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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER BAYRE CHAMBERLIN, Plaintiff-Appellant, v. HARTOG, BAER & HAND, APC; DAVID WALTER BAER; JOHN A. HARTOG; MARGARET M. HAND, Defendants-Appellees, v. COLDWELL BANKER REALTY, Third-Party Defendant.	No. 22-16049 D.C. No. 3:19-cv-08243-JCS MEMORANDUM* (Filed Feb. 24, 2023)

Appeal from the United States District Court
for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding**

Submitted February 14, 2023***

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: FERNANDEZ, FRIEDLAND, and H.A. THOMAS, Circuit Judges.

Christopher Bayre Chamberlin appeals pro se from the district court's partial judgment in his diversity action alleging state law claims. Because the district court certified its interlocutory orders under Federal Rule of Civil Procedure 54(b), we have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's ruling on cross-motions for summary judgment. *Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016). We affirm.

The district court properly granted partial summary judgment to Chamberlin on his negligent malpractice claim only as to the award of appellate costs. Chamberlin's $2,831.91 award is undisputed, and Chamberlin failed to otherwise raise a genuine dispute of material fact as to whether defendants' other actions breached a duty or whether the failure to appeal timely caused him other damages. *See Coscia v. McKenna & Cuneo*, 25 P.3d 670, 672 (Cal. 2001) (stating the elements of a civil legal malpractice claim); *Namikas v. Miller*, 171 Cal. Rptr. 3d 23, 29 (Ct. App. 2014) (explaining that causation and damages are closely linked and difficult to prove in legal malpractice cases).

The district court properly granted summary judgment on the issue of punitive damages because Chamberlin failed raise a genuine dispute of material fact as to whether defendants' actions merited such damages. *See Ferguson v. Lieff, Cabraser, Heimann, & Bernstein*,

69 P.3d 965, 974 n.3 (Cal. 2003) (explaining that punitive damages require that an attorney's conduct constitutes "oppression, fraud, or malice" (quoting Cal. Civ. Code § 3294(a))).

The district court properly dismissed Chamberlin's remaining claims, arising from defendants' failure to disclose an alleged conflict of interest, because Chamberlin failed to allege facts sufficient to show that defendants engaged in conflicted representation. *See* Cal. Rules Pro. Conduct 3-310 (current version at Cal. Rules Pro. Conduct 1.7) (requiring disclosure where a "member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter").

We lack jurisdiction to consider claims other than those certified in the district court's Rule 54(b) order and issues not determinative of entire claims. *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 179 n.1 (9th Cir. 1989) (holding that no appellate jurisdiction exists over claims the district court did not include in its Rule 54(b) order); *see also Schudel v. Gen. Elec. Co.*, 120 F.3d 991, 994 (9th Cir. 1997), *abrogated on other grounds by Weisgram v. Marley Co.*, 528 U.S. 440, 453 (2000).

We reject as without merit Chamberlin's contention that the district court was biased or showed favoritism to defendants.

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CHRISTOPHER BAYRE CHAMBERLIN, *Plaintiff* v. HARTOG, BAER & HAND, APC; DAVID WALTER BAER; ESQ., JOHN A. HARTOG; ESQ., AND MARGARET M. HAND, ESQ., AND DOES 1-100, *Defendants*	Case No: CV19-8243-JCS **~~[PROPOSED]~~ RULE 54(b) JUDGMENT** (Filed Jun. 24, 2022) Judge: Joseph C. Spero Complaint Filed: 12/18/19 Amended Complaint Filed: May 29, 2020 Crossclaim Filed: 2/24/20 Trial Date: None Set

HARTOG, BAER & HAND, A PROFESSIONAL CORPORATION,

Cross-Claimant

v.

CHRISTOPHER BAYRE CHAMBERLIN,

Cross-Defendant

On December 18, 2019, Plaintiff filed a Verified Complaint against Defendants Hartog Baer & Hand, A Professional Corporation ("HBH"), David Walter Baer, John A. Hartog and Margaret M. Hand. (ECF. No. 1.)

On May 29, 2020, Plaintiff filed a First Amended Verified Complaint. (Dkt. No. 47.)

On September 1, 2020, the Court entered Order Regarding Motion to Dismiss in Part First Amended Complaint. (Dkt. No. 60, the "**September 2020 Dismissal**.") The Court dismissed, with prejudice, Plaintiff's First, Second, Third, Fourth and Fifth Causes of Action for Declaratory Judgment, Fraudulent Inducement, Breach of Fiduciary Duty, Breach of Duty of Loyalty, and Intentional Professional Malpractice, respectively. The Court dismissed, with prejudice, Defendant Margaret M. Hand. Following the September 2020 Dismissal, the only remaining claim by Plaintiff was his Sixth Cause of Action for Negligent

Professional Malpractice against Defendants HBH, David Walter Baer and John A. Hartog.

On February 22, 2022, the Court issued Order Regarding Motion for Summary Judgment and Motion to Exclude Expert Testimony. (Dkt. No. 125, the "**MSJ Order**".) Plaintiff's Sixth Cause of Action for Negligent Professional Malpractice was resolved in the MSJ Order, in part, as follows:

> "[Plaintiff's] motion for summary judgment is GRANTED as to his malpractice claim with respect to the $2,831.91 award of costs against him . . . Defendants' motion for summary judgment is GRANTED as to all other aspects of Chamberlin's malpractice claim . . . The parties' motions for summary judgment are otherwise DENIED." (Dkt. 125 at 40:10-14.)

On May 12, 2022, the Court issued an Order Denying [131] Motion for Reconsideration and granted summary judgment *sua sponte* that Plaintiff cannot recover punitive damages. (Dkt. 143, the "**Punitive Damages Dismissal**.")

In accordance with the September 2020 Dismissal, MSJ Order and Punitive Damages Dismissal, the Clerk shall forthwith enter Judgment as follows:

1. Judgment is entered in favor of Defendant Margaret M. Hand and against Plaintiff Christopher Bayer Chamberlin on Plaintiff's First Amended Verified Complaint;

2. Judgment is entered in favor of Defendant John A. Hartog and against Plaintiff Christopher Bayer Chamberlin on Plaintiff's First Amended Verified Complaint;

3. Judgment is entered in favor of Plaintiff Christopher Bayer Chamberlin and against Defendants HBH, and David W. Baer on Plaintiff's Sixth Cause of Action for Negligent Professional Malpractice in the amount of $2,831.91. Judgement is entered in favor of Defendants HBH, and David W. Baer on all other causes of action in Plaintiff's First Amended Verified Complaint; and

4. Judgment is entered in favor of Defendants and against Plaintiff on Plaintiff's prayer for punitive damages.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: June 24, 2022 /s/ Joseph C. Spero
THE HONORABLE
JOSEPH C. SPERO
Chief Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER BAYRE CHAMBERLIN, Plaintiff, v. HARTOG, BAER & HAND, APC, et al., Defendants.	Case No. 19-cv-08243-JCS **ORDER REGARDING PUNITIVE DAMAGES AND MOTION FOR RECONSIDERATION** (Filed May 12, 2022) Re: Dkt. Nos. 125, 131

I. INTRODUCTION

Plaintiff Christopher Chamberlin, pro se, brought this action asserting negligent legal malpractice (and other claims that have since been dismissed) against his former attorneys in a probate matter concerning his late mother's estate. The remaining defendants at this point in the case are David Baer and Hartog, Baer & Hand, APC ("HBH"). The Court previously granted summary judgment in Chamberlin's favor with respect to a $2,831.91 award of costs against him, and granted summary judgment for Defendants on all other aspects of Chamberlin's claim except for punitive damages, which they failed to address in their motion. *See generally* Order re Mots. for Summ. J. & Mot. to Exclude Expert Test. ("MSJ Order," dkt. 125).[1] The Court ordered

[1] *Chamberlin v. Hartog, Baer & Hand, APC*, No. 19-cv-08243-JCS, 2022 WL 526157 (N.D. Cal. Feb. 22, 2022). Citations herein

Chamberlin to show cause why summary judgment should not be entered against him sua sponte under Rule 56(f) as to punitive damages. *Id.* at 33–34. The Court also granted Chamberlin leave to file a motion for reconsideration addressing whether the Court erred in treating the likely outcome of an appeal in the probate matter as a question of fact requiring expert testimony, and if so, how that affects the outcome of the previous motion.

The Court finds these matters suitable for resolution without oral argument and VACATES the law and motion hearings previously set for May 13, 2022. The case management conference set for the same time remains on calendar.

For the reasons discussed below, Chamberlin's motion for reconsider is DENIED, and the Court GRANTS summary judgment sua sponte under Rule 56(f) that Chamberlin cannot recover punitive damages on his negligent malpractice claim. Chamberlin's malpractice claim is therefore fully adjudicated, and Defendants' counterclaims against Chamberlin are the only remaining issues for trial.[2]

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to this previous order refer to page numbers of the version filed in the Court's ECF docket.

[2] The parties have consented to the jurisdiction of a magistrate judge for all purposes under 28 U.S.C. § 636(c).

II. BACKGROUND

A. Factual Overview and Previous Orders

This order assumes the parties' familiarity with the facts and history of the case, which are set forth in more detail in the Court's previous order on the parties' motions for summary judgment. In brief, Chamberlin filed a petition to remove his uncle Michael Levin as executor of Chamberlin's mother's estate. The probate court sustained a demurrer against Chamberlin's petition, dismissing it without leave to amend. Defendants, representing Chamberlin, assured him that the demurrer order was not appealable until judgment was entered. Defendants were wrong. When they later appealed, the appellate court dismissed the appeal as untimely with respect to the order sustaining the demurrer, because it served in effect as a final denial of a request to remove an executor, which is an appealable order under the California Probate Code.

After excluding most of the opinions offered by Defendants' expert witness, this Court held that Chamberlin was entitled to summary adjudication that Defendants breached their duty of care in failing to file a timely appeal of the demurrer order. *See* MSJ Order at 17–22, 24–27. The Court found a sufficiently clear causal connection between the untimely appeal and a $2,831.91 award of costs against Chamberlin to grant summary judgment as to those limited damages. *Id.* at 29–31. The Court otherwise granted summary judgment for Defendants on this claim, holding that Chamberlin did not provide sufficient evidence to show any

breach of duty besides the untimely appeal and Defendants' failure to obtain a transcript of the demurrer hearing, *id* at 24–25, or to show that any damages besides the award of costs were caused by the untimeliness of the appeal (or the failure to obtain a transcript), *id.* at 31–32. The holding that Chamberlin had not shown causation as to other forms of damages, which is the subject of Chamberlin's present motion for reconsideration, was based on Chamberlin's failure to offer expert testimony on that subject and the Court's conclusion that "a jury of nonlawyers would lack the experience and training to assess whether the Court of Appeal would more likely than not have reversed [the probate court's] order sustaining the demurrer if the appellate court had reached the merits of the appeal." *Id.* at 32. The Court also provided notice under Rule 56(f) of the Federal Rules of Civil Procedure that it was considering granting summary judgment sua sponte that Chamberlin could not recover punitive damages. *Id.* at 34.

Later, the Court granted Chamberlin leave to file a motion for reconsideration as to whether the hypothetical outcome of a timely appeal is a question of fact for resolution by the jury (as assumed in the previous order) or a question of law to be resolved by the Court. The Court held that while "Chamberlin did not clearly raise this argument in his summary judgment briefing," the Court was "nevertheless inclined to allow full briefing to ensure that the summary judgment order did not rest on a fundamental error of law." Order

Granting Mot. for Leave to File (dkt. 130). The Court instructed Chamberlin to address:

> whether California law calls for deciding the likely outcome of the appeal (if timely filed) as a question of law rather than a question of fact, and if so, how that alters the outcome of the parties' motions for summary judgment—including, for example, questions of whether he was likely as a matter of law to prevail on the appeal, and whether he could prevail at trial (or is entitled to summary judgment in his favor) on any further steps in the chain of causation necessary to show harm as a result of Defendants' error.

Id.

B. Arguments Regarding Reconsideration

Chamberlin contends that the likely outcome of an appeal is a matter for a malpractice court to decide as a question of law and cannot be submitted to a jury. Mot. for Reconsideration (dkt. 131) at 9–10. He recites the legal standard for evaluating a demurrer under California law and the facts alleged in his petition (as well as facts he contends are supported elsewhere in the record of this case). *Id.* at 10–14. He contends that the brief Defendants filed on his behalf opposing the demurrer "provides a legal guide for this Court to consider when judging how the Court of Appeal would have ruled if Defendants had filed a timely appeal." *Id.* at 15. He also notes that that Defendants were surprised by the ruling and considered it to be incorrect,

id. at 15–16, and acknowledges that Levin filed a declaration by Chamberlin's mother's former therapist "purporting to tell the court that [his mother] thought [Chamberlin] and his wife were dishonest," which Chamberlin contends was not true, *id.* at 14. According to Chamberlin, the appellate court would likely have reversed the order sustaining the demurrer if it had engaged in a de novo review on a timely appeal, *id.* at 16, and he would have been able to disqualify the probate judge on remand, resulting in more favorable rulings on a host of issues including but not limited to Levin's removal as executor, *id.* at 17–21.

Defendants contend that the Court's previous order was correct because causation in legal malpractice cases is ordinarily a question of fact, although they acknowledge that "juries do not decide questions of law." Opp'n to Reconsideration (dkt. 136) at 6–8. Defendants frame the relevant question as "whether a determination of the underlying case 'hinges on an issue of law,'" *id.* at 8, with no citation for that quoted phrase, which they seem to have drawn from *In re Alan Deatley Litig.*, No. CV-06-0278-JLQ, 2008 WL 4153675, at *8 (E.D. Wash. Aug. 29, 2008), a malpractice case applying Washington law. Sidestepping the question of whether the likely outcome of the appeal (if it had been timely filed) is such an issue, they contend that the likely outcome of the probate case (if the appeal had been successful) is not. Opp'n to Reconsideration at 9–10. Defendants argue that California law grants probate courts broad discretion as to whether to remove an executor, guided by the principle that the testator's

choice of executor should not lightly be set aside. *Id.* at 10–11. They contend that the appellate court likely would not have disturbed the probate court's decision not to remove the executor, *id.* at 12–13, and regardless, Chamberlin has not offered sufficient evidence to show that any other aspect of the probate case would have resolved differently if the appellate court had reversed the order sustaining the demurrer, *id.* at 13–15.

In his reply, Chamberlin reiterates his position that the hypothetical outcome of questions of law in the underlying case are to be determined by the court rather than by the jury in a malpractice case. Reply re Reconsideration (dkt. 139) at 8. He contends that the appellate court would have reviewed the order sustaining the demurrer de novo, and would have reversed because his petition sufficiently stated a cause of action for Levin's removal as executor. *Id.* at 9. He also argues that "this Court should find that an objective, unbiased judge, familiar with the Probate Code and procedure, would have *suspended* Levin's powers and *would have removed him* after a hearing with testimony and evidence revealing" various facts Chamberlin discovered in this case. *Id.* at 9–11. He contends that he has sufficiently shown harm proximately caused by Defendants' negligence and that the amount of his damages should be determined by a jury. *Id.* at 11–12.

C. Arguments Regarding Punitive Damages

Chamberlin argues that he should be permitted to pursue punitive damage for Defendants' malpractice because Defendants' failure to research whether the demurrer order was immediately appealable meets the standard of willful misconduct described in *Bains v. Western Pacific Railroad Co.*, 56 Cal. App. 3d 902 (1976): "(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." *Bains*, 56 Cal. App. 3d at 905; *see* Pl.'s Br. re Punitive Damages (dkt. 132) at 7. He notes that Baer wrote to a colleague that he was "99% sure" that a separate judgment was needed to appeal but would "check in the morning," but there is no evidence that Baer actually followed up on that issue. Pl.'s Br. re Punitive Damages at 8. Chamberlin contends that failure to conduct research can be relevant to show "malice" by an attorney, citing malicious prosecution cases. *Id.* at 10 (citing *Lanz v. Goldstone*, 243 Cal. App. 4th 441, 468 (2015); *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 868 (1989)). He argues that Defendants' failure to disclose their purported deficiencies constitutes oppression and fraud. *Id.* at 11–12. In doing so, he renews arguments the Court has previously rejected regarding intentional concealment of a conflict of interest due to former defendant Hartog's attenuated familial-by-marriage relationship with Levin. *See id.* at 4, 11.

Defendants argue that Chamberlin cannot recover punitive damages for a claim based on negligence, which is his only surviving claim in the case. Defs.' Br. re Punitive Damages at 4–6. They contend that Chamberlin has not presented "clear and convincing evidence that any of the Defendants engaged in intentional conduct against him with the requisite state of mind." *Id.* at 6. Defendants also offer a new declaration by Baer explaining his conduct, *see id.* at 9–10; Baer Decl. (dkt. 137-1), to which Chamberlin objects as untimely, *see* dkt. 138. The Court does not rely on that declaration.

III. ANALYSIS

A. Legal Standard for Reconsideration

Unless a court specifically directs entry of final judgment on some portion of the case, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment." Fed. R. Civ. P. 54(b). "A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (cleaned up).

