

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/14/18 TIME: 1:30 P.M. DEPT: B CASE NO: CV1600577

PRESIDING: HON. ROY O. CHERNUS

REPORTER:

CLERK: CHRISTINA ASLESON

PLAINTIFF: MICHAEL HOLT, ET AL

vs.

DEFENDANT: OCWEN LOAN
SERVICING, LLC, ET AL

NATURE OF PROCEEDINGS: NOTICE OF MOTION – AND MOTION TO COMPEL COMPLIANCE AND TO COMPEL FURTHER RESPONSES TO SPECIAL INTERROGATORIES, ETC. [PLTF] JILL CORDOVA-HOLT [PLTF] MICHAEL HOLT

RULING

Good cause appearing, Plaintiffs' unopposed Motion to Compel Compliance and to Compel Further Responses to Special Interrogatories, Form Interrogatories, and Request for Production, Set One is granted. Defendant Ocwen Loan Servicing, LLC shall fully comply with all discovery without objection within ten (10) days from the date of notice of entry of this order.

In addition, Defendant Ocwen Loan Servicing, LLC shall pay sanctions in the amount of \$19,947.50 to Plaintiffs' attorney within thirty (30) days from the date of notice of entry of this order. CCP §2023.030(a).

Parties must comply with Marin County Superior Court Local Rules, Rule 1.10(B) to contest the tentative decision. In the event that no party requests oral argument in accordance with Rule 1.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.11.

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 02/14/18 TIME: 1:30 P.M. DEPT: B CASE NO: CV1703040

PRESIDING: HON. ROY O. CHERNUS

REPORTER:

CLERK: CHRISTINA ASLESON

PLAINTIFF: FRANK MULBERG

vs.

DEFENDANT: DENISE WEINSTEIN, ET
AL

NATURE OF PROCEEDINGS: 1) HEARING ON DEMURRER – TO CROSS-COMPLAINANTS’ FIRST AMENDED CROSS-COMPLAINT [CRDF] BRETT MULBERG
2) HEARING ON DEMURRER [CRDF] FRANK MULBERG [CRDF] MULBERG LAW FIRM, AN UNKNOWN ENTITY
3) MOTION TO STRIKE [CRDF] FRANK MULBERG [CRDF] MULBERG LAW FIRM, AN UNKNOWN ENTITY

RULING

The demurrer by Cross-Defendant Brett Mulberg to the First Amended Cross-Complaint is sustained as to First Cause of Action, in part as to Cross-Complainants CP Shades and David Weinstein, and the Third, Fourth, Fifth and Sixth Causes of Action. The demurrer is overruled as to the Second Cause of Action.

The demurrer by Cross-Defendants Mulberg Law Firm and Frank Mulberg is sustained as to the First Cause of Action, in part as to Cross-Complainants CP Shades and David Weinstein, and the Fourth, Fifth and Sixth Causes of Action, and is overruled as to the Second and Third Causes of Action. Mulberg Law Firm/Frank Mulberg’s motion to strike ¶s 51, 53, 69 and 71 of the First Amended Cross-Complaint is rendered moot by the order sustaining the demurrer to the Fourth and Fifth Causes of Action.

All cross-defendants are granted 20 days leave to amend from the date of notice of entry of this order. Cross-Complainants CP Shades and David Weinstein shall set forth any malpractice claims as separate causes of action.

First Cause of Action: Professional Negligence-Legal Malpractice

Cross-Complainants CP Shades and David Weinstein fail to allege facts sufficient to support the elements of breach, causation and damages separate and distinct or apart from the Meyer Litigation. All of the specific damages claimed in the First Cause of Action involve the Meyer Litigation except “inflated and fraudulent invoices.” (§22.) *Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1060, explains that overpayment of fees does not support tort damages for negligence on the theory that the client paid more than the value of the legal services he received, but only contract damages.

Second Cause of Action: Breach of Fiduciary Duty

“A breach of fiduciary duty is a specie of tort distinct from a cause of action for professional negligence” that involves obligations of loyalty, confidentiality and fidelity. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086; *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1102.) In general, a fiduciary relationship is founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and it precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed. (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29-30.)

The Second Cause of Action does not simply reassert the allegations in the First Cause of Action verbatim, as the Mulbergs suggest, although there is substantial overlap between the two causes of action as to the thirteen delineated acts of negligence, which are essentially the same. However, beyond these acts of negligence, the Second Cause of Action emphasizes the Mulbergs alleged “fraudulent billing practices” based on the submittal of “false and fraudulent invoices . . . for work that was never started, not completed, or not handled in a competent manner” and billing at the highest senior attorney rate for work done by Brett Mulberg, an associate. (First Amended Cross-Complaint, ¶s 26-30.)

