Superior Court of the State of California
County of Orange

Tentative Rulings
Law and Motion Calendar
Department C23
Honorable David J. Hesseltine

Hearing Date and Time: April 15, 2024, at 11:00 a.m.

Court Reporters: Official court reporters (i.e., court reporters employed by the court) are **NOT** typically provided for law and motion matters in this department. If a party desires a record of a law and motion proceeding, it is that party's responsibility to provide a court reporter, unless the party has a fee waiver and timely requests a court reporter in advance of the hearing (see link at end of this paragraph for further information). Parties must comply with the Court's policy on the use of privately retained court reporters, which may be found at the following link: **Civil Court Reporter Pooling**. For additional information regarding court reporter availability, please visit the court's website at **Court Reporter Interpreter Services**.

Tentative Rulings: The court endeavors to post tentative rulings on the court's website no later than 12:00 noon on the date of the afternoon hearing. Tentative rulings will be posted case by case on a rolling basis as they become available. Jury trials and other ongoing proceedings, however, may prevent the timely posting of tentative rulings, and a tentative ruling may not be posted in every case. Please do not call the department for tentative rulings if one has not been posted in your case. **The court will not entertain a request to continue a hearing or any document filed after the court has posted a tentative ruling.**

Submitting on Tentative Rulings: If all counsel intend to submit on the tentative ruling and do not desire oral argument, please advise the courtroom clerk or courtroom attendant by calling (657) 622-5223. Please do not call the department unless **ALL** parties submit on the tentative ruling. If all sides submit on the tentative ruling and advise the court, the tentative ruling shall become the court's final ruling and the prevailing party shall give notice of the ruling and prepare an order for the court's signature if appropriate under California Rules of Court, rule 3.1312.

Non-Appearances: If no one appears for the hearing and the court has not been notified that all parties submit on the tentative ruling, the court shall determine whether the matter is taken off calendar or the tentative ruling becomes the final ruling. The court also may make a different order at the hearing. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 442, fn. 1.)

Appearances: Department C23 conducts non-evidentiary proceedings, such as law and motion hearings, remotely by Zoom videoconference pursuant to Code of Civil Procedure section 367.75 and Orange County Local Rule 375. Any party or attorney, however, may appear in person by coming to Department C23 at the Central Justice Center, located at 700 Civic Center Drive West in Santa Ana, California. All counsel and self-represented parties appearing in-person must check in with the courtroom clerk or courtroom attendant before the designated hearing time.

All counsel and self-represented parties appearing remotely must check-in online through the court's civil video appearance website at

https://www.occourts.org/media-relations/civil.html before the designated hearing time. Once the online check-in is completed, participants will be prompted to join the courtroom's Zoom hearing session. Participants will initially be directed to a virtual waiting room pending the start of their specific video hearing. Check-in instructions and instructional video are available at **https://www.occourts.org/media-relations/aci.html**. The Court's "Appearance Procedures and Information--Civil Unlimited and Complex" and "Guidelines for Remote Appearances" also are available at **https://www.occourts.org/media-relations/aci.html**. Those procedures and guidelines will be strictly enforced.

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#	Case Name	Tentative
1.	Birch Gold Group v. Alexander	Before the court is the motion of defendant Smith LC (Smith) for issue, evidentiary, and terminating sanctions for violations of court order and discovery abuses, to compel further responses, and for monetary sanctions against plaintiff Birch Gold Group, LP (Plaintiff). The motion is **GRANTED IN PART** and **DENIED IN PART** as set forth below. Initially, the court notes Plaintiff's apparent opposition is untimely. The opposition was due by April 2, 2024, but was not filed until nearly 9:00 p.m. on April 8, 2024—i.e., nearly a week late and after the close of business on the same day Smith's reply was due. Plaintiff provides no explanation or justification for failing to timely serve the opposition, and the late filing of the opposition has deprived Smith of its opportunity to file anything more than an untimely, truncated opposition. The court therefore exercises it discretion to refuse to consider the opposition. (Cal. Rules of Court, rule 3.1300(d); *Kapitanski v. Von's Grocery Co., Inc.* (1983) 146 Cal.App.3d 29, 32-33.) Nonetheless, even if the court were to consider Plaintiff's filing, the court's ruling on the merits of the motion would be the same. Indeed, it is not even clear the opposition was intended to respond to Smith's motion. Although it bears the hearing date for this motion, the opposition is captioned as responding