As noted above, the Court granted Chamberlin leave to file his motion for reconsideration based on concern that the Court may have committed clear error in treating what should have been a question of law as a question of fact requiring expert testimony.

B. Legal Standard for Summary Judgment

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to designate "'specific facts showing there is a genuine issue for trial.'" *Id.* (citation omitted); *see also* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record. . . ."). "[T]he inquiry involved in a ruling on a motion for summary judgment . . . implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty*

Lobby Inc., 477 U.S. 242, 252 (1986). The non-moving party has the burden of identifying, with reasonable particularity, the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). Thus, it is not the task of the court "'to scour the record in search of a genuine issue of triable fact.'" *Id.* (citation omitted); *see Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); Fed. R. Civ. P. 56(c)(3).

A party need not present evidence to support or oppose a motion for summary judgment in a *form* that would be admissible at trial, but the *contents* of the parties' evidence must be amenable to presentation in an admissible form. *See Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th Cir. 2003). Neither conclusory, speculative testimony in affidavits nor arguments in moving papers are sufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant, *Scott v. Harris*, 550 U.S. 372, 378 (2007), but where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial" and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

Under Rule 56(f) of the Federal Rules of Civil Procedure, a Court may "(1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment

on its own after identifying for the parties material facts that may not be genuinely in dispute," so long as the Court first "giv[es] notice and a reasonable time to respond."

C. Chamberlin Is Not Entitled to Reconsideration of His Limited Damages

Although the Court's previous order did not address the issue with the depth it may have deserved, Chamberlin has not shown that the Court erred in treating the hypothetical outcome of a timely appeal as a question for the jury, requiring proof through expert testimony.

The parties agree that questions of law in the underlying case are for the court rather than the jury to decide in a malpractice action. That position finds support in California caselaw. *See, e.g.*, *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 970 (2001) (holding that the likely outcome of a dispute that would have been resolved by arbitrators as finders of fact is for a jury to decide in a malpractice case, and finding that "conclusion . . . consistent with numerous out-of-state authorities holding that in legal malpractice cases, whether a court or jury decides the underlying case-within-a-case does not turn on the identity or expertise of the trier of fact, but whether the issues are predominately questions of fact or law"). *Piscitelli* cited with approval a Michigan decision holding that "whether an appeal lost because of an attorney's negligence would have succeeded if properly pursued is an issue for the court

because the resolution of the underlying appeal originally would have rested on a decision of law." *Id.* (summarizing *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579, 513 (1994)).

Typically, appellate review of an order on a demurrer turns on the legal question of whether the facts alleged support a claim, as well as the question of whether the trial court abused its discretion in denying leave to amend:

> We employ two separate standards of review when considering a trial court order sustaining a demurrer without leave to amend. We first review the complaint de novo to determine whether it contains facts sufficient to state a cause of action under any legal theory. We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed. We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale.
>
> If we determine the facts as pleaded do not state a cause of action, we then consider whether the court abused its discretion in denying leave to amend the complaint. It is an abuse of discretion for the trial court to sustain a demurrer without leave to amend if the

> plaintiff demonstrates a reasonable possibility that the defect can be cured by amendment.

Est. of Dito, 198 Cal. App. 4th 791, 800–01 (2011) (cleaned up).

Here, however, the appellate court made clear that it considered the demurrer order to be effectively "[a]n order denying a request to remove an executor." Defs.' Request for Judicial Notice ("Defs.' RJN," dkt. 107-2) Ex. 27. Such an order is entitled to far more deferential review under an abuse-of-discretion standard:

> The probate court's decision removing or declining to remove a personal representative is reviewed for abuse of discretion. To the probate court is given, in the first instance, the supervision and protection of estates of deceased persons, with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the protection of the estate; and that power is not to be interfered with by the appellate court, unless there has been a clear abuse of that discretion.
>
> The abuse of discretion standard applies even when the evidence is of such a nature that reasonable minds would possibly differ regarding the facts. The test is not whether we would have made a different decision had the matter been submitted to us in the first instance. Rather, the discretion is that of the trial court, and we will only interfere with its ruling if we find that under all the evidence,

> viewed most favorably in support of the trial court's action, no judge reasonably could have reached the challenged result.
>
> As with all factual determinations, the probate court's findings of fact underlying its discretionary decision to remove an administrator are reviewed for substantial evidence. On appeal, our authority begins and ends with a determination of whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. Therefore, we must consider all of the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference from the evidence tending to establish the correctness of the trial court's decision, and resolving conflicts in support of the trial court's decision.
>
> It is well settled that all presumptions and intendments are in favor of supporting the judgment or order appealed from, and that the appellant has the burden of showing reversible error, and in the absence of such showing, the judgment or order appealed from will be affirmed. If the *decision* of a lower court is correct on any theory of law applicable to the case, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the lower court reached its conclusion.

Est. of Sapp, 36 Cal. App. 5th 86, 103–04 (2019).

That standard does not implicate pure issues of law, but instead calls on the appellate court to review the manner in which the probate court exercised its discretion. The likely outcome of such issues of judicial discretion are normally for a jury to decide in a subsequent malpractice action. If a plaintiff fails to offer competent expert testimony "taking into account all of the relevant statutory factors or the broad discretion afforded the trial court," summary judgment for the defense is appropriate. *Namikas v. Miller*, 225 Cal. App. 4th 1574, 1586 (2014) (affirming summary judgment where a plaintiff failed to offer sufficient expert evidence addressing the discretionary judicial decision to determine spousal support). Chamberlin needed to offer expert testimony here as to the likely outcome of the appeal, and failed to do so. The Court declines to alter the substance of its previous decision.

Even if the likely outcome of the appeal were for the Court to decide as a matter of law, Chamberlin has not met his burden of persuasion to show that the probate court's order on the demurrer would likely have been reversed if the appeal had been timely. The probate court was presented with evidence that Chamberlin's mother distrusted him and specifically chose not to list him as an alternative executor. Whether that evidence was accurate is not the question here. The probate court had broad discretion in determining how to weigh the evidence before it and whether to remove Levin as executor. The probate court could reasonably have determined that leaving Levin in place as executor best served the intent of the deceased, and that any

issue of mismanagement was best addressed through a subsequent accounting. *See, e.g., In re Chadbourne's Est.*, 15 Cal. App. 363, 367 (1911) ("The nomination of the executor is evidence of the confidence reposed in him by the testator, and the deliberate purpose and desire thus solemnly expressed as to the administration should not be thwarted, unless the plain provisions of the law or the interests of justice demand it."). To the extend Chamberlin believes he should have been entitled to leave to amend, he neither then nor now has "demonstrate[d] a reasonable possibility that [any] defect [could have been] cured by amendment." *See Est. of Dito*, 198 Cal. App. 4th at 801.

Moreover, even if Chamberlin could show that the demurrer order would likely have been reversed, he has not shown that outcome of the probate proceedings would have differed in any practical respect. His assertion that the probate judge would have been removed for bias is entirely speculative and cites no legal authority beyond the general statute prohibiting judicial prejudice. Mot. for Reconsideration at 17 (citing Cal. Civ. Proc. Code § 170.6). The reversal of a decision on appeal does not itself show bias by the judge, and there is no reason to think a motion to disqualify the probate judge after such a result would have been any more successful than the one Chamberlin actually filed, which was denied. *See* Defs.' RJN Ex. 31. Regardless, all of Chamberlin's claims to harm, besides the award of costs that the Court already found he is entitled to recover as damages, rest on subsequent discretionary decisions by the probate court—primarily whether, if

Chamberlin had been permitted to proceed on his petition, Levin would actually have been removed as executor. Under *Namikas*, 225 Cal. App. 4th at 1586, Chamberlin was required to show a likelihood of success on those issues through competent expert testimony, and failed to do so.

Accordingly, Chamberlin's motion for reconsideration is DENIED.

D. Punitive Damages

"Under California law, a plaintiff may recover punitive damages in connection with a non-contractual claim if she establishes by clear and convincing evidence that the defendant is guilty of (1) fraud, (2) oppression, or (3) malice." *Doe v. Uber Techs., Inc.*, No. 19-cv-03310-JSC, 2019 WL 6251189, at *8 (N.D. Cal. Nov. 22, 2019) (citing Cal. Civ. Code § 3294(a)).

> Punitive damages are properly awarded where defendants are guilty of oppression, fraud or malice. The defendant "must act with the intent to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights. Where nonintentional torts involve conduct performed without intent to harm, punitive damages may be assessed when the conduct constitutes conscious disregard of the rights or safety of others. A conscious disregard of the safety of others may thus constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff

> must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences. Consequently, to establish malice, it is not sufficient to show only that the defendant's conduct was negligent, grossly negligent or even reckless.

Bell v. Sharp Cabrillo Hosp., 212 Cal. App. 3d 1034, 1043–44 (1989) (cleaned up).

The evidence here shows nothing more than that Defendants made a mistake. Even if it was an obvious mistake, which is far from clear, gross negligence cannot support punitive damages. Even Baer's email that he intended to confirm his belief as to the deadline to appeal does not show the willful disregard necessary to pursue punitive damages, because by indicating that Baer was "99% sure" he was correct, it does not show any recognition of "*probable* dangerous consequences" if he did not follow up with further research. *Cf. id.* at 1044. Instead, the email indicates that Baer was highly confident (despite being incorrect) that his course of action would protect Chamberlin's rights. The cases Chamberlin cites addressing malicious prosecution are inapposite, and the Court finds no basis for punitive damages in the record of this case. Summary judgment is therefore GRANTED sua sponte that Chamberlin cannot obtain punitive damages.

IV. CONCLUSION

For the reasons discussed above, Chamberlin's motion for reconsideration is DENIED, and the Court sua sponte GRANTS summary judgment for Defendants that Chamberlin cannot recover punitive damages.

IT IS SO ORDERED.

Dated: May 12, 2022

/s/ Joseph C. Spero
JOSEPH C. SPERO
Chief Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER BAYRE CHAMBERLIN, Plaintiff, v. HARTOG, BAER & HAND, APC, et al., Defendants.	Case No. 19-cv-08243-JCS **ORDER GRANTING MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION** (Filed Mar. 7, 2022) Re: Dkt. No. 127

Plaintiff Christopher Chamberlin, pro se, seeks leave to file a motion for reconsideration of the Court's order on summary judgment (dkt. 125), arguing that the Court erred in treating the hypothetical outcome of a state-court appeal (if Defendants had timely filed it) as a question of fact requiring expert testimony rather than a question of law to be decided by the Court. *See* Mot. for Leave (dkt. 127). Chamberlin did not clearly raise this argument in his summary judgment briefing. The Court is nevertheless inclined to allow full briefing to ensure that the summary judgment order did not rest on a fundamental error of law.

Chamberlin's motion for leave is GRANTED, and he may file a motion for reconsideration no later than March 18, 2022, not exceeding fifteen pages, addressing whether California law calls for deciding the likely outcome of the appeal (if timely filed) as a question of law rather than a question of fact, and if so, how that

alters the outcome of the parties' motions for summary judgment—including, for example, questions of whether he was likely as a matter of law to prevail on the appeal, and whether he could prevail at trial (or is entitled to summary judgment in his favor) on any further steps in the chain of causation necessary to show harm as a result of Defendants' error. Defendants shall file an opposition brief not exceeding fifteen pages no later than April 1, 2022, and Chamberlin may file a reply not exceeding ten pages no later than April 8, 2022. The Court will hear argument on May 13, 2022 at 9:30 AM via Zoom webinar.

The case management conference previously set for April 29, 2022 is CONTINUED to the same date and time as the hearing. The parties shall file an updated joint case management statement no later than May 6, 2022.

Chamberlin may not submit additional evidence with his motion, and must rely on the existing evidentiary record. Since the motion addresses an argument not clearly raised in Chamberlin's original motion for summary judgment, however, and Defendants would have been entitled to submit evidence in response if the argument had been raised at that time, Defendants may include new evidence with their opposition brief if they believe it to be necessary. If—and only if—Defendants submit new evidence with their opposition, Chamberlin may submit additional evidence with his reply.

IT IS SO ORDERED.

Dated: March 7, 2022

/s/ Joseph C. Spero
JOSEPH C. SPERO
Chief Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER BAYRE CHAMBERLIN, Plaintiff, v. HARTOG, BAER & HAND, APC, et al., Defendants.	Case No. 19-cv-08243-JCS **ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO EXCLUDE EXPERT TESTIMONY** (Filed Feb. 22, 2022) Re: Dkt. Nos. 105, 106, 107

I. INTRODUCTION

Plaintiff Christopher Chamberlin, pro se, brought this case asserting claims for malpractice and related theories against his former attorneys in a probate matter concerning his late mother's estate. The remaining defendants at this point in the case are Hartog, Baer & Hand, APC ("HBH"), John Hartog, and David Baer. Chamberlin moves to exclude testimony by Defendants' expert witness, and both sides move for summary judgment.

The Court finds these motions suitable for resolution without oral argument and VACATES the hearing set for February 25, 2022. For the reasons discussed below, Chamberlin's motion to exclude expert testimony is GRANTED in large part. His motion for summary judgment is GRANTED as to his malpractice

claim against Baer and HBH with respect to a $2,831.91 award of costs against him, and as to Defendants' counterclaim for account stated. Defendants' motion for summary judgment is GRANTED as to all other aspects of Chamberlin's malpractice claim they addressed—i.e., all other aspects except punitive damages. If Chamberlin wishes to pursue such damages, he must show cause why the Court should not grant summary judgment on that issue sua sponte under Rule 56(f). The parties' motions for summary judgment are otherwise DENIED, and Defendants' remaining counterclaims may proceed to trial.[1]

The case management conference previously set for the same time as the motion hearing is CONTINUED to 2:00 PM Pacific Time the same day, to occur via Zoom webinar.

II. BACKGROUND

A. Factual Overview

The following summary, with matters preceding probate litigation largely drawn from Chamberlin's declarations, is intended as context for the convenience of the reader. It is not intended as a complete recitation of all relevant evidence in the record. A number of issues Chamberlin has presented in the record—as a few examples, animosity between Chamberlin's wife and uncle, whether the probate judge referred to an

[1] The parties have consented to the jurisdiction of a magistrate judge for all purposes under 28 U.S.C. § 636(c).

evidentiary hearing as a "rabbit hole" or to Chamberlin's mother's estate as a "rat hole," and the disposal of Chamberlin's mother's remains—are not relevant to the outcome of present motions, and are not addressed herein.

In April of 2013, Chamberlin's mother Sylvia Jane Levin Chamberlin ("Jane"[2]) executed a will leaving all of her assets to sons, Plaintiff Christopher Chamberlin and his brother Richard Chamberlin, except that her partner Donald Partier would inherent sixteen percent of Tinkachew Creative, an entity that had no value. Chamberlin MSJ Decl. (dkt. 106-1) ¶ 3 & Ex. A. On January 1, 2014, while Jane was undergoing medical treatment, Partier printed a new will for her leaving a one-third share of her estate to Partier, which Jane signed. *Id.* ¶ 4 & Ex. C.[3] The will named Jane's brother Michael Levin as executor, and Partier and a Michael Bishop (Richard Chamberlin's partner, who is not otherwise relevant to this case) as alternate executors if Levin was unwilling or unable to serve in the role. *Id.* Ex. C. Chamberlin chose not to contest that will. Chamberlin Opp'n Decl. (dkt. 114-1) ¶ 19.

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[2] This order refers to Plaintiff Christopher Chamberlin as "Chamberlin," and to his late mother as "Jane."

[3] Many of the assertions in Chamberlin's declaration appear to fall outside his personal knowledge and would likely be inadmissible if presented in his testimony at trial, but except where Defendants have objected, the Court assumes for the purpose of the present motions that Chamberlin could support the contents of his declaration with admissible evidence at trial. The hearsay portions of Chamberlin's declarations are generally not relevant to the outcome of the present motions.

Jane was repeatedly hospitalized in 2014 and 2015. Chamberlin MSJ Decl. ¶ 5. On June 21, 2015, Chamberlin traveled to San Francisco and spent the day with Jane and Partier. *Id.* Jane died that afternoon. *Id.*

Chamberlin paid approximately $15,000 for family members to travel to San Francisco and for a memorial service. *Id.* ¶ 6. Jane's brother Mike Levin, serving as executor of Jane's estate, instructed Chamberlin and his wife to track their expenses for reimbursement from the estate upon sale of the houseboat, and in July of 2015 indicated that he was working to find a marine surveyor to assess the value of the houseboat. *Id.* ¶ 7. Chamberlin offered to pay his mother's debts and the houseboat's insurance and berth fees, but Levin refused that offer. Chamberlin Opp'n Decl. ¶ 24.

In June and July of 2015, Levin was in touch with a real estate agent named Rachelle Dorris, who worked with Levin's wife at Coldwell Banker, regarding the houseboat. *Id.* ¶¶ 3, 41.

