citations omitted.)

Here, defendant contends that the court should stay or dismiss the case in California because there is a forum selection clause in the purchase order "Terms and Conditions" that defendant sent to plaintiff when defendant ordered raisins from plaintiff. (Exh. 5 to Daniel Lee decl., Purchase Order Terms and Conditions, p. 14, § 15 A.) The forum selection clause states that the venue for any disputes between the parties shall be in Bexar County, Texas. (*Ibid*.) Defendant also claims that plaintiff never objected to this provision and, instead, sent the raisins to defendant pursuant to the terms of the contract. Therefore, defendant concludes that plaintiff tacitly agreed to the forum selection provision, and as a result it cannot litigate the dispute here in California.

However, as plaintiff notes, there is no indication that plaintiff ever actually read and consented to the forum selection clause in the purchase order terms and conditions. The terms and conditions were not signed by either party, and plaintiff sent the raisins with its own separate forms and invoices, which did not contain any forum selection provisions. (Boghosian decl., ¶ 5.) The parties also never discussed a forum selection clause in their prior dealings. (*Id*. at ¶¶ 3, 4.) Defendant had simply contacted plaintiff and asked to purchase quantities of raisins, plaintiff sent a price quote, and defendant responded with a purchase order that included its terms and conditions. (*Ibid*.) However, plaintiff never indicated that it was agreeing to the terms and conditions, and instead sent its own invoices, bill of lading, and certificates of analysis. (*Ibid*.)

Thus, the evidence indicates that plaintiff did not consent to defendant's forum selection clause in the terms and conditions and, instead, it sent its own inconsistent forms that did not include a forum selection clause, which indicates that it had not agreed to defendant's terms. "Section 2207 of the California Commercial Code controls contract interpretation when the parties have exchanged conflicting forms." (*Textile Unlimited, Inc. v. A..BMH and Co., Inc.* (9th Cir. 2001) 240 F.3d 781, 787, internal citation omitted.) "Where a commercial buyer and seller seeking to make a deal exchange forms containing inconsistent provisions, California Uniform Commercial Code section 2207 governs the existence of a contract and its terms." (*Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 513.)

"As a general rule, under section 2207 the common law counteroffer becomes an acceptance if it contains a 'definite and seasonable expression of acceptance' and, between merchants, the additional terms of the 'counteroffer' become a part of the contract. (§ 2207, subds. (1), (2).) The foregoing rule does not apply if the offeree expressly conditions its acceptance on the offeror's assent to the offeree's additional terms. (§ 2207, subd. (1).) However, even if the offeree's acceptance is expressly made conditional

on the offeror's assent to the offeree's additional terms, and no such assent is given, the existence of a contract and its terms may nevertheless be inferred if the parties' conduct recognizes the existence of a contract. In such case, the terms of the contract are those on which the parties' writings agree plus any supplementary terms incorporated into the contract under any other provisions of the California Uniform Commercial Code. (§ 2207, subd. (3).)" (*Transwestern Pipeline Co. v. Monsanto Co.*, *supra*, 46 Cal.App.4th at p. 514.)

"A comment to section 2207, subdivision (3) addresses the precise situation we have here: 'In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. ... The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.' (Com., 23A West's Ann. Cal. U. Com. Code, § 2207, par. 7 (1995 pocket supp.) p. 42.) The governing rule is that one party should not be able to impose its terms and conditions on the other simply because it fired the last shot in the battle of forms. 'Instead, all of the terms on which the parties' forms do not agree drop out, and the [Uniform Commercial Code] supplies the missing terms.' (*Id.* at pp. 515–516, quoting *Diamond Fruit Growers, Inc*. v. *Krack Corp.* (1986) 794 F.2d 1440, 1444.)

"To qualify as an acceptance under § 2207(1), an offeror must 'give specific and unequivocal assent' to the supplemental terms. If the new provisos are not accepted, then no contract is formed. However, even when the parties' written expressions do not establish a binding agreement under § 2207(1), a contract may arise based upon their subsequent conduct pursuant to § 2207(3)." (*Textile Unlimited, Inc. v. A..BMH and Co., Inc.* (9th Cir. 2001) 240 F.3d 781, 787, internal citations omitted.)