		to the terminating sanctions motion filed by defendant Stephanie Alexander (Alexander) that is set for hearing in June. Moreover, although the opposition and its supporting declaration make some references to Smith's motion, it appears to substantively respond to Alexander's motion, not Smith's. Indeed, the opposition only states an opposition to imposition of a terminating sanction, which is the only relief sought by Alexander's motion. Smith's motion also, or in the alternative, seeks issue, evidentiary, and/or monetary sanctions or an order compelling further responses to the underlying discovery requests. The opposition does not address these requests in any way. Moreover, the opposition does not include a responsive separate statement. Smith filed a 101-page separate statement identifying the deficiencies in Plaintiff's most recent responses, but Plaintiff makes no effort to respond or defend its responses. Finally, the excuses the opposition offers are insufficient. It claims the client representative contracted COVID, but provides no admissible evidence of that, and nonetheless Smith provided Plaintiff additional time to respond—and, indeed, did not file this motion until after the client representative had recovered and some supplemental responses had been provided. Plaintiff claims there was a turnover of key personnel at Plaintiff, but again offers no admissible evidence to support that claim. Finally, Plaintiff claims the lead attorney and paralegal left the firm representing Plaintiff. Plaintiff, however, offers no justification as to why it has not complied with the court's orders in the six months that have elapsed since this motion was filed. There have been several months since the lead attorney and paralegal left the firm, and they were not the only ones staffing the case. The court also must initially note the truncated reply Plaintiff filed improperly cites three unpublished superior court decisions. The Rules of Court prohibit citation to unpublished appellate court and superior court appellate division cases. (Cal. Rules of Court, rule 8.115) Citation to unpublished trial court decision also should not be made, and they clearly have no precedential value. (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1148.) The court refuses to consider them. Moreover, counsel is cautioned that citation to unpublished decisions may support an award of

		sanctions if it continues. (See *People v. Williams* (2009) 176 Cal.App.4th 1521, 1529; *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 885.) Smith seeks sanctions for Plaintiff's failure to comply with the court's order adopting the discovery referee's recommendations and ordering Plaintiff to provide further responses to form interrogatories, special interrogatories, requests for admissions, and requests for production of documents (including the production of documents). The court also ordered Plaintiff to pay monetary sanctions and the discovery referee's fees, which also apparently has not occurred. Code of Civil Procedure sections 2030.300(e) [interrogatories], 2031.310(i) [production requests], and 2033.290(e) [requests for admissions], all provide that when a party fails to obey an order compelling further responses to discovery, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). These sections also authorize the imposition of a monetary sanction in lieu of, or in addition to, any other sanction. Section 2023.010(g) defines misuses of the discovery process to include disobeying a court order to provide discovery. "The trial court has broad discretion in selecting discovery sanctions, subject to reversal only for abuse. [Citations.] The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should '"attempt [] to tailor the sanction to the harm caused by the withheld discovery."' [Citation.] The trial court cannot impose sanctions for misuse of the discovery process as a punishment. [Citations.] "The discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination. 'Discovery sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery."' [Citation.] If a lesser sanction fails to curb misuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions until the sanction is reached that will curb