In August of 2015, Chamberlin checked in with Levin, who told him that Partier had accepted a tenant for the downstairs unit of the houseboat where Partier lived and was collecting rent, which Chamberlin opposed. Chamberlin MSJ Decl. ¶ 8. In response to Chamberlin's insistence that Partier should not be allowed to take in a tenant, should be required to pay rent, and should be removed from the houseboat if possible, Levin wrote in an email on August 11, 2015 that he

was unwilling to serve as executor. Defs.' Request for Judicial Notice ("Defs.' RJN," dkt. 107-2) Ex. 7 (Cross-Petition) Ex. B. Levin later testified in a deposition for this case that he "wasn't going to precipitously kick [Partier] out on the street after he had taken care of [Jane] for 16 years," and when Partier had agreed that his disbursement from the estate would be reduced to account for rent. Chamberlin Opp'n Decl. Ex. 10 (Levin Dep.) at 149:8–25. Partier took steps to become the executor after Levin expressed that he was unwilling to serve. Chamberlin Opp'n Decl. ¶ 64 & Ex. 27.

Chamberlin asked a lawyer friend, Richard Coplon, to represent his interests in administering the estate. Chamber MSJ Decl. ¶ 8. Coplon worked with Levin to try to find a lawyer for Levin as well, in the hope that Levin would continue as executor, and Levin hired J.R. Hastings. *Id.* ¶¶ 9–10. On August 23, 2015, Levin emailed Coplon and Hastings to say that the tenant in the upstairs unit the houseboat, Laurel Braitman, was interesting in buying it, and that Levin had therefore decided not to resign as executor. *Id.* ¶ 10.

Braitman wrote in an August 20, 2015 email to her mother that houseboat was appraised at $400,000 but might be worth more due to a second appraiser valuing it in the range of $550,000 to $700,000. *Id.* ¶ 11 & Ex. B.[4] She testified at her deposition that she never saw documentation of the higher range and believed either

[4] Chamberlin erroneously cites this exhibit as Exhibit M, which is in fact an April 4, 2017 amended order of the California Superior Court for Marin County.

Partier or Levin told her that figure. *Id.* ¶ 12. Levin's attorney Hasting testified that the lower $400,000 valuation was a "guess." *Id.* ¶ 17. Braitman inquired with Bank of Marin regarding a loan to purchase the houseboat. *Id.* ¶ 13 & Ex. B. At a memorial for Jane in September of 2015, Levin told Chamberlin that Braitman had expressed interest in purchasing the houseboat for $320,000 but that Levin had dismissed that figure as too low. D'Amato MSJ Decl. (dkt. 107-1) Ex. 6 (Chamberlin Dep.) at 101:18–102:12; Chamberlin Opp'n Decl. ¶ 87.

Hastings and Levin filed a petition for probate in the California Superior Court for Marin County on September 4, 2015, attaching the January 1, 2014 will. Chamberlin MSJ Decl. ¶ 16 & Ex. C. The petition sought a $382,000 bond, equal to the estimated value of the estate, which was based on a $400,000 valuation for the houseboat. *Id.* ¶ 19 & Ex C.

On September 9, 2015, Coplon wrote to Levin, acknowledging that Levin had previously said he "would not continue to act as Executor if [he was] getting 'jerked around,'" and setting forth Chamberlin's expectations for a sale of houseboat, including that Chamberlin would accept a private sale "based on a contract price supported by current, independent fair market appraisal." *Id.* ¶ 14. Hastings responded on behalf of Levin, stating that California law provided an executor with "several choices of procedure" for the sale of a houseboat, and that all such choices would "rely upon valuation by a California Probate Referee," which

Hastings understood would "ensure an impartial valuation." *Id.* ¶ 15.

The Honorable Roy Chernus approved Levin as executor on October 22, 2015. *Id.* ¶ 18 & Ex. D. Chamberlin did not receive a copy of that order, and letters testamentary were not issued until a few months later. *Id.* ¶ 18. Levin filed a second petition for probate on November 24, 2015, which was not reflected on the Superior Court's register of actions and which Chamberlin did not see until a year and a half later, which requested a much smaller bond of $50,000. *Id.* ¶¶ 19–20.

On December 9, 2015, realtor Tom Verkozen told Hastings to expect a $300,000 valuation for the houseboat from a marine surveyor. *Id.* ¶ 24. In a report based on an inspection that same day, the marine surveyor actually assessed the fair value as $825,000. *Id.* ¶ 26 & Ex. F. Verkozen took issue with that assessment, and told Hastings that he believed the value was between $390,000 and $420,000. *Id.* ¶ 27. Levin sent the survey to Chamberlin on January 21, 2016, stating that he thought it "best to put the boat on the market," but that cold and rainy weather might counsel against trying to sell the houseboat at that time, and that he intended to rely on Hastings's "advice as to how to maximize the value." *Id.* ¶ 28.

On February 12, 2016, probate referee Andrew Rask appraised the value of the houseboat as $360,000. *Id.*

¶ 31 & Ex. G.[5] Levin did not provide Chamberlin with a copy of that appraisal until late March. *Id.* ¶ 31. On February 22, 2016, Verkozen proposed listing the houseboat for $360,000. *Id.* ¶ 32. In conversations with Chamberlin and his attorney Coplon, Levin indicated that he intended to sell the houseboat in three to four months. *Id.* ¶ 33. Chamberlin asserts that Levin "remained focused on" selling the houseboat to Braitman, and insuring a commission or referral fee for his wife's colleague Rachelle Dorris. *Id.* ¶ 34. Dorris told Levin on March 10, 2016 that she believed $450,000 would be an appropriate list price for the houseboat. Chamberlin Opp'n Decl. ¶ 161. In March of 2016, Levin wrote that Braitman remained a potential buyer and that he was keeping her informed of plans for a sale, but that the listing would be open. Chamberlin MSJ Decl. ¶ 35. In a deposition for this action, Braitman testified that she was not interested in purchasing the houseboat in March of 2016, and that the last time she indicated to Levin that she was a potential buyer was in August or September of 2015. D'Amato MSJ Decl. Ex. 7 (Braitman Dep.) at 34:11–24. According to Chamberlin and his wife, Partier told them in April of 2016 that Levin had been waiting for Braitman to obtain financing in the hopes of selling the houseboat to her, but that by the time of their conversation Levin intended to sell

[5] Much later, while this action was pending in 2020, Rask wrote to Hastings to propose "jointly taking action against Chamberlin" for malicious prosecution in light of subpoenas that Chamberlin had served. Chamberlin MSJ Decl. ¶ 45.

the houseboat on the open market. *See* Chamberlin Opp'n Decl. ¶¶ 204–06, 215–16.[6]

On March 31, 2016, Levin told Chamberlin that if Chamberlin did not agree to buy the houseboat himself, Levin would list it on April 6, 2016 for $410,000. Chamberlin MSJ Decl. ¶ 36. Chamberlin hired Lynn McCabe as his California attorney. *Id.* On April 15 2016, Levin filed a petition for instructions authorizing him to list the houseboat for sale at $435,000. Defs.' RJN Ex. 6.

A real estate agent Chamberlin was consulting, Deborah Cole, roughly estimated that the houseboat could sell for $805,000 if improved and that it would cost $80,000 to $100,000 to prepare for such a sale. Chamberlin Opp'n Decl. ¶¶ 217–18. On April 27, 2016, Chamberlin offered to buy the houseboat for $410,000 or advance funds for repairs to benefit the estate. *Id.* ¶ 211. Levin rejected those offers. *Id.* ¶ 219.

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[6] Defendants object to Chamberlin's and his wife's testimony regarding this conversation with Partier (relaying his previous conversations with Levin) as hearsay. It is certainly not admissible to prove the truth of the matter asserted, i.e., that Levin had actually been waiting to list the houseboat because he wanted to sell it to Braitman, at least in this case where neither Partier nor Levin are parties. It is not obvious, however, that such testimony would have been inadmissible in probate proceedings (perhaps as a statement of party opponent), and it could perhaps be admissible here for the limited purpose of showing what testimony Chamberlin and his wife could have offered if given the opportunity in the probate case. The Court assumes for the sake of argument that it is admissible for that purpose, which does not alter the outcome of the present motions.

Braitman occupied the upstairs unit of the houseboat until May of 2016. *Id.* ¶ 22. According to Chamberlin, she failed to pay rent for her final month and recovered more of her security deposit than she should have from the estate. *Id.* ¶ 23. Hastings instructed Partier's attorney in June of 2016 to prevent Chamberlin from accessing the houseboat until Hastings could inspect the upper unit. *Id.*

On May 11, 2016, Chamberlin—represented by McCabe—filed an opposition to Levin's petition for instructions and a cross-petition seeking authorization to list the houseboat with Chamberlin's preferred real estate agent, an independent appraisal, payment of Chamberlin's attorneys' fees, removal of Levin as executor for breach of fiduciary duty (including failure to collect rent from Partier and purportedly conspiring with Braitman to sell the houseboat to her for less than its value), appointment of Chamberlin as replacement executor, an order requiring Partier to pay rent, an order requiring Levin to provide an accounting, and a surcharge of Levin, among other relief. Defs.' RJN Ex. 7. Chamberlin asserted that in April of 2016, he had discovered a conspiracy to mislead the probate referee as to the value of the houseboat and to sell it to Braitman for less than its fair value to benefit her at the expense of the estate. *Id.* ¶¶ 2–3. He acknowledged that Levin had rejected a $320,000 offer by Braitman in September of 2015, but asserted that the probate case had been artificially delayed to allow Braitman to obtain financing and allow her and Partier to continue living on the houseboat. *Id.* ¶¶ 50–52.

Levin filed a demurrer, arguing that Chamberlin's cross-petition was unclear as to the causes of action asserted, that it relied on an unfounded theory of conspiracy between Levin and Braitman (despite the fact that Levin rejected Braitman's offer to purchase the houseboat as too low), that Levin had been designated as executor in Jane's will while Chamberlin had not been included among her designated alternative executors, that no accounting was due at that time, and that decisions regarding collection of rent fell within Levin's authority as executor. Defs.' RJN Ex. 8. Levin also moved for sanctions against Chamberlin. Chamberlin Opp'n Decl. ¶¶ 228–32. Partier joined in Levin's demurrer and requested sanctions against Chamberlin. Defs.' RJN Ex. 9.

On July 27, 2016, Chamberlin reached out to Defendants and spoke with Baer, hoping to hire experienced probate counsel. Chamberlin Opp'n Decl. ¶ 234. Baer told him HBH had no conflict of interest, and that he expected they would succeed in removing Levin as executor. *Id.* ¶¶ 238–39. The next day, Chamberlin signed an agreement retaining Defendants as counsel. Baer Decl. Ex. 1. The agreement provided that Defendants would represent Chamberlin "in connection with the petitions that are currently on file and may subsequently be filed . . . in the matter of the Estate of Sylvia Jane Levin Chamberlin, Marin County Superior Court Case No. PR 1503278," Defendants would bill Chamberlin monthly in accordance with a fee schedule attached as an exhibit, and Chamberlin would pay those bills within fifteen days of their dates. *Id.* The

agreement did "not require [Defendants] to represent [Chamberlin] in connection with any appeal. *Id.* Julie Woods, an associate at HBH, prepared discovery for the case in August of 2016, but it was never served. Chamberlin Opp'n Decl. ¶ 247.

Acting on Chamberlin's behalf, Defendants filed a brief opposing Levin's demurrer, signed by Woods, which made clear that the cross-petition sought "(1) re-appraisal of the Houseboat; (2) instructions to list the Houseboat for sale; (3) Michael's breach of fiduciary duty and surcharge [sic]; (4) suspension of Michael as Executor; (5) removal of Michael as Executor; (6) appointment of Christopher as Executor; and (7) accounting and surcharge of Michael as Executor." Defs.' RJN Ex. 12 at 2. Among other points, Woods argued that the cross-petition sufficiently asserted valid causes of action including for breach of fiduciary duty, and that although Chamberlin was not named as an alternative executor, it was possible that the alternative executors named in the will would be unwilling or unqualified to serve and Chamberlin could be appointed if Levin was removed. *See generally id.*

On September 6, 2016, Judge Chernus sustained Levin's demurrer, signing a proposed order that read in relevant part:

> Having reviewed and considered the Demurrer and the pleadings in support thereof, and finding good cause therefore, the Court rules as follows:

> IT IS HEREBY ORDERED:
>
> 1) The Demurrer is sustained/granted;
>
> 2) All attempted causes of action in the cross-Petition are denied.

Defs.' RJN Ex. 13. An entry in the Superior Court's register of actions indicated that the demurrer was "SUSTAINED WITHOUT LEAVE TO AMEND." *Id.* Ex. 10. Levin and Partier's request for sanctions against Chamberlin was denied, *id.* although at the hearing, Judge Chernus sua sponte threatened Chamberlin's counsel with sanctions if Chamberlin pursued a challenge to the probate referee's appraisal, Chamberlin Opp'n Decl. ¶ 259. Woods was surprised to have lost on the demurrer. Chamberlin Opp'n Decl. ¶ 257.

There was some delay in Defendants obtaining a copy of the order sustaining the demurrer. *See* Chamberlin MSJ Decl. Ex. J. Baer wrote to Chamberlin on October 1, 2016 that the order was not appealable at that time:

> Under California law, even though the order sustaining the demurrer effectively terminates the litigation on that particular petition, it is not appealable. Rather, a judgment on the order would need to be entered for the time to appeal to begin to run. Many appeals of orders sustaining demurrers have been dismissed for this reason.
>
> Please let me know if you want me to either request Hastings to prepare a judgment or if you want me to do so. Only on entry of the

> judgment would the time to appeal start. If you want authority to that effect I can gladly provide it. I don't recommend obtaining a judgment, however, because it makes more sense for this matter to conclude as a whole. That won't occur until there is a ruling on the objections that you plan to file to the executor's accounting.
>
> Best,
> David
>
> PS: Were the order sustaining the demurrer appealable the last day to appeal would be November 21.

Id.

Meanwhile, in August of 2016, Chamberlin's preferred real estate agent Cole emailed him to provide a "reality check" that the houseboat was "in very rough shape" and she "would not take on a listing of this property, as is," since she was not sure how to price it and believed it would take a long time to find a buyer. D'Amato MSJ Decl. Ex 20. Dorris, the real estate agent with whom Levin had been working, reached out to Hastings that month about a "buying client of [hers]," Gary Starr, who was interested in purchasing the houseboat and, as a contractor, believed he could complete necessary repairs and upgrades. Chamberlin MSJ Decl. ¶ 52.

On September 14, 2016—two days before the hearing set for Levin's petition for instructions—Levin and Chamberlin stipulated to list the houseboat with

Dorris at an asking price of $499,000, and for Levin to file a $400,000 bond. Defs.' RJN Ex. 15. Judge Chernus so ordered on September 15, 2016, vacated the hearing, and dismissed with prejudice a petition that Chamberlin had filed concerning the appraisal. *Id.* In discussions of whether to agree to the stipulation, Baer told Chamberlin that he was unlikely to get an agreement for a higher listing price, and that the stipulation did not waive Chamberlin's appellate rights regarding the demurrer. Chamberlin Opp'n Decl. ¶ 277; Chamberlin Decl. re Mot. to Strike (dkt. 105-1) Ex. Q. Soon afterwards, Baer told Chamberlin that there was still no appealable order of dismissal on the demurrer, but that he was not in a hurry to obtain one because he felt it would be better to appeal all issues at the same time and the same issues would be raised later in the probate court. Chamberlin Opp'n Decl. ¶ 282.

Dorris "got the listing" on September 28, 2016; and Starr, his wife, and another investor signed a purchase contract on October 4, 2016. Chamberlin MSJ Decl. ¶ 53. The buyers were able to secure a $14,750 concession from the list price, which Defendants advised Chamberlin that it would not be worthwhile to challenge. Chamberlin Opp'n Decl. ¶ 293.

On October 7, 2016, Starr (who was also a marine surveyor and home inspector) inspected the houseboat and determined that as of the date of Jane's death in 2015, its value was $504,000. Chamberlin MSJ Decl. Ex. S. According to Chamberlin, Levin sought that new appraisal to avoid a tax clawback based on the probate

referee's $360,000 valuation. Chamberlin MSJ Decl. ¶ 54.

Starr and his co-owners later sold the houseboat in 2021 for $875,000. *Id.* ¶ 57. Based on the listing for that sale, Chamberlin characterized the repairs and upgrades that Starr completed as similar to what Chamberlin had proposed the estate undertake before listing the houseboat for sale. *Id.*

In November of 2016, Chamberlin requested assurance that he would still be able to appeal the demurrer order, and Baer responded that an appeal would still be premature (and dismissed on that basis by an appellate court) because no order of dismissal had been entered by the probate court. Chamberlin Opp'n Decl. ¶¶ 306–07 & Ex. 135.