This Court finds that knowingly submitting false invoices, billing for services that were not done and billing at an excessive hourly rate supports the second cause of action for breach of fiduciary duty separate and apart from the first cause of action for professional negligence.

Third Cause of Action: Breach of Contract

It appears Cross-Complainants are pleading alternative claims for negligence and breach of contract based on the same facts. This is not unusual. (See e.g. *Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145.) However, the written contract attached as Exhibit 1 to the First Amended Cross-Complaint identifies “The Mulberg Law Firm” as the party to the agreement, not Brett Mulberg. Facts appearing in exhibits attached to a complaint are given precedence over inconsistent facts alleged in the body of the complaint. (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.)

Fourth Cause of Action: Fraud**Fifth Cause of Action: Fraudulent Inducement**

The fourth cause of action lacks specificity alleging generalized allegations of misrepresentation occurring over a long period of time. The fourth cause of action lumps together a variety of conduct-- fraudulent billing practices, misrepresentations regarding work done and failure to inform cross-complainants concerning the status of their cases, and misrepresentations

concerning cross-defendants skills, experience, capabilities and legal knowledge in order to secure an inflated hourly rate, but fails to allege facts showing “how, when, where, to whom, and by what means” the purported false representations were tendered. For example, cross-complainants’ allegation that “each and every invoice from Cross-Defendants . . . were fraudulent” is nothing more than a legal conclusion. (FACC, ¶40.) Cross-complainants cite “examples” of “fraudulent billing practices” without explaining exactly how or why the cited invoices are false and fraudulent. (Id.)

Although the fifth cause of action for fraudulent inducement is more limited than the fourth cause of action, focusing on the time period “during negotiation and . . . entry into the Agreement,” (¶ 55) it still suffers from the same vagueness as the fourth cause of action as it fails to identify the precise misrepresentations at issue along with facts explaining how, when, where, to whom and by what means they were tendered.

Sixth Cause of Action: Unjust Enrichment

Cross-defendants demur that there is no cause of action for unjust enrichment in California, and that it is merely duplicative of the breach of contract claim. Cross-complainants contend that California courts recognize a cause of action for unjust enrichment as a quasi-contractual claim seeking restitution that may be pled as an alternative theory of recovery.

It has been said that the term “unjust enrichment” is synonymous with restitution, and there is no particular form of pleading necessary to invoke the doctrine of restitution. (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1314-1315.) A plaintiff may not, however, pursue or recover on a quasi-contract claim if the parties have an enforceable agreement regarding a particular subject matter. (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1388.)

In *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388, the Court explained there are several potential bases for a cause of action seeking restitution:

- In lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason; or
- Where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct, plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory.

In *Klein, supra*, cited by cross-defendants, the Court ruled that the trial court correctly sustained Chevron’s demurrer to the plaintiffs’ unjust enrichment claim:

Plaintiffs’ unjust enrichment claim does not allege that this contract is unenforceable or that the parties did not have a contract governing the sale of motor fuel. Indeed, the plaintiffs’ pleadings and briefs do not provide any explanation as to why the consumer sales agreement referenced in their breach of contract claim might be unenforceable or otherwise not qualify as a contract. Although a plaintiff may plead inconsistent claims that allege both the existence of an enforceable agreement and the absence of an enforceable agreement, that is not what occurred here. Instead, plaintiffs’ breach of contract claim pleaded the

existence of an enforceable agreement and their unjust enrichment claim did not deny the existence or enforceability of that agreement. Plaintiffs are therefore precluded from asserting a quasi-contract claim under the theory of unjust enrichment. (202 Cal.App.4th at 1389-90, citing *California Medical, supra*, 94 Cal.App.4th at pp. 173-174, 114 Cal.Rptr.2d 109; *Durell, supra*, 183 Cal.App.4th at p. 1370, 108 Cal.Rptr.3d 682.)

Similarly here, cross-complainants' purported quasi-contract/unjust enrichment claim is not pleaded in the alternative to their breach of contract claim and does not deny the existence or enforceability of that agreement.

Parties must comply with Marin County Superior Court Local Rules, Rule 1.10(B) to contest the tentative decision. In the event that no party requests oral argument in accordance with Rule 1.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.11.