		the abuse. 'A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.' [Citation.]" (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992.) "Code of Civil Procedure section 2023.030, subdivision (c), provides that the trial court may sanction any party engaging in a misuse of the discovery process by prohibiting that party from introducing designated matters in evidence. A failure to respond to an authorized method of discovery may constitute misuse of the discovery process. [Citation.] Nevertheless, absent unusual circumstances, such as repeated and egregious discovery abuses, two facts are generally prerequisite to the imposition of a nonmonetary sanction. There must be a failure to comply with a court order and the failure must be willful. [Citation.]" (*Lee v. Lee* (2009) 175 Cal.App.4th 1553, 1559.) The factors to be considered in deciding whether to impose a sanction and which sanction to impose include the following: (1) The time that has elapsed since the discovery was served; (2) Whether the party received extensions of time to answer or respond; (3) The number of discovery requests and the burden of replying; (4) The importance of the information sought; (5) Whether the answering party acted in good faith and with reasonable diligence—i.e., whether the answering party was aware of the duty to furnish the requested information and had the ability to do so; (6) Whether the answers supplied were evasive or incomplete; (7) The number of questions remaining unanswered; (8) Whether the unanswered questions sought information that was difficult to obtain; (9) The existence of prior court orders compelling discovery and the answering party's compliance with them; (10) Whether the party was unable to comply with previous orders re discovery; (11) Whether an order allowing more time to respond would enable the responding party to supply the necessary information; and (12) Whether some sanction short of dismissal or default would be appropriate to the dereliction. (Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2023) ¶8:2205.)

		Here, considering all these factors, the court finds Plaintiff has disobeyed the prior discovery orders and that disobedience is willful. The underlying discovery was served in 2021 and has been the subject of considerable litigation. The discovery referee found Plaintiff's prior responses and production inadequate and worthy of sanctions. The court agreed and adopted the discovery referee's recommendation as to the discovery and sanctions. Plaintiff has not responded to all the requests for which further responses were ordered and it has not produced the additional documents. The further responses Plaintiff has provided are non-responsive and evasive. As explained above, Plaintiff has made no attempt to justify its conduct or the adequacy of the responses it has provided despite have considerable time to do so. The information sought goes to the heart of Smith's ability to understand Plaintiff's claims and defend against them. Indeed, Smith has set forth a persuasive basis for imposing sanctions against Plaintiff, and Plaintiff has provided no meaningful defense. The court's focus is on the failure to provide the underlying discovery, not on the alleged failure to pay sanctions and the referee's fees. With a signed order, the sanctions are enforceable as a money judgment, and therefore do not weigh in the court's analysis. Based on the foregoing, the court finds a terminating or issue sanctions are not appropriate at this junction under the governing authorities, and therefore the motion is **DENIED as to the request for terminating and issue sanctions**. The motion, however, is **GRANTED as to the request for evidentiary sanctions,** and Plaintiff is hereby prohibited from offering or attempting to introduce any facts, documents, testimony, or evidence of any kind on the following subjects unless the specific fact, document, witness, or evidence was disclosed to Smith by Plaintiff during the discovery process before April 15, 2024 (i.e., the date of the hearing on this motion): (1) any malpractice attributable to Smith; (2) any malpractice committed by Alexander after she joined Smith in or about April 2017; (3) any lack of awareness by Plaintiff as of April 30, 2018, that Smith had represented Plaintiff; and (4) any lack of awareness by Plaintiff as of August 24, 2020, that Smith had represented Plaintiff.