In December of 2016, Levin filed an accounting and petition for final distribution. Defs.' RJN Ex. 16. A hearing scheduled for February 6, 2017 was postponed. Chamberlin Opp'n Decl. ¶ 333. Defendants prepared objections and, on February 13, 2017, told Chamberlin they would propound discovery and send a settlement offer. *See* Chamberlin Opp'n Decl. ¶¶ 332–35. They did not send a settlement offer with their February 16, 2017 objections, and did not propound discovery until March 10, 2017, which was too late to obtain any discovery before Judge Chernus dismissed the case. *Id.* ¶¶ 336–37. On February 21, 2017, Woods appeared before Judge Chernus to argue in support of Chamberlin's objections, and by her own account "over-asked" for a three-day evidentiary hearing, which she believed

displeased Judge Chernus. *Id.* ¶¶ 341–43 & Ex. 150 (Woods Dep.) at 88:2–11. Judge Chernus ordered Chamberlin to file an offer of proof in support of his objections, which Chamberlin was not meaningfully able to do without discovery, and set a hearing for March 15, 2017. *Id.* ¶¶ 342–49. Defendants filed a cursory offer of proof on Chamberlin's behalf, on March 6, 2017, addressing topics where discovery *might* be able to show deficiencies by Levin. *Id.* ¶¶ 361–61; Defs.' RJN Ex. 20.

On March 29, 2017, Judge Chernus issued an order on Levin's petition for final approval, authorizing reimbursement of certain expenses and fees to Levin and Hastings (including attorneys' fees totaling $27,372.50 for "extraordinary services performed on behalf of the Estate for its Petition for Instructions"), reimbursement of $9,114.14 to Chamberlin for certain expenses,[7] and distribution of $108,982.58 to Chamberlin, $99,868.44 to his brother Richard, and $92,668.44 to Partier (noting a deduction from Partier's share by agreement). Chamberlin MSJ Decl. ¶ 40 & Ex. L. That order erroneously listed Levin rather than Chamberlin as one of Jane's beneficiaries for the purpose of any as-yet-unknown property of the estate, which was corrected at Levin's ex parte request in an April 4, 2017 amended order. *Id.* ¶ 41 & Ex. M.

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[7] Judge Chernus noted that Chamberlin had not submitted a creditor's claim as to other expenses for which he sought reimbursement.

Defendants filed an appeal of the September 6, 2016 demurrer order and the final distribution order on April 4, 2017. Chamberlin Opp'n Decl. ¶ 398. On June 30, 2017, Chamberlin wrote to Baer that he and his wife wanted to "make sure that [Baer was] all over this case, as the lead." *Id.* ¶ 426 & Ex. 175.

Contrary to Baer's predictions, the Court of Appeal granted Levin's motion to dismiss Chamberlin's appeal of the order sustaining the demurrer, issuing the following short opinion on July 19, 2017:

> Michael Joseph Levin's motion to dismiss appellant Christopher Chamberlin's appeal as to the probate court's September 2016 order is granted. An order denying a request to remove an executor is appealable. (Prob. Code, § 1303, subd. (a); *Estate of Cuneo* (1963) 214 Cal.App.2d 381, 383.) While it may be true, as appellant argues, that an order sustaining a demurrer to a probate opinion is not generally appealable, appealability is determined by the substance of the order, not its form. (*Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 755.) The probate court's order sustaining a demurrer to appellant's cross-petition was, in substance, final. Appellant alleged the facts he believed supported removal and replacement, and the probate court found them legally insufficient. The court indicated its intent that the ruling be recognized as final by stating in its order, "All attempted causes of action in the Cross-Petition are denied." This was sufficient to make the order appealable. (See *Estate of Dito* (2011) 198 Cal.App.4th

> 791, 799.) Because the September 2016 order was not timely appealed, the appeal is dismissed with respect to that order. This dismissal does not affect appellant's appeal of the probate court order entered on April 4, 2017.

Defs.' RJN Ex. 27.

Section 1303(a) of the Probate Code provides that, "[w]ith respect to a decedent's estate, the grant or refusal to grant the following orders is appealable: (a) Granting or revoking letters to a personal representative, except letters of special administration or letters of special administration with general powers." Cal. Prob. Code § 1303. *Cuneo* held that "[a]n order denying a petition to remove an executor is appealable on the rationale that it is, in effect, an order refusing to revoke letters." 214 Cal. App. 2d at 383. *Miramontes-Najera* held that "[a]n order is appealable, even if not mentioned in the Probate Code as appealable, if it has the same effect as an order the Probate Code expressly makes appealable." 118 Cal. App. 4th at 755. *Dito* held that although "[a]n order sustaining a demurrer without leave to amend is not an appealable order" in the absence of an "order of dismissal," the Court of Appeal could and would "amend the court's . . . order sustaining the demurrer without leave to amend to specify that it is a judgment of dismissal as to appellants' petition," so as to avoid an unnecessary remand and second appeal. 198 Cal. App. 4th at 799–800.[8]

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[8] In *Dito*, the court held that the appeal was governed by Probate Code section 1300(k) because the order at issue adjudicated

In an internal email to Woods on July 24, 2017, Baer wrote that he was "leaning towards submitting a petition [for review by the California Supreme Court] as a gesture to the client since this is my mistake." Chamberlin MSJ Decl. Ex. V at HBH_28775. Defendants filed a petition for review. Chamberlin Opp'n Decl. ¶ 432. In an August 22, 2017 letter to Chamberlin accompanying an invoice, Baer wrote that he could not express "how sorry and surprised [he was] that the Court of Appeal granted the motion," and that, barring an unexpected positive outcome from the California Supreme Court, Defendants would not bill Chamberlin for work related to the timeliness of the appeal. Chamberlin Opp'n Decl. Ex. 179.

The California Supreme Court denied review of the order granting the motion to dismiss on October 11, 2017. *See* Chamberlin Opp'n Decl. ¶ 441 & Ex. 180. On October 19, 2017, the Court of Appeal issued a partial remittitur certifying the dismissal as final and providing that Levin would recover his costs on the motion to dismiss. *See* Pl.'s RJN (dkt. 114-4) Ex. 30 ¶ 10. Chamberlin was not initially aware of that award of

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a claim that could have been brought as a separate civil action but was asserted in the probate case under Probate Code section 855 based on its factual relatedness, and noted that appeals under that section generally require entry of judgment. *Dito*, 198 Cal. App. 4th at 799 n.5. Chamberlin's petition for Levin's removal seems to have been more clearly governed by section 1303(a) than section 1300(k), suggesting that section 1303(a) and *Cuneo* (and to the extent there was any ambiguity as to the form of the order, *Miramontes-Najera*) were more directly on point than *Dito*.

costs, and when he asked Defendants about it, Baer responded that costs likely would not exceed $700, that Levin would need to file a bill of costs within forty days, and that opposing the bill of costs would probably not be worthwhile. Chamberlin Opp'n Decl. ¶¶ 443–48. Levin did not file a bill of costs. *Id.* ¶ 449.

In March of 2018, Chamberlin discovered that Defendant Hartog (a partner at HBH who was only minimally involved with Defendants' representation of Chamberlin) had a sister, Fay Levin, who was married to Daniel Levin, who was a cousin of Michael Levin and Jane. Chamberlin Opp'n Decl. ¶ 461. As this Court previously dismissed with prejudice Chamberlin's claims based on a theory of conflict of interest arising from that attenuated relationship, this order does not dwell on that issue. Chamberlin has not provided any evidence that alters the Court's previous conclusions.

After not receiving any invoices for many months, Chamberlin received a letter from Defendants on July 10, 2018 with a bill for services from September 17, 2017 through July 10, 2018 seeking payment of $64,288.92. Chamberlin Opp'n Decl. ¶ 467; Chamberlin MSJ Decl. Ex. U. Up to that time, Chamberlin had paid Defendants $170,286.34. Chamberlin Opp'n Decl. ¶ 467.

On December 19, 2018, the Court of Appeal affirmed the probate court's order granting Levin's petition for final distribution, rejecting Chamberlin's "primary contention on appeal" that he was entitled to an evidentiary hearing on his objections. Defs.' RJN

Ex. 31 at 6–14. The Court of Appeal noted that Chamberlin "only appealed the decision denying him an evidentiary ruling," and did not appeal the substantive ruling regarding Levin's treatment of rent from Partier and Braitman. *Id.* at 11 n.7. On Levin and Partier's cross appeal, the Court of Appeal also affirmed Judge Chernus's decision to deny sanctions against Chamberlin. *Id.* at 14–17. The Court of Appeal ordered the parties to bear their own costs. *Id.* at 18.

On July 3, 2019, Judge Chernus denied a request by Chamberlin—apparently representing himself at that point—to disqualify him, striking it as untimely and concluding that Chamberlin had shown no basis for disqualification on the merits. Defs.' RJN Ex. 31. Chamberlin sought a writ of mandate by an appellate court and review by the California Supreme Court, both of which were denied. Chamberlin Opp'n Decl. ¶¶ 492–96.

On July 25, 2019, Judge Chernus approved distribution of the remaining assets of the estate, including extraordinary fees of $32,000 to Hastings for defense of Chamberlin's appeals. Pl.'s RJN Ex. 30. In accordance with the Court of Appeal's October 19, 2017 remittitur providing for the executor to recover costs on the successful motion to dismiss Chamberlin's untimely appeal of the demurrer order, Judge Chernus deducted $2,831.91 from Chamberlin's share of the final distribution, apparently for copying and filing fees incurred in connection with the motion to dismiss and responding to Chamberlin's request for review by the California Supreme Court. *Id.*

B. Expert Reports

Chamberlin's expert witness Richard Van Dyke, an experienced probate attorney, states in his report that "experienced probate litigation counsel are keenly aware that many interim probate orders are immediately appealable, as opposed to civil department orders which usually are not," and that appeals from one petition in a probate case will often occur while other petitions proceed to trial or hearing. D'Amato MSJ Decl. Ex. 27 (Van Dyke Report) at 12. Van Dyke states that the finality of Judge Chernus's order granting Levin's demurrer and dismissing Chamberlin's petition to remove Levin as executor was apparent, that Baer and HBH should have recognized that it was appealable, and that any doubt as to the appropriate time to appeal should have been resolved in favor of either filing a "protective" appeal (which would not substantially harm Chamberlin's interests if dismissed as premature) or requesting that Judge Chernus enter judgment to establish a clear right to appeal. *Id.* at 13–15. According to Van Dyke, allowing the deadline to appeal to lapse, as well as failing to secure a court reporter for the demurrer hearing, represented a breach of HBH and Baer's duty of care as "experienced probate litigation counsel." *See id.* 15.

Van Dyke "assum[ed] that damages naturally flowed from the dismissal of Mr. Chamberlin's untimely appeal of the removal order, because he was unable to seek a reversal of the court's order refusing to appoint himself as executor in the place of Mr. Levin," the "[p]otential benefits of [which] may have had a

monetary component." *Id.* He did "not render a professional opinion concerning the conduct of Mr. Hartog or Ms. Hand," another HBH partner who has been dismissed as a defendant in this case. *Id.*

Van Dyke's rebuttal report adds a number of a new opinions that Defendants failed to meet their professional obligations with respect to other aspects of the case, including but not limited to their failure to conduct discovery, the manner of their communication with Chamberlin and supervision of staff, and issues they failed to raise in the eventual appeal. *See generally* Chamberlin Decl. re Mot. to Strike Ex. Y (Van Dyke Rebuttal Report).

Defendants' expert witness Lewis Warren asserts in his opening report that Defendants did not breach their standard of care, and that they "conducted reasonable research," "held honest and reasonable beliefs respecting the applicable law," "exercised reasonable judgment," "appropriately communicated with Mr. Chamberlin[,] and reasonably supervised attorneys and staff." Chamberlin Decl. re Mot. to Strike Ex. G (Warren Report) at 1. Warren's rebuttal report repeats the same conclusion and responds to some of Van Dyke's opinions, largely with similar conclusory assertions of reasonableness. Chamberlin Decl. re Mot. to Strike Ex. I (Warren Rebuttal Report) at 1–2. Warren also provided a declaration in conjunction with Defendants' opposition brief providing somewhat more specific reasons why he believes Defendants acted reasonably and it was not clear that they should have

appealed the order sustaining Levin's demurrer. Warren Decl. (dkt. 115-3).

C. Procedural History

Chamberlin's original complaint, filed December 18, 2019, asserted the following claims: (1) declaratory judgment that his retainer agreement with HBH "is void against public policy because it created an undisclosed, unwaivable, and irreconcilable conflict of interest," Compl. (dkt. 1) ¶ 292–301; (2) fraudulent inducement, *id.* ¶¶ 302–39; (3) breach of fiduciary duty, *id.* ¶¶ 340–53; (4) breach of the duty of loyalty, *id.* ¶¶ 354–74; (5) "intentional legal malpractice," *id.* ¶¶ 375–98; and (6) "negligent legal malpractice," *id.* ¶¶ 399–414.

On Defendants' motion under Rule 12(b)(6), the Court dismissed with leave to amend Chamberlin's claims for fraudulent inducement, breach of fiduciary duty, breach of the duty of loyalty, intentional legal malpractice,[9] and declaratory judgment, as well as his prayer for punitive damages, because Chamberlin did not allege that any particular defendant actually knew that Michael Levin was Defendant Hartog's sister's husband's cousin—the purported conflict of interest on

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[9] Although Defendants argued, likely correctly, that California does not recognize a separate tort for intentional (as opposed to merely negligent) legal malpractice, the Court held that Chamberlin's distinction between the two theories served a useful purpose, and addressed them separately. 1st MTD Order at 14.

which those claims relied. 1st MTD Order (dkt. 44)[10] at 11–16. The Court also dismissed Chamberlin's negligent malpractice claim against Margaret Hand based on Chamberlin's failure to allege that Hand represented him, and denied Chamberlin's motion for partial summary judgment. *Id.* at 15, 17–18. Chamberlin asserted the same claims in his operative first amended complaint, 1st Am. Compl. (dkt. 47) ¶¶ 337–487, and the Court again dismissed all claims except for negligent legal malpractice against HBH, Hartog, and Baer, 2d MTD Order (dkt. 60)[11] at 8–12, which is Chamberlin's only remaining claim at this time.

The Court declined to enter separate judgment on the dismissed claims or certify an interlocutory appeal, dkt. 75, and denied two motions by Chamberlin for leave to file a motion for reconsideration, dkts. 101, 121.

Defendant HBH filed counterclaims against Chamberlin seeking payment of $75,633.97 for services rendered, dkt. 12, and Chamberlin filed an answer to the counterclaims, dkt. 33.

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[10] *Chamberlin v. Hartog, Baer & Hand, APC*, No. 19-cv-08243-JCS, 2020 WL 2322884 (N.D. Cal. May 11, 2020). Citations herein to the Court's previous orders refer to page numbers of the versions filed in the Court's ECF docket.

[11] *Chamberlin v. Hartog, Baer & Hand, APC*, No. 19-cv-08243-JCS, 2020 WL 5210919 (N.D. Cal. Sept. 1, 2020).

III. ANALYSIS OF MOTION TO EXCLUDE EXPERT TESTIMONY

A. Legal Standard

Rule 702 of the Federal Rules of Evidence permits a party to offer testimony by a "witness who is qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. This rule embodies a "relaxation of the usual requirement of firsthand knowledge," *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592 (1993), and requires that certain criteria be met before expert testimony is admissible. The rule sets forth four elements, allowing such testimony only if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. These criteria can be distilled to two overarching considerations: "reliability and relevance." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). The inquiry does not, however, "require a court to admit or exclude evidence based on its persuasiveness." *Id.*

The reliability prong requires the court to "act as a 'gatekeeper' to exclude junk science," and grants the court "broad latitude not only in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability." *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 145, 147–49, 152 (1999)). Evidence should be excluded as unreliable if it "suffer[s] from serious methodological flaws." *Obrey v. Johnson*, 400 F.3d 691, 696 (9th Cir. 2005).

The relevance prong looks to whether the evidence "fits" the issues to be decided: "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes," and "[e]xpert testimony which does not relate to any issue in the case is not relevant." *Daubert*, 509 U.S. at 591.

B. Most of Warren's Opinions Are Inadmissible

Chamberlin moves to strike the opinions of Defendants' expert witness Lewis Warren. *See generally* Mot. to Strike (dkt. 105). The full "[c]omplete statement of all opinions . . . and the basis and reasons for them" in Warren's opening report reads as follows:

> Based on my review and analysis of the facts, documentary evidence and circumstances identified *infra* and my knowledge, training, skill and experience in probate litigation, I am not aware of any facts or circumstances which lead me to conclude that [Defendants]

> breached the standard of care for a probate litigator under like or similar circumstances in their representation of Christopher Chamberlin. Defendants conducted reasonable research in an effort to ascertain relevant legal principles and to make informed decisions as to the course of conduct based upon an intelligent assessment of the problem. They held honest and reasonable beliefs respecting the applicable law. Defendants exercised reasonable judgment in selecting among legal strategies, decision-making and in the opinions and recommendations offered in view of the complexity of the law and difficult circumstances of the case. Defendants appropriately communicated with Mr. Chamberlin and reasonably supervised attorneys and staff. Accordingly, it is my opinion that Defendants HBH, Mr. Baer and Mr. Hartog did not fail to use the skill and care that a reasonable careful attorney would have used in similar circumstances.

Chamberlin Decl. re Mot. to Strike Ex. G (Warren Report) at 1. The remainder of Warren's report consists of a summary of the factual and procedural history of the probate case, without analysis. *Id.* at 1–16. Warren's curriculum vitae was apparently attached, but is not included in the record before the Court. *See id.* at 17.[12]

Warren's rebuttal report addresses some of the issues raised in Van Dyke's report. He asserts that

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[12] Chamberlin does not argue that Warren is unqualified to express opinions on probate law, only that the opinions he has presented are improper.