Here, the purchase order terms and conditions sent by defendant to plaintiff included a provision stating that the seller would be deemed to have accepted all of the terms and conditions, which shall constitute the entire agreement of the parties unless modified in writing. (Lee decl., Exh. 5, p. 16, § 21.) Thus, defendant's terms and conditions acted as a counteroffer to plaintiff's offer to sell raisins, and any additional terms that defendant attempted to add would only apply if plaintiff specifically and unequivocally agreed to them. There is no evidence that plaintiff ever specifically or unequivocally agreed to the new terms that defendant attempted to impose, including the forum selection clause. Neither party signed the terms and conditions, and plaintiff sent its own invoices, bills of lading, and certificates of analysis that did not mention the additional terms. Thus, the evidence indicates that plaintiff did not consent to defendant's terms and conditions. Nor did the parties' past transactions and conduct indicate that plaintiff had consented to defendant's terms and conditions. While the parties still apparently agreed to a basic contract to sell raisins, defendant's additional terms and conditions were not part of the agreement that the parties reached. Instead, section 2207(2) the UCC supplied any missing terms.

Defendant's argument that the "merchant's exception" to the statute of frauds applies here because plaintiff did not object to the terms and conditions after receiving them from defendant misses the point. Plaintiff has not argued that the entire agreement is unenforceable due to the statute of frauds. In fact, plaintiff has sued for breach of the contract to purchase raisins, which indicates that it believes that there was a valid and enforceable contract. However, plaintiff maintains that the contract did not include a forum selection clause because it never consented to the defendant's additional terms

and conditions. As discussed above, plaintiff's contention is correct, and regardless of whether or not the "merchant's rule" applies here, the court will not find that the parties are required to litigate their dispute in Texas.

As a result, since plaintiff never agreed to defendant's forum selection clause, the court will not stay or dismiss the pending action in California. Instead, the court intends to deny defendant's motion and allow the action to go forward.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DTT on 5/25/2022.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Martinez v. Fresno Unified School District***
Superior Court Case No. 21CECG01017

Hearing Date: June 2, 2022 (Dept. 501)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:

To grant and sign the proposed Order. No appearance necessary.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DTT on 5/31/2022.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***In re: Devin Cornell***
Superior Court Case No. 21CECG00457

Hearing Date: June 2, 2022 (Dept. 501)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To deny the petition without prejudice unless counsel appears with new papers addressing the issues described below, which would then be considered during the hearing. Counsel will need to call and request oral argument if they intend to appear with new papers at the hearing. Otherwise, counsel shall comply with Local Rule 2.8.4, and request a new hearing and file a new Petition.

Explanation:

Item 12 of the Petition reflects total medical expenses of $9,486.24, paid expenses of $4,696.00 and no payments requested to be reimbursed by the insurer. The court previously requested further information to support the figures represented in the Petition. The Amended Petition did not include medical bills or documentation to support the amounts reflected in Item 12. Petitioner is requested to provide documentation regarding the paid medical expenses and confirming there is no reimbursement sought by the health insurer for its payments made on the minor's behalf.

The medical records attached to the Declaration on Michael F. Brown indicated on 9/28/15 that claimant's fracture is "healing." This last record mentions a prospective follow up appointment in December 2015. If the minor claimant did follow up after the 9/28/15 visit, a record of the assessment of the injury at that time is requested.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DTT on 5/31/2022.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Mata, et al. v. Ciresi, M.D., et al.***
Superior Court Case No. 20CECG03627

Hearing Date: June 2, 2022 (Dept. 501)

Motion: by Plaintiffs for Leave to Amend Complaint

Tentative Ruling:

To grant in part and deny in part. Plaintiffs are granted 10 days' leave to amend the Complaint to add punitive damage allegations and prayers for relief as to defendant Ciresi. (Code Civ. Proc., § 425.13, subd. (a).) Plaintiffs are denied leave to amend as to Athenix Physicians Group, Inc., and Athenix Body Sculpting Institute (together "Athenix"), on any cause of action. The time in which the Complaint may be amended will run from service by the clerk of the minute order.

Explanation:

Plaintiffs seek leave to amend to add claims and prayers for punitive damages against all defendants pursuant to Code of Civil Procedure section 425.13.