		As for monetary sanctions, the request is **GRANTED**. For the reasons stated above, the court finds Plaintiff failed to establish it has acted with substantial justification or that the imposition of monetary sanctions otherwise would be unjust even if the opposition is considered. The court finds $6,430 to be the appropriate amount of sanctions based on the hourly rate of $245, 26 hours of time, and a $60 filing fee. These monetary sanctions are awarded against Plaintiff and Plaintiff is ordered to pay them to Smith, through its counsel, within 30 days. Smith's counsel is ordered to give notice of this ruling.
2.		OFF CALENDAR
3.		OFF CALENDAR
4.	Jeyaprakash v. New Skin and Body Aesthetics, Inc.	Before the court are three demurrers to the first amended complaint (FAC) of plaintiff Tharini Jeyaprakash (Plaintiff) filed by (1) defendant Suwan Cheong named as Doe 1 (Cheong), (2) defendant Nader Mirhoseni, M.D., named as Doe 2 (Dr. Mirhoseni), and (3) defendant Taylor Pollei, M.D., named as Doe 3 (Dr. Pollei) (collectively, Cheong, Mirhoseni, and Pollei are referred to as Defendants). Although Defendants filed three separate demurrers, the demurrers are virtually identical and assert the same challenges to the FAC. As such, the demurrers will be addressed together with any significant distinctions highlighted. Defendants' challenge both the first cause of action for medical negligence and the second cause of action for fraud on the ground "[Defendants are] . . improper doe defendant[s]. (Code of Civil Procedure section 474.)" (Demurrers, p. 3, lines 5, 9.) Whether a defendant is a proper doe defendant, however, is not a permissible ground for demurrer. The permissible grounds for demurrer are set forth in Code of Civil Procedure section 430.10, and do not include "improper doe defendant." Moreover, whether Plaintiff was ignorant of Defendants identities or involvement in this matter prior to filing the FAC is not a defect that appears on the face of the pleading. This is demonstrated by Defendants' reliance of deposition testimony to

		establish Plaintiff alleged knowledge of Defendants' identities and involvement. Consideration of extrinsic evidence on demurrer is improper. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Defendants do not cite any authority authorizing this challenge on a demurrer. Indeed, the cases Defendants do cite are either summary judgment or trial cases. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937 (summary judgment); *Hahn v. New York Air Brake LLC* (2022) 77 Cal.App.5th 895 (summary judgment); *Fuller v. Tucker* (2000) 84 Cal.App.4th 1163 (bifurcated trial).) Finally, as to Cheong, the face of the FAC does demonstrate Plaintiff's knowledge of her identity, but as Defendants recognize, the phrase "ignorant of the name of a defendant" in Code of Civil Procedure section 474 is broadly interpreted to mean not only ignorant of the defendant's identity, but also ignorant of the facts giving rise to a cause of action against that defendant. (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170.) In the opposition, Plaintiff argues summarily she discovered facts giving rise to the causes of action against Cheong after conducting discovery. That argument, however, is premised on improper extrinsic evidence that cannot be considered on a demurrer. Indeed, the extent of Plaintiff's knowledge is a factual question incapable of resolution on demurrer. In the reply, Cheong argues "the applicable one-year statute of limitations has run," citing to Code of Civil Procedure section 340.5, because Plaintiff has been aware of Cheong's identity and involvement since approximately October 2021. This statute of limitations argument, however, was not raised in the demurrer and is thus improper new argument in the reply, which the court will not consider. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38.) Based on the foregoing, Defendants' challenge to both the first and second causes of action on the ground Defendants are improper doe defendants is **OVERRULED**. By overruling this challenge to these causes of action, the court does not express any opinion on the merits of this challenge. Rather, the court simply rules this challenge may not be

		properly raised on a demurrer because it is not an authorized basis for demurrer and improperly requires consideration of extrinsic evidence. Defendants also separately challenge the second cause of action for fraud on the ground it fails to allege sufficient specific facts to state a cause of action. The elements of fraud that must be pleaded are: (a) misrepresentation; (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363.) Every element of the cause of action for fraud must be alleged in full, factually, and specifically. The policy of liberal construction of pleading will not be invoked to sustain a pleading defective in any material respect. (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1332.) Plaintiff fails to allege this cause of action with the required specificity. Plaintiff's allegations group all defendants together and alleges they all committed each act allegedly giving rise to this cause of action. That is not sufficient. Plaintiff must specifically allege who made each representation, when and how they made it, and to whom they made it. If one defendant is vicariously liable for another defendant making a representation, then Plaintiff must allege who made the representation and how another defendant is liable for it. Much more specificity is required to state this cause of action against all four defendants. Accordingly, each of Defendants' demurrers to the second cause of action for fraud is **SUSTAINED WITH 10 DAYS LEAVE TO AMEND**. Defendants' counsel is ordered to give notice.
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