Sefton v. Sefton, 206 Cal. App. 4th 875 (2012), did not squarely address the conditions under which an order sustaining a demurrer is appealable and is distinguishable from Judge Chernus's order in that the trial court in that case more clearly dismissed the petition. Chamberlin Decl. re Mot. to Strike Ex. I (Warren Rebuttal Report) at 2. Warren also asserts, without explanation, that he "do[es] not believe obtaining a record of the trial court hearing on the Demurrer would have had a material impact on the Court of Appeal's ruling. *Id.* at 3. Aside from disputing Van Dyke's suggestion that Defendants' purported errors might be a matter of common knowledge not requiring expert opinion (which is likely not itself a matter amenable to resolution by expert opinion, as these witnesses have established no particular expertise to assess what a layperson would know), Warren's remaining responses are merely assertions that, contrary to Van Dyke's opinions, Defendants' conduct was "reasonable under the circumstances," without explanation as to why that is so. *Id.* at 1–2.

In a declaration submitted in response to Chamberlin's motion for summary judgment, Warren elaborates that preexisting case law regarding appeals from an order sustaining a demurrer in a probate case was contradictory or at best nuanced, with at least one case stating that a judgment must be entered before an appeal may be taken, and that Defendants had good reasons not to seek entry of a judgment against their own client Chamberlin (which Warren asserts would be "extraordinary" and "almost never done") while he was

still pursuing relief in the trial court through avenues other than the petition that was the subject of the demurrer. Warren Decl. (dkt. 115-3) ¶¶ 5–7. Defendants assert, and Chamberlin does not dispute, that Chamberlin never deposed Warren.

Chamberlin argues that Warren's opinion as to whether Defendants held an "honest" belief should be excluded as improperly usurping the jury's role to assess credibility, Mot. to Strike at 2, and that his opinions regarding the reasonableness of Defendants' conduct should be excluded as improperly addressing an ultimate issue of law, *id.* at 10–13.

As to the former question, Defendants make no real effort to defend Warren's opinion that their belief was "honest," arguing instead that his "use of the single word 'honest' does not render the entirety of Mr. Warren's opinions inadmissible." Opp'n to Mot. to Strike (dkt. 116) at 2. Chamberlin is correct that Warren cannot testify as to Defendants' state of mind, or more specifically, whether they genuinely believed the positions they asserted. "The jury must decide a witness'[s] credibility. . . . An expert witness is not permitted to testify specifically to a witness'[s] credibility or to testify in such a manner as to improperly buttress a witness'[s] credibility." *United States v. Candoli*, 870 F.2d 496, 506 (9th Cir. 1989); *see also Reed v. Lieurance*, 863 F.3d 1196, 1209 (9th Cir. 2017). Warren's experience as a probate litigator does not qualify him to present expert opinions as to whether Defendants' beliefs were "honest." Chamberlin's motion to exclude that opinion is GRANTED.

As for Warren's opinions on reasonableness, the thrust of Chamberlin's argument is that such opinions are inherently improper because they address an ultimate issue.

> "It is well-established . . . that expert testimony concerning an ultimate issue is not per se improper." *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (citing *Mukhtar* [*v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1066 n.10 (9th Cir. 2002)[13]]). Federal Rule of Evidence 704(a) provides that expert testimony that is "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.* "[A] witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." *Id.* at 1017 (citing *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988)). However, "an expert witness cannot give an opinion as to her legal conclusion, *i.e.*, an opinion on an ultimate issue of law." *Mukhtar*, 299 F.3d at 1066 n.10. Moreover, instructing the jury as to the applicable law "is the distinct and exclusive province" of the court. *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993) (citations and quotation marks omitted).

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[13] *Mukhtar* was overruled on other grounds by *United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020) (en banc).

Nat.-Immunogenics Corp. v. Newport Trial Grp., No. SACV 15-2034 JVS (JCGx), 2019 WL 3099725, at *4 (C.D. Cal. Apr. 15, 2019).

Generally, courts have held that expert opinions as to whether a party's conduct was "reasonable" oversteps even the broad latitude afforded to experts under Rule 704(a). This Court has previously addressed that issue at some length, concluding that expert witnesses could "offer testimony regarding typical steps a patent attorney might take to investigate and assess a potential claim, but may not testify as to whether any conduct in this case was or was not 'objectively reasonable.'" *Cave Consulting Grp., Inc. v. OptumInsight, Inc.*, No. 15-CV-03424-JCS, 2019 WL 4492802, at *18–19 (N.D. Cal. Sept. 18, 2019), *vacated in unrelated part on reconsideration*, 2020 WL 127612 (N.D. Cal. Jan. 10, 2020).

Defendants assert that the standard is different for legal malpractice cases, where a jury will require the assistance of expert testimony as to the duty of care, but cite no case permitting the sort of conclusory opinions regarding reasonableness that Warren has offered here. *See* Opp'n to Mot. to Strike at 4–5, 7. In this Court's view, an expert witness could certainly testify on topics such as the typical steps a probate attorney would take in considering whether to file an appeal, the general knowledge within the profession regarding such deadlines, and the settled or unsettled nature of the law in that regard. From there, the expert could offer an opinion as to whether an attorney acted in accordance with the community standards of care the

expert has described. But the expert cannot simply label a party's conduct as "reasonable." *See, e.g.*, *M.H. v. County of Alameda*, No. 11-cv-02868-JST, 2015 WL 54400, at *2 (N.D. Cal. Jan. 2, 2015) ("[C]ases also consistently hold that while an expert cannot testify as to . . . "objective reasonableness" using those specific terms, . . . they may opine as to the appropriate standards of healthcare in a correctional facility, or generally accepted law enforcement standards, custom, or practice."). Chamberlin's motion is GRANTED as to Warren's opinions that Defendants acted "reasonably."

Unlike in *Cave Consulting*, it is for the most part not possible to parse out permissible opinions in Warren's reports regarding typical practices of probate litigators, because Warren has not offered any such opinions. The only opinion he offers that would inform the reasonableness of Defendants' conduct, rather than simply labeling that conduct as reasonable, is that the *Sefton* case did not clearly address the issue at hand and is distinguishable from Judge Chernus's order sustaining Levin's demurrer. Chamberlin's motion is DENIED as to that limited opinion, although as discussed below in the context of summary judgment, that opinion is not particularly useful to Defendants on its own.

Even if it were permissible for Warren to testify as to the reasonableness of Defendants' conduct, his reports do not offer a sufficient foundation for his conclusions. "'[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Gen. Elec. Co. v. Joiner*,

522 U.S. 136, 146 (1997). Here, that is virtually all that Warren has offered in his reports. His declaration submitted with Defendants' opposition to Chamberlin's motion for summary judgment includes greater detail as to why he believed Defendants acted reasonably, but under Rule 26, an expert witness must disclose not only the opinions they intend to present, but also "the basis *and reasons* for them." Fed. R. Civ. P. 26(a)(2)(B)(i) (emphasis added). The new reasoning that Warren provided for the first time in conjunction with Defendants' opposition brief was not disclosed on the timeline ordered by the Court for expert discovery, and thus was not available for Chamberlin to explore in discovery and address in his present motion.

While Chamberlin could perhaps have uncovered that reasoning if he had chosen to depose Warren, Rule 26 does not limit a retained expert witness's duty of disclosure to bare opinions or place the burden of discovering the grounds for such opinions on the opposing party. And while it is not uncommon for an expert to elaborate later in testimony on reasoning that might not have been stated with perfect clarity in a report, Warren's reports here—with the narrow exception of his discussion of the *Sefton* decision—do not include his reasoning at all. Because Warren's reports failed to disclose any explanation for his conclusions that would allow the Court or the jury to determine whether they were based on reliable methods and reasoning, Chamberlin's motion is GRANTED not only with respect to opinions that Defendants acted reasonably, but also with respect to the unexplained opinion that

a transcript of the demurrer hearing would not have altered the outcome of an appeal.

IV. ANALYSIS OF MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standard

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to designate "'specific facts showing there is a genuine issue for trial.'" *Id.* (citation omitted); *see also* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record. . . ."). "[T]he inquiry involved in a ruling on a motion for summary judgment . . . implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986). The non-moving party has the burden of identifying, with reasonable

particularity, the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). Thus, it is not the task of the court " 'to scour the record in search of a genuine issue of triable fact.' " *Id.* (citation omitted); *see Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); Fed. R. Civ. P. 56(c)(3).

A party need not present evidence to support or oppose a motion for summary judgment in a *form* that would be admissible at trial, but the *contents* of the parties' evidence must be amenable to presentation in an admissible form. *See Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th Cir. 2003). Neither conclusory, speculative testimony in affidavits nor arguments in moving papers are sufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant, *Scott v. Harris*, 550 U.S. 372, 378 (2007), but where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial" and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

Accordingly, the Court here resolves all reasonable inferences in favor of Chamberlin for the purposes of Defendants' motion, and resolves all reasonable inferences in favor of Defendants for the purpose of Chamberlin's motion.

B. Chamberlin's Claim for Legal Malpractice

Chamberlin's sole remaining claim is for legal malpractice under California law.

> To prevail on his legal malpractice claim, [a plaintiff] must prove four elements: "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence."

Namikas v. Miller, 225 Cal. App. 4th 1574, 1581 (2014) (quoting *Coscia v. McKenna & Cuneo* 25 Cal. 4th 1194, 1199–1200 (2001)).

1. Claim Against Hartog

As a starting point, Chamberlin does not address Defendants' argument that he has not shown a breach of duty by Hartog. *See* Defs.' MSJ (dkt. 107) at 25. His expert witness, Van Dyke, specifically did "not render a professional opinion concerning the conduct of Mr. Hartog." D'Amato MSJ Decl. Ex. 27 (Van Dyke Report) at 15. Nor has Chamberlin identified any other evidence from which a finder of fact could conclude that Hartog breached a professional duty, and it is not the Court's task "to scour the record in search of" any possible evidence that might support such a conclusion when Chamberlin has failed to respond to this portion

of Defendants' motion. *See Keenan*, 91 F.3d at 1279. Defendants' motion for summary judgment is therefore GRANTED as to Chamberlin's malpractice claim against Hartog.

2. Breach of Duty by Baer and HBH

For the purpose of their present motion for summary judgment, Defendants do not dispute that Chamberlin might succeed in showing a duty of care and a breach of duty by HBH and Baer in their failure to recognize the appropriate time to appeal. Defendants instead argue that Chamberlin cannot show the elements of causation and damage from any such breach, Defs.' MSJ at 19–24, and that he cannot show a breach of duty to in any other aspect of Defendants' conduct because his expert witness's original report was limited to the timeliness of the appeal and failure to obtain a transcript, *id.* at 24–25. Chamberlin seeks summary judgment on all elements of his claim. Pl.'s MSJ (dkt. 106) at 21–26.

While Chamberlin asserts that Defendants' failure to propound discovery, failure to prepare for an evidentiary hearing, advice to enter a stipulation approving the sale of the houseboat, and failure to argue certain issues on the eventual appeal—among other purported errors—contributed to his harm, *see id.* at 23–24, his expert witness's opening report identifies only the untimely appeal and failure to arrange for a reported transcript as breaches of Defendants' professional obligations, *see* Chamberlin Decl. re Mot. to

Strike Ex. X (Van Dyke Report). Additional purported failings identified in Van Dyke's May 24, 2021 rebuttal report, Chamberlin Decl. re Mot. to Strike Ex. Y, were not timely disclosed, leaving Defendants' expert witness no opportunity to respond to those opinions within the schedule ordered by the Court. *See* dkt. 98 (order on stipulation setting May 7, 2021 as the deadline to disclose expert witnesses and May 24, 2021 as the deadline for rebuttal reports). "Rebuttal expert testimony is limited to 'new unforeseen facts brought out in the other side's case,'" and "cannot be used to advance new arguments or new evidence." *Columbia Grain, Inc. v. Hinrichs Trading, LLC*, No. 3:14-cv-115-BLW, 2015 WL 6675538, at *2 (D. Idaho Oct. 30, 2015) (citation omitted). As the plaintiff with the burden of proof on his malpractice claim, Chamberlin was required to present any basis for that claim in his expert's opening report. *See* Fed. R. Civ. P. 26(a)(2)(B)(i) (requiring expert reports to disclose "a complete statement of all opinions the witness will express and the basis and reasons for them"). Van Dyke's opinions regarding separate purported failings that were disclosed for the first time in his rebuttal report cannot be considered.

As Chamberlin acknowledges, *see* Pl.'s Opp'n (dkt. 114) at 23–24, generally "expert testimony is required to establish the prevailing standard of skill and learning in the locality and the propriety of particular conduct by the practitioner in particular circumstances, as such standard and skill is not a matter of general knowledge." *Vaxiion Therapeutics, Inc. v.*

Foley & Lardner LLP, 593 F. Supp. 2d 1153, 1165 (S.D. Cal. 2008) (quoting *Lipscomb v. Krause*, 87 Cal. App. 3d 970, 975 (1978)). There is no basis to conclude that any aspect of Chamberlin's claim for malpractice falls within the narrow exception for matters of common knowledge. Since Van Dyke's initial report discloses opinions only as to Defendants' failure to file a timely appeal and obtain a transcript, Defendants' motion for summary judgment is GRANTED as to all other theories of malpractice.

On the other hand, "[w]hen a party in a professional malpractice claim moves for summary judgment and supports the motion with expert declarations as to whether a professional's conduct fell within the community standard of care, he is entitled to summary judgment unless the opposing party comes forward with conflicting expert evidence," unless an exception for common knowledge applies. *Vaxiion*, 593 F. Supp. 2d at 1165 (citing *Hutchinson v. United States*, 838 F.2d 390, 392 (9th Cir. 1988); *Willard v. Hagemeister*, 121 Cal. App. 3d 406, 412 (1981)). As discussed above, the Court has excluded most of the opinions offered by Defendants' expert witness Lewis Warren. His only allowable opinion concerns the lack of guidance a reasonable attorney would take from a single case, *Sefton v. Sefton*, 206 Cal. App. 4th 875 (2012), as to the appealability of Judge Chernus's order. Chamberlin Decl. re Mot. to Strike Ex. I (Warren Rebuttal Report) at 2. Beyond the conclusory assertions of reasonableness that the Court has excluded, Warren's rebuttal report does not rebut Van Dyke's opinions, for example, that piecemeal

appeals while other portions of the case remain pending are common in probate cases, that Judge Chernus's order was sufficiently final to put an experienced probate lawyer on notice that it was appealable, and that the prudent choice if in doubt would have been to seek entry of judgment or file a protective appeal. *See* Chamberlin Decl. re Mot. to Strike Ex. X (Van Dyke Report) at 12–15. Warren offers more on some of those points in his January 7, 2022 declaration, but that reasoning was not timely disclosed in his expert reports.

Baer offers his own explanation of his conduct, asserting that he remains unaware of any other California appellate decision treating an order on a demurrer without an explicit order of dismissal as appealable, such that a later appeal was untimely. *See* Baer Decl. (dkt. 115-2) ¶¶ 13–15. Defendants apparently disclosed Baer as an unretained expert, *see* Chamberlin Opp'n Decl. ¶ 503, and the Court assumes for the sake of argument that in an appropriate case, an attorney defending a malpractice case might be able to rely on their own expertise, opinions, and explanation to rebut a plaintiff's expert's opinion that the attorney breached the applicable duty of care.[14] But Baer does not address the section of the Probate Code on which the Court of Appeal relied (section 1303(a), providing that the "refusal to grant" and "revoking letters to a

[14] Although Defendants cite Baer's declaration in conjunction with Warren's opinions in opposing Chamberlin's motion for summary judgment, they do not address the question of whether, as a matter of law, Baer's own expert opinions could be sufficient to rebut Van Dyke's opinions if Warren's opinions are excluded. *See* Defs.' Opp'n to MSJ (dkt. 115) at 13–14.

personal representative" is appealable), the *Cuneo* decision holding that an order denying a request to remove an executor is appealable under that statute, or the portion of Judge Chernus's order that the Court of Appeal quoted: "All attempted causes of action in the Cross-Petition"—which included a cause of action to remove Levin as executor—"are denied." Baer's declaration also does not address Van Dyke's opinion that a reasonable probate lawyer would know that interim probate orders (such as orders regarding removal of an executor) are often immediately appealable, or his opinion that a reasonable probate lawyer would have either filed a protective appeal or sought entry of judgment to dispel any doubt as to whether the order was appealable. Under the circumstances of this case, Baer's explanation of his conduct in assessing whether the demurrer order was appealable would not allow a reasonable jury to determine that his conduct was reasonable, and is not sufficient to avoid summary judgment in light of Van Dyke's opinions that his approach was *not* consistent with the standard of care for experienced probate litigation counsel.