Plaintiffs' motion must be filed within two years after the original complaint was filed, or nine months before the date the matter is first set for trial, whichever is earlier. (Code Civ. Proc., § 425.13, subd. (a).) Here, the original Complaint was filed on December 15, 2020, and trial is set on December 5, 2022. Therefore, the deadline in this case is March 5, 2022, so the motion is timely.

No claim for punitive damages may be included in an original complaint "[i]n any action for damages arising out of the professional negligence of a health care provider." (Code Civ. Proc., § 425.13, subd. (a) [brackets added].) Instead, a punitive damages claim in such a case must be raised in an amended complaint filed with leave of court pursuant to the procedures required by Section 425.13. This statute "shift[s] to the plaintiff the procedural burden that would otherwise fall on the defendant to remove a 'frivolous' or 'unsubstantiated' claim early in the suit." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 787.)

It is undisputed that defendants are "health care providers" under the statute. Further, the phrase "arising out of professional negligence" is not limited to a malpractice action, but applies to any claim for injury, including intentional tort claims, such as battery (i.e., based on treatment different from or exceeding the consent given), and fraud or intentional infliction of emotional distress (e.g., related to the manner in which defendants performed or communicated test results). The key is that the claims are "directly related to the professional services provided" by a health care provider. (*Id*., 782.)

The motion under Section 425.13 must be supported by affidavits stating facts sufficient to support a finding that there is a "substantial probability" plaintiff will prevail

on the claim. (Code Civ. Proc., § 425.13, subd. (a).) "Substantial probability" requires plaintiff to both state and substantiate (i.e., with competent, admissible evidence) a legally sufficient claim. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719.) Thus, plaintiffs' burden on this motion is to produce evidence that, if accepted by the trier of fact, would establish a prima facie showing of "malice, oppression or fraud," bearing in mind the "clear and convincing" standard of proof required at trial. (*Ibid.*) This statutory procedure operates as a "demurrer or summary judgment in reverse," such that instead of requiring defendant to defeat a punitive damages claim by showing it is factually or legally meritless, plaintiff has the burden to state and substantiate the merits of the claim. (*Ibid*.)

The court cannot weigh conflicting affidavits or predict the likely outcome at trial. (*Id*., 709 [the trial court cannot "reject a well pled and factually supported punitive damages claim simply because the court believes the evidence is not strong enough for probable success before a jury."].)

(1) "'Malice' means conduct which is intended by the defendant to cause injury to plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others; (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Code Civ. Proc., § 3294, subd. (c).)

Here, plaintiffs argue that Dr. Ciresi's concealment of his probationary status was both fraudulent and conducted with malice, with an intent to deprive Ms. Mata of her legal right make an informed decision to consent to surgeries. Plaintiffs further assert that Athenix's concealment of Dr. Ciresi's probationary status was fraudulent for the same reason. Plaintiffs present evidence only to confirm Dr. Ciresi's probationary status[1] and Athenix's statement that the surgeons practicing at their facilities are thoroughly evaluated, highly experienced and well-trained, and that Dr. Ciresi was such a surgeon.

Plaintiffs assert that had Ms. Mata known of Dr. Ciresi's probationary status, she would not have consented to the surgeries. Defendants argue that they had no statutory duty to inform plaintiffs of Dr. Ciresi's probationary status.

The court takes judicial notice that the Decision of the Medical Board of California was ordered on June 25, 2019, and became effective on July 25, 2019. Business and Professions Code section 2228.1 provides, in relevant part:

[1] Plaintiffs' request for judicial notice of the Decision of the Medical Board of California (Exhibit B) is granted only to the extent that such records exist and the date such records were ordered and came in effect, not for the truth of their factual findings. (Evid. Code, § 452, subd. (c); *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405 ["[a] court may take judicial notice of [another] court's action, but may not use it to prove the truth of the facts found…" brackets added].)

> On and after July 1, 2019, except as otherwise provided in subdivision (c), the board… shall require a licensee to provide a separate disclosure that includes the licensee's probation status, the length of the probation, the probation end date, all practice restrictions placed on the licensee by the board, the board's telephone number, and an explanation of how the patient can find further information on the licensee's probation on the licensee's profile page on the board's online license information internet website, to a patient or the patient's guardian or health care surrogate before the patient's first visit following the probationary order while the licensee is on probation *pursuant to a probationary order made on and after July 1, 2019…*

(Bus. & Prof. Code, § 2228.1, subd. (a) [emphasis added].)