Defendants specifically assert that the exception (to the general requirement for expert testimony to prove legal malpractice) for matters of common knowledge does not apply here. Defs.' Opp'n to MSJ (dkt. 115) at 8–10. With Warren's expert opinions largely excluded and Baer's declaration insufficient to rebut Van Dyke's opinions, Chamberlin is therefore entitled to summary adjudication that Baer and HBH's failure to

timely appeal Judge Chernus's order sustaining the demurrer breached their duty of care.[15]

3. Causation and Damages

The question, then, is whether Chamberlin can show causation and damages resulting from the untimely appeal. Some California decisions have held that a malpractice plaintiff must show causation not merely as a matter of probability, but instead "to a legal certainty," such that but for the malpractice, the plaintiff "*certainly* would have received more money in settlement or at trial." *Filbin v. Fitzgerald*, 211 Cal. App. 4th 154, 166 (2012). A recent appellate decision rejected the view that a plaintiff must prove harm by anything more than the usual preponderance-of-the-evidence standard, holding that the phrase " 'legal certainty' simply means the level of certainty required by law, which is established by the applicable standard of proof." *Masellis v. L. Off. of Leslie F. Jensen*, 50 Cal. App. 5th 1077, 1092 (2020). That case addressed the question in greater detail than any other decision of which this Court is aware, but in concluding that previous cases did not clearly hold that a plaintiff must show causation of damages by anything greater than a preponderance of the evidence, *see id.*, it glosses over a long line of cases stating that a "mere probability" of

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[15] Chamberlin has likely also shown that Defendants' failure to obtain a transcript of the demurrer hearing breached their duty of care, but since, as discussed below, he has shown no damages resulting from that decision, the Court need not resolve that question.

damages caused by an attorney's error is not sufficient. *See, e.g.*, *Filbin*, 211 Cal. App. 4th at 166; *Shopoff & Cavallo LLP v. Hyon*, 167 Cal. App. 4th 1489, 1511 (2008); *Slovensky v. Friedman*, 142 Cal. App. 4th 1518, 1528 (2006); *Barnard v. Langer*, 109 Cal. App. 4th 1453, 1461 (2003); *Thompson v. Halvonik*, 36 Cal. App. 4th 657, 663 (1995); *McGregor v. Wright*, 117 Cal. App. 186, 197 (1931); *see also Thompson v. Asimos*, 6 Cal. App. 5th 970, 990 (2016) (applying the "legal certainty" standard to contract damages that depended on predicting the outcome of litigation); *McQuilkin v. Postal Tel. Cable Co.*, 27 Cal. App. 698, 701 (1915) (requiring "legal certainty" and more than "mere probability" for damages resulting from failure to deliver a telegram).

The California Supreme Court has not been entirely clear on this matter. In declining to set a lower standard of causation for transactional legal malpractice than litigation malpractice, the court held that in either context, a plaintiff "must show that *but for* the alleged malpractice, it is *more likely than not* that the plaintiff would have obtained a more favorable result," apparently consistent with *Masellis*'s later conclusion that a preponderance-of-the-evidence standard applies. *Viner v. Sweet*, 30 Cal. 4th 1232, 1244 (2003) (second emphasis added)). But in another case decided the same month, in its analysis of why potentially foregone punitive damages could not support a legal malpractice claim, the court quoted with approval earlier decisions holding that "the mere possibility *or even probability* that damage will result from wrongful conduct does not render it actionable," and that instead,

"[d]amage to be subject to a proper award must be such as follows the act complained of as a legal certainty." *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal. 4th 1037, 1048 (2003) (citations omitted). Neither of those cases directly presented the question of whether a malpractice plaintiff must show the likelihood of a better result in the absence of malpractice by anything more than the preponderance of the evidence.

Here, Defendants cite the "legal certainty" standard in their motion, Chamberlin's opposition brief cites *Masellis*'s interpretation of that standard as adding nothing beyond the usual preponderance standard, and Defendants do not address the issue in their reply. Neither party acknowledges the apparent conflict in California case law or argues why their proposed standard is correct. In the absence of any argument to the contrary in Defendants' reply, the Court accepts *Masellis*'s detailed analysis as the best predictor of how the California Supreme Court would resolve the issue if directly confronted with it, and holds that Chamberlin need only show that damages more likely than not resulted from Defendants' untimely appeal.[16]

For one relatively small portion of Chamberlin's claimed damages, that causal connection is clear: the $2,831.91 in costs that Judge Chernus deducted from Chamberlin's final distribution as a result of the Court of Appeal's determination that Chamberlin would pay

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[16] The outcome of the present motions would not differ under a more stringent standard of "legal certainty."

Levin's costs for Levin's motion to dismiss Chamberlin's appeal of the demurrer order. The Court of Appeal granted the motion to dismiss on the basis that the appeal was untimely. A jury does not need an expert to determine that but for Defendants' failure to file a timely appeal, that motion would not have been filed—and if it was not filed, it would not have been granted, and Chamberlin would not have been ordered to pay Levin's costs for filing it.

Defendants' response to that item of damages is as follows:

> Lastly, Chamberlin's assertion that he was "ordered to pay $2,831.91 to Mike Levin for costs under the Court of Appeal remittitur" for the Demurer Order is not a cognizable tort damage for legal malpractice. The larger context matters as Chamberlin is asserting that a successful appeal of the Demurrer Order would have allowed him to engage in a costly evidentiary hearing per Probate Code §8500(d) to wage a losing war to remove Levin based on an unsupported "conspiracy" theory—an order that Chamberlin would have appealed and also lost against the heightened evidentiary requirement for removal and an abuse of discretion standard upon review. Chamberlin's ongoing unsupported fight would have further reduced the Estate through additional fees for both the Executor and his counsel. As is clear, the claimed "$2,831.91" is not a damage arising from an alleged successful removal of Levin that would have occurred but-for HBH's actions, nor does it arise from an

> alleged more successful result to the petition for a final accounting that would have occurred but-for HBH's alleged malpractice. The "$2,831.91" is, if anything in a malpractice context a "nominal damage" that "does not suffice to create a cause of action for negligence." *Budd v. Nixen* 6 Cal.3d 195, 200 (1971). cf. *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* 137 Cal.App.4th 579, 591 (2006), *Filbin v. Fitzgerald* 211 Cal.App.4th 154, 165–66 (2012). The asserted fees, however, are not an applicable tort damage.

Defs.' Reply at 14.

Defendants' assertions that the $2,831.91 deduction from Chamberlin's share of the estate is "not a cognizable tort damage" and "not an applicable damage" are conclusory and unsupported by any authority, and the Court disregards them.

The possibility that other adverse consequences might have flowed from a timely appeal is speculative and unsupported by evidence. While it is conceivable that further litigation might have followed and depleted the estate (and thus Chamberlin's share of it) if Chamberlin had prevailed in reversing Judge Chernus's decision on the demurrer, Defendants have not offered evidence or analysis of the likelihood of such an outcome. Had Defendants timely appealed, perhaps the demurrer order would have been affirmed on its merits without an award of costs against Chamberlin, or perhaps Chamberlin would have ultimately succeeded in securing a better outcome for himself and the

estate as a whole, or perhaps the parties would have settled. Chamberlin has the burden as the plaintiff to prove damages on his claim, but he has met that burden by submitting sufficient evidence to show that the $2,831.91 charge against his share of the estate flowed from Defendants' negligence and would not have been imposed but for that negligence. Chamberlin need not prove the negative of all other conceivable consequences that might have followed if Defendants had not missed the deadline.

Finally, the cases Defendants cite holding that nominal damages are not sufficient to support a claim for malpractice or negligence are inapposite. *Budd* and *Filbin* merely recite that rule in their discussion of the elements of the claim. *Budd*, 6 Cal. 3d at 200 (citing, *e.g.*, *Walker v. Pac. Indem. Co.*, 183 Cal. App. 2d 513, 517 (1960)); *Filbin*, 211 Cal. App. 4th at 149 (citing *Budd*). That rule stems from cases holding that a plaintiff cannot bring a malpractice claim for nominal damages in lieu of actual damages where the plaintiff has not yet suffered *any* concrete harm that would support actual damages. *E.g.*, *Walker*, 183 Cal. App. 2d at 516–17 (holding that a possibility of nominal damages for an insurance broker's negligent failure to secure sufficient coverage did not start the statute of limitations for the insured's claim against the broker until a judgment in excess of coverage was entered against the insured, establishing actual loss). Defendants cite no case holding that a de minimis value of actual harm, as opposed to no actual harm at all, precludes a malpractice claim—much less that a liability in the

thousands of dollars would fall within that category as a matter of law.[17]

On this record, a jury could reach no reasonable conclusion except that Chamberlin was damaged in the amount of $2,831.91 by the award of costs against him in the order dismissing his appeal of the demurrer, and that such damage was caused by Defendants' failure to timely appeal. Taking into account the conclusion above that, by virtue of effectively unrebutted expert testimony, Chamberlin has established that the untimely appeal was a breach of Defendants HBH and Baer's professional duty, Chamberlin's motion for summary judgment is GRANTED with respect to his malpractice claim against Baer and HBH to the extent it is based on the $2,831.91 deduction from his final distribution.

Beyond the award of costs, all other categories of damages potentially connected the untimely appeal or failure to obtain a reported transcript of the demurrer hearing—funds that Judge Chernus awarded from the

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[17] The other case cited in this portion of Defendants' reply brief, *Hecht, Solberg*, does not discuss nominal damages at all, instead holding that a plaintiff was entitled to discovery as to whether the hypothetical judgment he purportedly failed to obtain on account of malpractice would have been collectable, because the plaintiff must show that he would have not only won but actually collected that judgment to establish the causation and damages elements of his claim. 137 Cal. App. 4th at 591–93. It has no bearing on the damages at hand, which stem from a penalty that was actually assessed against Chamberlin as a result of Defendants' malpractice, not from any hypothetical judgment Chamberlin might have obtained in his favor and needed to collect.

estate for Hastings's fees, lost potential surcharges against Levin, lost potential proceeds from the houseboat sale if it had been handled differently and resulted in greater profit, reimbursements that Levin declined to approve for Chamberlin, and the like, *see* Pl.'s Opp'n at 28–29—do not flow so directly from Defendants' errors. All such damages require, at the very least, a showing that Judge Chernus's order sustaining the demurrer would likely have been reversed if the appeal had been timely. Most of them require a further showing that Chamberlin would then have prevailed on remand not only in removing Levin as executor, but also in securing the executor role for himself (despite not being named in the will as an alternate) or for someone who shared his view of how the estate should be managed. Some categories of damages require still further inferences, such as proving that the houseboat would likely have returned greater net value for the estate if Chamberlin's proposal to advance funds for repairs before listing it had been followed, or that Judge Chernus would have chosen to surcharge Levin for purported derelictions and the amounts he would have assessed.

On this record, Chamberlin cannot clear even the first hurdle in showing that the Court of Appeal would more likely than not have reversed the order sustaining the demurrer if it had reached the merits of that question. While not all questions of causation in a malpractice will require expert testimony—as discussed above, for example, the causal effect between the untimely appeal and the assessment of costs against

Chamberlin is clear—it is difficult to see how a plaintiff could persuade a jury of a court's likely treatment of a question of law without the benefit of expert opinion.

Case law tends to support that conclusion. In *Namikas v. Miller*, an appellate court affirmed summary judgment for the defendant attorney because although the plaintiff submitted expert testimony as to the likely outcome of some elements of the spousal support calculation he lost an opportunity to challenge, his "expert evidence failed to raise a triable issue [of causation] because it focused on the marital standard of living without taking into account all of the relevant statutory factors or the broad discretion afforded the trial court in determining the weight to accord each factor." 225 Cal. App. 4th 1574, 1585–87 (2014). The court in that case did not suggest that the jury could have reached its own conclusions as to how the trial court would likely have resolved those issues in the absence of expert testimony. *See id.*

Here, a jury of nonlawyers would lack the experience and training to assess whether the Court of Appeal would more likely than not have reversed Judge Chernus's order sustaining the demurrer if the appellate court had reached the merits of the appeal. That task would require the jury to understand the applicable pleading standard for the theories asserted in the cross-petition, the standard for denying leave to amend, and the standard of review on appeal, among other questions of law. Chamberlin can point to evidence that Defendants believed at the time they were

likely to succeed both in opposing the demurrer and in challenging it on appeal, but in the absence of expert testimony, a jury would lack the tools to determine whether Defendants' assessment was accurate, especially as compared to Judge Chernus's decision that the demurrer should be sustained without leave to amend. Chamberlin's expert witness Van Dyke's mere "assumption that damages naturally flowed from the dismissal of Mr. Chamberlin's untimely appeal," Chamberlin Decl. re Mot. to Strike Ex. X at 15, does nothing to fill that gap. Accordingly, a jury could not reasonably conclude on this record that any damages besides the award of costs was caused by Defendants' professional negligence.

Chamberlin also asserts that he can recover his legal fees as damages because Defendants' services were worth less to him as a result of their malpractice, citing *Budd*, 6 Cal. 3d at 202. Pl.'s Opp'n at 27–28. That case considered, hypothetically, that a plaintiff might be able to recover fees paid to the defendant if the plaintiff could show not only that the defendant's negligence caused those fees to exceed the value of the services rendered, but also that the defendant's negligence caused the plaintiff to pay the fees at a particular time at all. 6 Cal. 3d at 202.[18] A more recent appellate case construed *Budd*'s discussion of overpaying for

[18] The California Supreme Court also held that the plaintiff might be able to recover fees paid to a different attorney, after firing the defendant, "to the extent that such fees compensated that attorney for his efforts to extricate plaintiff from the effect of defendant's negligence." *Budd*, 6 Cal. 3d at 202. No such fees are at issue in this case.

inadequate services as describing contract damages, not tort damages, and held that although the plaintiff's contract claim could proceed, the trial court erred in failing to grant summary judgment against the plaintiff on his professional negligence claim. *Herrington v. Superior Ct.*, 107 Cal. App. 4th 1052, 1060 (2003). Chamberlin therefore cannot base his malpractice claim on the fees he paid HBH, and Chamberlin has asserted no claim for breach of contract. Regardless, even if such damages were available on a malpractice claim, Chamberlin has not shown that he overpaid for deficient services. Baer provides undisputed testimony that Defendants "did not charge [Chamberlin] for any work attributable to the appeal of the September 6, 2016 order the [sic] sustaining the Executor's demurrer," Baer Decl. ¶ 7, the untimely appeal of which is the only breach of Defendants' professional duty that Chamberlin can establish on the record provided.

Since Chamberlin cannot show causation of any damages besides the $2,831.91 award of costs as a result of Defendants' untimely appeal or failure to obtain a transcript, Defendants' motion for summary judgment is GRANTED as to all other consequential damages on Chamberlin's malpractice clam.

4. Punitive Damages

Defendants did not specifically seek summary judgment on the issue of punitive damages. It does not appear that any evidence in this record could support

a reasonable inference of *intentional* misconduct[19] by Defendants sufficient to support such an award. *See Ferguson*, 30 Cal. 4th at 1053 n.3 (noting that "plaintiffs may recover punitive damages in a legal malpractice action if the attorneys, *themselves*, are guilty of 'oppression, fraud, or malice'" (quoting Cal. Civ. Code § 3294(a)). The evidence of Baer's "cavalier attitude" that Chamberlin cites in seeking summary judgment on Defendants' affirmative defense that punitive damages are not available, Pl.'s Mot. at 21, does not rise to the level of conscious failure to act, as opposed to mere negligence, that might be sufficient to support such an award. *See Colich & Sons v. Pac. Bell*, 198 Cal. App. 3d 1225, 1242 (1988).

The Court hereby provides notice pursuant to Rule 56(f) that it is considering granting summary judgment that Chamberlin cannot recover punitive damages. *See* Fed. R. Civ. P. 56(f) (providing that a court may "grant summary judgment for a nonmovant"

[19] While the Court previously dismissed with prejudice Chamberlin's claim for "intentional malpractice," which was framed as a claim based on Defendants' purported failure to disclose a conflict of interest with respect to the Levin family and intentional sabotage of Chamberlin's case, that claim as pleaded and dismissed did not necessarily encompass the theory of conscious disregard that Chamberlin now appears to be pursuing. *See* 2d MTD Order at 10–11. And while the Court's order on Defendants' motion to dismiss Chamberlin's *original* complaint specifically dismissed or struck his prayer for punitive damages, it did so without prejudice, 1st MTD Order at 15–16, and Defendants did not include that request in their second motion to dismiss after Chamberlin reasserted his prayer for punitive damages in his amended complaint, *see generally* Mot. to Dismiss 1st Am. Compl. (dkt. 48).

or "consider summary judgment on its own" after providing "notice and a reasonable time to respond"). If Chamberlin believes he should be permitted to pursue punitive damages, he may file a responsive brief not exceeding ten pages, as well as any relevant evidence not already included in the record, no later than March 18, 2022. Defendants may file a reply brief not exceeding ten pages no later than April 1, 2022. Any such briefs must be limited to the question of whether summary judgment should be granted as to Chamberlin's request for punitive damages.

C. Defendants' Affirmative Defenses

Chamberlin seeks summary judgment on a number of Defendants' affirmative defenses. Pl.'s MSJ at 16–21. As discussed above, Defendants are entitled to summary judgment on the merits of Chamberlin's malpractice claim except as to the $2,831.91 award of costs. Defendants have identified no specific evidence in relation to any affirmative defense that would preclude summary judgment for Chamberlin based on the award of costs. *See* Defs.' Opp'n to MSJ at 16–17 (in response to Chamberlin's motion for summary judgment on Defendants' affirmative defenses, offering only conclusory assertions that Chamberlin did not meet his burden). Since Chamberlin's only remaining claim is now fully adjudicated as discussed above, Defendants' affirmative defenses are moot, and the Court need not address further the parties' arguments regarding those defenses.

D. Defendants' Counterclaims

1. Book Account

Chamberlin moves for summary judgment on Defendants' "book account" counterclaim. Pl.'s MSJ at 27–28.

> The term "book account" is defined by statute to mean "a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner." (§ 337a.) A book account is "open" where a balance remains due on the account. (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708, 220 Cal.Rptr. 250.)

Eloquence Corp. v. Home Consignment Ctr., 49 Cal. App. 5th 655, 664–65 (2020).[20]

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[20] A book account claim generally cannot lie where the parties' obligations are governed by an express contract, but courts recognize an exception to that rule "where the parties had *agreed*

> To prevail on such a claim, a plaintiff must show:
>
> 1. That [the plaintiff] and [the defendant] had financial transactions with each other;
>
> 2. That [the plaintiff], in the regular course of business, kept [a written or electronic] account of the debits and credits involved in the transactions;
>
> 3. That [the defendant] owes [the plaintiff] money on the account; and
>
> 4. The amount of money that [the defendant] owes [the plaintiff]

CACI 372. Express intent to be bound by the account is not generally required; "California courts only require that the parties expressly intend to be bound by an open book account when there is an express contract that sets the time and amount of payment." *In re Roberts Farms Inc.*, 980 F.2d 1248, 1253 n.3 (9th Cir. 1992). Courts have recognized attorneys' "ledger cards, time sheets, and billing statements" as records sufficient to support a book account claim. *Id.* at 1252–53.

Chamberlin contends that Defendants have not presented a sufficient permanent record of the account, Pl.'s MSJ at 27, but the invoices and billing letters that Defendants have provided are not materially different from the records held to be sufficient in *Roberts*. *See* 980 F.2d at 1252–52; Baer Decl. Exs. 2, 3. Chamberlin asserts that this counterclaim cannot lie in a

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to treat money due under an express contract as items under an open book account." *Eloquence*, 49 Cal. App. 5th at 665–67.

malpractice case because "there is no agreed upon 'amount of money,'" Pl.'s MSJ at 27, but he cites no authority for that proposition. Even if it were generally true that malpractice bars a book account claim, Defendants are entitled to summary judgment on Chamberlin's malpractice claim with respect to most of the conduct at issue, as discussed above, and the Court is aware of no authority or rationale for the proposition that malpractice in one element of Defendants' representation of Chamberlin would bar this claim as to other unrelated work. Chamberlin also asserts that this counterclaim fails because "there is a dispute over whether HBH's services provided any value to Chamberlin," but the only case he cites for that assertion did not involve a book account claim and says nothing of the sort. Pl.'s MSJ at 28 (citing *Farmers Ins. Exchange v. Zerin*, 53 Cal. App. 4th 445, 460 (1997)).

Defendants have offered evidence that could support a reasonable conclusion that Defendants' invoices and billing letters reflect an amount owed by Chamberlin, accrued over a series of transactions in the parties' course of dealing. Chamberlin's motion for summary judgment as to the book account counterclaim is DENIED.

2. Account Stated

"The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on

the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount due." *Leighton v. Forster*, 8 Cal. App. 5th 467, 491 (2017) (citation omitted). "[I]t must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck *and agreed to be the correct sum owing* from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing." *Id.* (emphasis added; citation omitted).

Chamberlin asserts that there is no evidence that he ever agreed that the purportedly unpaid fees were a correct sum that he owed Defendants. Pl.'s MSJ at 28. To the contrary, he disputed his obligation to pay the unpaid bills upon receiving them, and Defendants acknowledged that dispute. *See* Chamberlin MSJ Decl. Ex. U. Defendants' opposition brief asserts that their fees were valid and reasonably incurred, and recites the elements of a claim for account stated, but identifies no evidence of an express or implied *agreement by Chamberlin* that the particular bills at issue reflected valid and accurate sums, and does not respond to Chamberlin's argument that no such evidence exists. Defs.' Opp'n to MSJ at 18–19 & n.9. Accordingly, while Defendants may be able to recover some or all of their fees under one of the other counterclaim theories they have asserted, Chamberlin's motion is GRANTED as to Defendants' account stated counterclaim.

3. Quantum Meruit

Chamberlin seeks summary judgment on Defendants' counterclaim for quantum meruit. Pl.'s MSJ at 28–30.

> Quantum meruit refers to the well-established principle that the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered. To recover in quantum meruit, a party need not prove the existence of a contract but it must show the circumstances were such that the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made.

Huskinson & Brown v. Wolf, 32 Cal. 4th 453, 458 (2004) (cleaned up).

Chamberlin cites a 1900 decision by the California Supreme Court for the rule that where, due to an attorney's negligence, the services at issue provided "a detriment, and not an advantage, no compensation should have been allowed." *In re Kruger's Est.*, 130 Cal. 621, 626 (1900); Pl.'s MSJ at 29. In light of Chamberlin's failure to provide cognizable expert opinion evidence of professional negligence except as to the untimely appeal of the demurrer order (for which he was not billed), it is not clear that he can show that Defendants' negligence rendered any other services worthless, even where those services were unsuccessful in achieving Chamberlin's litigation goals. At the very least, that is not the only conclusion that can be drawn from

the record—particularly since the appellate proceedings for which the fees at issue were incurred resolved partially in Chamberlin's favor, in that the Court of Appeal affirmed the decision not to impose sanctions against Chamberlin for litigating in bad faith. Chamberlin's motion is DENIED as to this counterclaim, which may proceed to trial.

4. Breach of Contract

Under California law, the "cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal. App. 4th 1375, 1391 n.6 (2004). Chamberlin seeks summary judgment on Defendants' counterclaim for breach of contract on the basis that the retainer agreement did not cover the appellate work for which fees purportedly remain unpaid, citing the California Business and Professions Code's requirement that a contract for legal services generally must set forth "[t]he general nature of the legal services to be provided to the client." Cal. Bus. & Prof. Code § 6148(a)(2); Pl.'s MSJ at 30–31. "Failure to comply with any provision of [that] section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee." Cal. Bus. & Prof. Code § 6148(c).

The relevant portion of the retainer agreement reads as follows:

> As you have requested, HARTOG, BAER & HAND, A Professional Corporation, will represent you individually as a beneficiary in connection with the petitions that are currently on file and may subsequently be filed by you individually or by others in the matter of the Estate of Sylvia Jane Levin Chamberlin, Marin County Superior Court Case No. PR 1503278.
>
> [. . .]
>
> We will perform only those legal services within the scope of the engagement described above. Accordingly, among other matters, this Agreement . . . does not require us to represent you in connection with any appeal.

Baer Decl. Ex. 1 at 1.

Defendants contend that although the retainer agreement did not *require* them to perform appellate work, that work nevertheless falls within the scope of the agreement as work "in connection with" the probate petitions at issue. Defs.' Opp'n to MSJ at 20. Standing alone, the description of the scope and the provision that the agreement "does not require [HBH] to represent [Chamberlin] in connection with any appeal" would be amenable to Defendants' interpretation. The word "accordingly," however, indicates that the lack of a requirement to work on appeals derives from the previous sentence, which states that Defendants would "perform only those legal services within

the scope of the engagement described above." Such a connection is only present if "the scope of the engagement described above" does not include appeals. The agreement could have been written more clearly, but in light of its use of "accordingly" to precede the statement that Defendants need not work on appeals, there is no reasonable reading of the agreement as a whole that encompasses appeals within the scope of the engagement.

Defendants contend that even if the retainer agreement did not specifically contemplate appellate work, they may nevertheless proceed on a breach of contract claim because section 6148's requirement for a written fee agreement allows an exception for "[a]n arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client." Defs.' Opp'n to MSJ at 20.[21] Chamberlin does not respond to this argument. *See generally* Pl.'s Reply re MSJ (addressing only Chamberlin's malpractice claim, without argument as to Defendants' counterclaims).

There is reason to doubt that the appellate work at issue was "of the same general kind" as the probate work in the Superior Court, particularly where the

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[21] Outside the context of section 6148, California recognizes implied contracts in generally the same manner as express contracts, with the only difference being that "[w]hile an express contract is defined as one, the terms of which are stated in words, an implied contract is an agreement, the existence and terms of which are manifested by conduct." *Levy v. Only Cremations for Pets, Inc.*, 57 Cal. App. 5th 203, 211 (2020).

written agreement specifically contemplated the latter and excluded the former. But the Court need not reach that question, because Chamberlin also paid some invoices that included appellate work. *See*, *e.g.*, Baer Decl. ¶ 6 & Ex. 2 (at least Invoice Nos. 29781 and 30102 describing appellate work, with Baer indicating that only later invoices were unpaid). There is no question that the subsequent appellate work for which Chamberlin has not paid Defendants was "of the same general kind" as the earlier appellate work that he paid for. Particularly in conjunction with Chamberlin's cooperation with prosecution of the appeal, and in at least some instances specific instructions to Defendants as to how to handle the appeal, a jury could conclude that the parties' conduct and the course of payment evinces an implied contract to continue paying for Defendants' services during the appeal on the same terms. *See*, *e.g.*, Chamberlin Opp'n Decl. Ex. 175 at HBH_17580 (email from Chamberlin to Defendants with instructions regarding the appeal, including that he wanted "to make sure you are all over this case, as the lead"). Chamberlin's motion for summary judgment on Defendants' counterclaim for breach of contract is therefore DENIED.[22]

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[22] Chamberlin states in his arguments regarding this counterclaim that he did not receive invoices for an extended period from October 2017 through July 2018, but does not explain why that entitles him to summary judgment. *See* Pls.' MSJ at 31. As Defendants note, while section 6148(b) of the Business and Professions Code requires attorney to provide bills upon request, there is no argument or evidence that Chamberlin requested any bills during the time when Defendants failed to provide them. Defs.' Opp'n to MSJ at 20.

V. CONCLUSION

For the reasons discussed above, Chamberlin's motion to exclude expert testimony is GRANTED in large part. His motion for summary judgment is GRANTED as to his malpractice claim with respect to the $2,831.91 award of costs against him, and as to Defendants' counterclaim for account stated. Defendants' motion for summary judgment is GRANTED as to all other aspects of Chamberlin's malpractice claim that they addressed. The parties' motions for summary judgment are otherwise DENIED.

If Chamberlin believes he should be permitted to pursue punitive damages, he may file a responsive brief no later than March 18, 2022 and Defendants may reply no later than April 1, 2022, as discussed above. If Chamberlin does not file a response, or the response is not sufficient to show that the record could support such damages, the Court will grant summary judgment on that issue sua sponte under Rule 56(f).

IT IS SO ORDERED.

Dated: February 22, 2022

/s/ Joseph C. Spero
JOSEPH C. SPERO
Chief Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER BAYRE CHAMBERLIN, Plaintiff, v. HARTOG, BAER & HAND, APC, et al., Defendants.	Case No. 19-cv-08243-JCS **ORDER DENYING MOTION TO ENTER FINAL JUDGMENT OR CERTIFY INTERLOCUTORY APPEAL** (Filed Oct. 9, 2020) Re: Dkt. No. 61

I. INTRODUCTION

Plaintiff Christopher Chamberlin, pro se, brought this action against his former attorneys, Defendants Hartog, Baer & Hand, APC ("HBH") and its three named partners David Baer, John Hartog, and Margaret Hand, asserting claims for fraudulent inducement, breach of fiduciary duty and the duty of loyalty, malpractice, and declaratory judgment that his retainer agreement with HBH is void. The thrust of many of Christopher Chamberlin's claims was that Defendants failed to disclose a purported conflict of interest with respect to Michael Levin, who is Christopher Chamberlin's uncle, served as the executor of Christopher Chamberlin's mother Jane Chamberlin's estate, and was his adversary in the underlying litigation for which Christopher Chamberlin engaged HBH. Unbeknownst

to Christopher Chamberlin at the time, Michael Levin's cousin was married to Hartog's sister.

The Court previously granted Defendants' first motion under Rule 12(b)(6) and dismissed Chamberlin's claims—except for his claim for negligent legal malpractice against Defendants HBH, Baer, and Hartog—with leave to amend. Chamberlin amended his complaint to reassert the dismissed claims, Defendants moved again to dismiss them, and the Court dismissed those claims with prejudice, while again allowing Chamberlin to proceed on his negligent malpractice claim against HBH, Baer, and Hartog. Chamberlin now moves either to enter a final, appealable judgment under Rule 54(b) of the Federal Rules of Civil Procedure, or alternatively to certify the Court's previous order for interlocutory appeal under 28 U.S.C. § 1292(b). The Court finds the matter suitable for resolution without oral argument and VACATES the hearing previously set for October 16, 2020. For the reasons discussed below, Chamberlin's motion is DENIED.[1]

II. BACKGROUND

A. Procedural History

Both Chamberlin's original complaint and his first amended complaint asserted the following claims: (1) declaratory judgment that his retainer agreement

[1] The parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

with HBH "is void against public policy because it created an undisclosed, unwaivable, and irreconcilable conflict of interest," Compl. (dkt. 1) ¶¶ 292–301; 1st Am. Compl. ("FAC," dkt. 47) ¶¶ 337–47; (2) fraudulent inducement, Compl. ¶¶ 302–39; FAC ¶¶ 348–404; (3) breach of fiduciary duty, Compl. ¶¶ 340–53; FAC ¶¶ 405–28; (4) breach of the duty of loyalty, Compl. ¶¶ 354–74; FAC ¶¶ 429–48; (5) "intentional legal malpractice," Compl. ¶¶ 375–98; FAC ¶¶ 449–72; and (6) "negligent legal malpractice," Compl. ¶¶ 399–414; FAC ¶¶ 473–87.

In the first of the two previous orders at issue, the Court dismissed with leave to amend Christopher Chamberlin's claim for fraudulent inducement because Christopher Chamberlin did not allege that any particular defendant actually knew that Michael Levin was Defendant Hartog's sister's husband's cousin, and without such an allegation it was not clear:

> (1) whether Christopher Chamberlin believes any defendant actually had such knowledge or whether he relies only on a theory of constructive knowledge or what Defendants' *should* have known;
> (2) whether Christopher Chamberlin believes that all Defendants knew of the relationship or that only some of them did; and
> (3) whether Christopher Chamberlin believes that Defendants knew of the relationship at the time that the parties entered the retainer agreement, or only learned of it at some point thereafter.

Order re Mot. to Dismiss, Mot. to Strike, & Mot. for Partial Summ. J. ("1st MTD Order," dkt. 44)[2] at 11–12. Lacking clarity on Christopher Chamberlin's theory of fraud, the Court declined to reach questions of whether any of those possibilities would support a viable claim for fraudulent inducement. *Id.* at 12. The Court also noted that Christopher Chamberlin did not allege with sufficient particularity the circumstances in which Defendants assured him there was no conflict of interest, and that Christopher Chamberlin had not alleged a breach of any California Rule of Professional Conduct. *Id.* at 12–13. Because Christopher Chamberlin's claims for breach of fiduciary duty, breach of the duty of loyalty, intentional legal malpractice,[3] and declaratory judgment rested on his theory of fraudulent inducement, the Court dismissed those claims as well. *Id.* at 13–15. The Court dismissed or struck Christopher Chamberlin's prayer for punitive damages for the same reason. *Id.* at 15–16.

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[2] *Chamberlin v. Hartog, Baer & Hand, APC*, No. 19-cv-08243-JCS, 2020 WL 2322884 (N.D. Cal. May 11, 2020). Citations herein to the Court's previous orders refer to page numbers of the versions filed in the Court's ECF docket.

[3] The Court noted Defendants' argument that California does not recognize a claim for "intentional legal malpractice" as distinct from a general malpractice claim, which requires only negligence, but held that addressing Christopher Chamberlin's claim based on intentional misconduct (i.e., Defendants allegedly choosing to act in Michael Levin's interest rather than Christopher Chamberlin's) separately from his claim asserting negligent error furthered the federal pleading standard's goals of elevating practical concerns of efficiency and notice over legal formalism. 1st MTD Order at 14.

Defendants did not seek dismissal of Christopher Chamberlin's claim for negligent legal malpractice against Defendants HBH, Baer, and Hartog, and the Court allowed that claim to proceed against those defendants. *Id.* at 15. The Court granted Defendants' motion to dismiss the negligent malpractice claim against Defendant Hand with leave to amend, because Christopher Chamberlin had not alleged that Hand represented him. *Id.* The Court denied Christopher Chamberlin's motion for summary judgment. *Id.* at 16–18.