As defendants point out, Dr. Ciresi's probationary order was entered on June 25, 2019, before the statutory effective date of July 1, 2019. (Bus. & Prof. Code, § 2228.1, subd. (a).) Although, as plaintiffs allege, the probationary order did not come into effect until July 25, 2019, after the statutory effective date, plaintiffs have not provided any authority indicating that an individual whose probationary order was entered before July 1, 2019, but became effective after July 1, 2019, is subject to the rules under Business and Professions Code section 2228.1. Nor have plaintiffs provided authority showing that the statute was intended to be retroactive. As such, by the plain language of the statute, Business & Professions Code section 2228.1 is inapplicable in this action. Moreover, to be completely accurate, the statute does not dictate what the doctor must do, but rather dictates what *the board* must require the licensee to do.

Nonetheless, plaintiffs have alleged that defendants had a fiduciary duty to inform. There is a well-established common law fiduciary relationship between a health care provider and a patient. The California Supreme Court has unanimously declared that "a physician who is seeking a patient's consent for a medical procedure must, in order to satisfy his fiduciary duty and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 131–132.) The Supreme Court has also held that the determination of whether a challenged disclosure was reasonably sufficient is not generally a matter of law, but is one for the jury to decide. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1184-1185.) Thus, while an issue may be raised as to whether defendants' disclosures, or rather nondisclosures, was reasonably sufficient to convey information material to make an informed treatment decision, this is not an issue that may be challenged during the pleading stage of litigation.[2]

Next, Athenix argues that plaintiffs fail to allege fraud with the requisite specificity. Although Athenix is correct in its assertion that a cause of action for "[f]raud must be specifically pleaded…" (Lazar v. Superior Court (1996) 12 Cal.App.4th 631, 645 [brackets added].) a plaintiff is only required to allege in her complaint the "ultimate facts" upon

[2] Based on the present findings, the court does not address Dr. Ciresi's further arguments pertaining to his sobriety and salary.

which his claim for punitive damages is based. (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 279, fn. 4.)

Athenix further argues that plaintiffs have failed to provide evidence establishing that Athenix had knowledge of the concealment, and that plaintiffs suffered actual damages. Plaintiff argues that pursuant to the terms of his probationary order, Dr. Ciresi was required to notify his employer of his probation. As provided above, the court declines to judicially notice the truth of the matters in the probationary order, and even if there were evidence to support this claim, Dr. Ciresi's *requirement to notify* his employer does not conclusively support a finding that Dr. Ciresi did, in fact, notify Athenix of his probationary status. Plaintiff also contends that the Accusation and Petition to Revoke Probation, submitted in conjunction with the Decision of the Medical Board of California for judicial notice, indicates that medical board notified Dr. Ciresi's employer when he violated his probationary order on or about February 13, 2019. Again, the court declines to judicially notice the truth of the matters in this request.[3] Thus, plaintiff has not sufficiently shown that Athenix had knowledge of Dr. Ciresi's probationary status.

As relates to Athenix's argument that plaintiff has failed to submit evidence of her actual damages, Athenix provides no authority for the proposition that a motion to amend under Code of Civil Procedure section 425.13 requires plaintiffs to present expert testimony as to breach and causation in addition to presenting evidence of oppression, fraud or malice to support punitive damages. None of the cases cited dealt with a motion to amend under section 425.13. Cases dealing with this statute clearly indicate this motion requires plaintiffs to produce evidence that, if accepted by the trier of fact, would establish a prima facie showing of "malice, oppression or fraud," bearing in mind the "clear and convincing" standard of proof required at trial. (*Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 539.) Thus, plaintiffs are not required to show proof of breach and causation at this juncture.

Since plaintiff has not sufficiently shown that Athenix had knowledge of Dr. Ciresi's probationary status, the court intends to grant leave to amend to add punitive damage allegations and prayers as to Dr. Ciresi only.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DTT on 5/31/2022.
(Judge's initials) (Date)

[3] Athenix's Evidentiary Objections to the Declaration of Lydia Victoria Mata are sustained as to Objection Nos. 4, 6, 8 and 9. As to the remaining evidentiary objections, the court declines to rule on them, as the evidence was not material to the disposition of the motion. (Code Civ. Proc., § 437c, subd. (q).)