After Christopher Chamberlin amended to reassert the dismissed claims and Defendants moved once again to dismiss them, the Court concluded that Christopher Chamberlin had not resolved the deficiencies set forth in the Court's first order. *See generally* Order re Mot. to Dismiss in Part 1st Am. Compl. ("2d MTD Order," dkt. 60).[4] Christopher Chamberlin again did not "allege[] that any defendant 'had a legal, business, financial, professional, or personal relationship' with Michael Levin," because he did not persuade the Court that the attenuated sister's-husband's-cousin relationship at issue was the sort of relationship contemplated by applicable rules of professional conduct, and failed to "allege[] that any person more closely related to any defendant—e.g., Hartog's sister Fay Levin, who is Michael Levin's cousin's wife—'would be affected substantially by resolution of' the dispute between Christopher Chamberlin and Michael Levin, much less that

[4] *Chamberlin v. Hartog, Baer & Hand, APC*, No. 19-cv-08243-JCS, 2020 WL 5210919 (N.D. Cal. Sept. 1, 2020).

any defendant knew or should have known of such an effect." *Id.* at 9 (quoting former Cal. Rule of Professional Conduct 3-310(B)(3)). The Court held that neither Christopher Chamberlin's conclusory allegations regarding Defendants' loyalty to the politically-connected Levin family nor Fay Levin's status as public figure (specifically, an ambassador) sufficed to allege a conflict of interest with respect to Michael Levin. *See id.* at 9–10. The Court also held that Christopher Chamberlin still did not allege any material involvement or error by Hand sufficient to support a claim against her for negligent malpractice. *Id.* at 11. Because Christopher Chamberlin had not been able to cure the defects identified in the previous order granting Defendants' first motion to dismiss, the Court denied leave to amend further and dismissed those claims with prejudice. *See id.* at 10–11.

B. Parties' Arguments

Christopher Chamberlin argues that entering a separate judgment under Rule 54(b) on the dismissed claims would promote judicial efficiency because "these 'conflict of interest' claims are analytically distinct from [his] remaining professional negligence claim." Mot. (dkt. 61) at 16. He contends that although "there is some overlap in the context for these different species of claims," they are sufficiently distinct that separate appeals would not require the Ninth Circuit to address the same issues twice. *Id.* at 17. According to Christopher Chamberlin, there is no just reason for

delay. *Id.* at 18–19. He cites no case entering a partial judgment under comparable circumstances. *See id.*

Alternatively, Christopher Chamberlin argues that the Court should certify the order dismissing his claims for interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* at 19–25. He contends that the order resolved controlling issues of law that will materially affect the outcome of the litigation, and that there is substantial ground for a difference of opinion because courts have recognized a lawyer's obligation to disclose conflicts of interest that are exclusively within the lawyer's knowledge. *See id.* at 22. Christopher Chamberlin argues that most of the potential discovery in the case would relate to his remaining negligent malpractice claims rather than the dismissed claims based on conflict of interest that he seeks to appeal, and that a simultaneous appeal therefore would not delay litigation of the remaining claims. *Id.* at 25.

Defendants contend that Christopher Chamberlin has not shown that the claims at issue are wholly severable, and argue that a partial judgment under Rule 54(b) would result in multiple duplicative appeals. Opp'n (dkt. 64) at 3–4. According to Defendants, they would be prejudiced by simultaneously litigating an appeal (which they believe is baseless) while aspects of this case remain pending in this Court, and Christopher Chamberlin has not established any prejudice he would suffer from waiting to appeal until all claims have been resolved. *Id.* at 5–6. Defendants argue that certification under § 1292(b) is not appropriate because Christopher Chamberlin has not established

either substantial grounds for difference of opinion or that an immediate appeal would promote efficient resolution of the case. *Id.* at 6–9.

In his reply brief, Christopher Chamberlin contends that a separate appeal is warranted because the dismissed claims turn on different questions of law, a different theory of causation, and different standards of proof than the negligence theory that the Court has allowed to proceed. Reply (dkt. 65) at 10–12. Among other arguments with respect to certification under § 1292(b), Christopher Chamberlin contends that there is substantial ground for a difference of opinion on the existence of a conflict of interest because courts have recognized the significance of sibling-in-law relationships. *Id.* at 14–16. According to Christopher Chamberlin, the general rule that attorneys must disclose potential conflicts of interest required disclosure that Hartog's sister had the same surname as the adverse party in the probate matter. *See id.* at 17–19.

III. ANALYSIS

A. Entry of Final Judgment Under Rule 54(b)

1. Legal Standard

Rule 54(b) allows a district court to direct entry of final judgment as to one or more of the claims while others remain pending if the court expressly determines that there is no just reason for delay. *See* Fed. R. Civ. P. 54(b). The Supreme Court has established a two-step process for district courts to determine whether

entry of judgment on a claim under Rule 54(b) is warranted. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7–8 (1980). First, the judgment must be final with respect to one or more claims. *See id.* A district court's judgment is final where it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Second, "the district court must go on to determine whether there is any just reason for delay." *Curtiss-Wright*, 446 U.S. at 8.

> "It is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal. This discretion is to be exercised 'in the interest of sound judicial administration.'" *Id.* at 8, (quoting [*Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956)]). Whether a final decision on a claim is ready for appeal is a different inquiry from the equities involved, for consideration of judicial administrative interests "is necessary to assure that application of the Rule effectively 'preserves the historic federal policy against piecemeal appeals.'" *Id.* (quoting *Mackey*, 351 U.S. at 438).

Wood v. GCC Bend, LLC, 422 F.3d 873, 878 (9th Cir. 2005). The Ninth Circuit has endorsed a "'pragmatic approach focusing on severability and efficient judicial administration,'" but emphasized that it "cannot afford the luxury of reviewing the same set of facts in a routine case more than once without a seriously important reason." *Id.* at 880, 882 (quoting *Cont'l Airlines,*

Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1525 (9th Cir. 1987)).

2. Separate Judgment Is Not Appropriate

Both the dismissed claims and the remaining claims in this case turn on Chamberlin's dissatisfaction with his legal representation. The difference is whether the purportedly substandard performance arose from negligence or from a conflict of interest. The Court has twice concluded that Chamberlin's allegations do not indicate a legally significant conflict of interest, and because Chamberlin failed to resolve that issue after the Court dismissed such claims in his initial complaint, the Court concluded that further leave to amend would be futile.

In *Wood*, the Ninth Circuit reversed a district court's decision to grant partial final judgment under Rule 54(b) after granting summary judgment on some but not all claims in an employment discrimination case:

> This is not a complicated case. It is a routine employment discrimination action. In such cases it is typical for several claims to be made, based on both state and federal law, and for several theories of adverse treatment to be pursued. It is also common for motions to be made for summary judgment, and to be granted in part and denied in part as district judges trim and prune a case to focus on what really is at issue for trial. At least in our

> experience, requesting—or granting a request for—certification in ordinary situations such as this is not routine. We believe it should not become so. As put by the Supreme Court, "[p]lainly, sound judicial administration does not require that Rule 54(b) requests be granted routinely." [*Curtiss-Wright*, 446 U.S.] at 10.
>
> Because Wood's case is itself routine and partial adjudication of one of several related claims or issues is likewise routine, granting her Rule 54(b) request does not comport with the interests of sound judicial administration.

Wood, 422 F.3d at 879.

Just as in that case, granting Chamberlin's present motion would "effectively sever[] trial on different theories of adverse treatment arising out of the same factual relationship," in a context where "severance in a straightforward case such as this would never occur [for trial purposes] as it would strain, rather than serve, the interests of sound judicial administration." *Id.* at 880–81.

It is, of course, conceivable that entering final judgment and allowing the piecemeal appeal that Chamberlin seeks *could* result in efficiency—if the Ninth Circuit reversed this Court's previous orders and resolved the appeal in Chamberlin's favor, and if it did so before this case proceeded to trial or other significant phases of litigation on the remaining claims, and if Chamberlin did not prevail on other theories that would render superfluous the claims this Court dismissed, and if the Court took no other actions to which Chamberlin

might object and raise on a subsequent appeal, then entering a separate judgment would promote efficiency. Such is true in virtually any case where some but not all claims are dismissed before trial. Conversely, if the Ninth Circuit were to affirm this Court's judgment, appealing now rather than later would be at most neutral from an efficiency standpoint. If the case resolves to Chamberlin's satisfaction, either through litigation or through settlement, there might be no need for an appeal at all. And if Chamberlin takes issue with other decisions this Court might make with respect to his remaining claim based on negligence, he might have cause to file a later appeal on those issues as well, weighing in favor of reserving judgment so that the Ninth Circuit can address all such issues at the same time in a single appeal after *all* of Chamberlin's claims have been resolved in this Court.

In short, Chamberlin has not meaningfully distinguished this case from any other where some claims are dismissed while other related claims proceed. "Because [Chamberlin's] case is itself routine and partial adjudication of one of several related claims or issues is likewise routine, granting [his] Rule 54(b) request does not comport with the interests of sound judicial administration." *Wood*, 422 F.3d at 879. The motion for entry of judgment under Rule 54(b) is therefore DENIED.

B. Certification of Interlocutory Appeal

1. Legal Standard

A district court may certify a non-dispositive order for interlocutory review under § 1292(b) where: (1) "the order involves a controlling question of law"; (2) "as to which there is substantial ground for difference of opinion;" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). By its terms, § 1292(b) requires the district court to expressly find in writing that all of those requirements are met. *Id.* "Courts traditionally will find that a substantial ground for difference of opinion exists where 'the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.'" *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (citation omitted).

"Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002); *see also In re Cement Antitrust Litig.*, 673 F.2d 1020, 1027 (9th Cir. 1981) ("The precedent in this circuit has recognized the congressional directive that section 1292(b) is to be applied sparingly and only in exceptional cases. . . ."). In seeking interlocutory appeal, a movant must show that "exceptional circumstances justify a departure from the basic policy of

postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

2. Interlocutory Appeal Is Not Appropriate

As discussed above in the context of Rule 54(b), Christopher Chamberlin has not shown that this case is exceptional, or that it warrants a departure from the usual process of a single appeal after final judgment on all claims. Moreover, Christopher Chamberlin has not identified any "substantial ground for difference of opinion" beyond his own disagreement with the Court's previous orders. The caselaw that Christopher Chamberlin cites addressing generally the significance of conflicts of interest does not indicate that the sort of attenuated relationship at issue here—an adverse party who is a lawyer's sister's husband's cousin, with no plausible allegation that the lawyer was aware of that relationship—constitutes a conflict of interest. *Cf. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co.*, 6 Cal. 5th 59, 80 (2018) (addressing circumstances where a law firm simultaneously represented clients with conflicting interests, actually knew of the conflicting interests, and failed to inform the client). Christopher Chamberlin cites a handful of cases from other jurisdictions noting the significance of a sibling-in-law relationship, albeit in contexts other than attorney conflicts of interest, Reply at 16 n.7, but Michael Levin is not Hartog's brother-in-law; he is Hartog's brother-in-law's cousin. Christopher Chamberlin has

not alleged, even after being granted leave to amend, that the two ever met or were aware of one another. Christopher Chamberlin cites no authority suggesting that such a relationship, unknown to the attorney, establishes a conflict of interest. The motion to certify an interlocutory appeal under § 1292(b) is therefore DENIED.

IV. CONCLUSION

For the reasons discussed above, Christopher Chamberlin's motion is DENIED.

IT IS SO ORDERED.

Dated: October 9, 2020

/s/ Joseph C. Spero
JOSEPH C. SPERO
Chief Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER BAYRE CHAMBERLIN, Plaintiff, v. HARTOG, BAER & HAND, APC, et al., Defendants.	Case No. 19-cv-08243-JCS **ORDER REGARDING MOTION TO DISMISS IN PART FIRST AMENDED COMPLAINT** (Filed Sep. 1, 2020) Re: Dkt. No. 47

I. INTRODUCTION

Plaintiff Christopher Chamberlin, pro se, brings this action against his former attorneys, Defendants Hartog, Baer & Hand, APC ("HBH") and its three named partners David Baer, John Hartog, and Margaret Hand, asserting claims for fraudulent inducement, breach of fiduciary duty and the duty of loyalty, malpractice, and declaratory judgment that his retainer agreement with HBH is void. Most of Christopher Chamberlin's claims are based on his theory that Defendants failed to disclose a purported conflict of interest with respect to Michael Levin, who is Christopher Chamberlin's uncle, served as the executor of Christopher Chamberlin's mother Jane Chamberlin's estate, and was his adversary in the underlying probate litigation for which Christopher Chamberlin engaged HBH. The Court previously granted Defendants' motion to

dismiss those claims, as well as a claim for negligent legal malpractice against Hand, with leave to amend. Christopher Chamberlin filed an amended complaint reasserting the dismissed claims, and Defendants move once again to dismiss. The Court found the matter suitable for resolution without oral argument and vacated the hearing set for August 14, 2020. For the reasons discussed below, Defendants' motion is GRANTED, and the claims at issue are DISMISSED WITH PREJUDICE.

Defendants have not moved to dismiss Christopher Chamberlin's negligent malpractice claims against HBH, Baer, and Hartog, which may proceed. Defendants shall file their answer no later than September 15, 2020.[1]

II. BACKGROUND

Because a plaintiff's factual allegations are generally taken as true in resolving a motion to dismiss under Rule 12(b)(6), this order summarizes Christopher Chamberlin's allegations as if true. Nothing in this order should be construed as resolving any issue of fact that might be disputed at a later stage of the case.

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[1] The parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

A. Allegations of the Original Complaint

The Court's previous order includes a more detailed summary of the alleged facts of this case. *See* Order re Mot. to Dismiss, Mot. to Strike, & Mot. for Partial Summ. J. ("1st MTD Order," dkt. 44)[2] at 2–5. In brief, after Christopher Chamberlin's mother Jane Chamberlin died in 2015 and his uncle Michael Levin was named in her will as executor, Christopher Chamberlin sought to contest a sale of Jane Chamberlin's houseboat and remove Michael Levin as executor. Compl. (dkt. 1) ¶¶ 26, 28, 51, 95–97. In July of 2016, Christopher Chamberlin retained Defendant HBH as his counsel, and HBH attorneys Defendant Baer and non-party Julie Woods appeared on his behalf in state court probate proceedings. *See id.* ¶¶ 118, 126, 136, 138. Christopher Chamberlin alleged that Defendants made a number of errors in representing him that led, among other consequences, to Christopher Chamberlin being held liable for Michael Levin's costs on appeal. *See, e.g., id.* ¶¶ 157–66, 195–202.

According to Christopher Chamberlin, those errors were not mere negligence, but stemmed from Defendants' desire to protect Michael Levin's family because—unbeknownst to Christopher Chamberlin at the time—Michael Levin's cousin is married to Defendant Hartog's sister. *See id.* ¶¶ 62, 220–21, 253. Christopher Chamberlin relied on Defendants to disclose that

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[2] *Chamberlin v. Hartog, Baer & Hand, APC*, No. 19-cv-08243-JCS, 2020 WL 2322884 (N.D. Cal. May 11, 2020). Citations herein to the Court's previous order refer to page numbers of the version filed in the Court's ECF docket.

relationship, which, in his view, created a conflict of interest. *E.g.*, *id.* ¶¶ 101–02, 295. Christopher Chamberlin had mentioned to Baer at the time he retained HBH that Jane Chamberlin and Michael Levin were related to former U.S. Senator Carl Levin and then-U.S. Representative Sander Levin. *Id.* ¶ 107.

Christopher Chamberlin asserted claims for: (1) declaratory judgment that his retainer agreement with HBH "is void against public policy because it created an undisclosed, unwaivable, and irreconcilable conflict of interest," *id.* ¶ 292–301; (2) fraudulent inducement, *id.* ¶¶ 302–39; (3) breach of fiduciary duty, *id.* ¶¶ 340–53; (4) breach of the duty of loyalty, *id.* ¶¶ 354–74; (5) "intentional legal malpractice," *id.* ¶¶ 375–98; and (6) "negligent legal malpractice," *id.* ¶¶ 399–414.

B. The Court's Previous Order

The Court previously dismissed with leave to amend Christopher Chamberlin's claim for fraudulent inducement because Christopher Chamberlin did not allege that any particular defendant actually knew that Michael Levin was Defendant Hartog's sister's husband's cousin, and without such an allegation it was not clear:

> (1) whether Christopher Chamberlin believes any defendant actually had such knowledge or whether he relies only on a theory of constructive knowledge or what Defendants' *should* have known;

> (2) whether Christopher Chamberlin believes that all Defendants knew of the relationship or that only some of them did; and
> (3) whether Christopher Chamberlin believes that Defendants knew of the relationship at the time that the parties entered the retainer agreement, or only learned of it at some point thereafter.

1st MTD Order at 11–12. Lacking clarity on Christopher Chamberlin's theory of fraud, the Court declined to reach questions of whether any of those possibilities would support a viable claim for fraudulent inducement. *Id.* at 12. The Court also noted that Christopher Chamberlin did not allege with sufficient particularity the circumstances in which Defendants assured him there was no conflict of interest, and that Christopher Chamberlin had not alleged a breach of any California Rule of Professional Conduct. *Id.* at 12–13. Because Christopher Chamberlin's claims for breach of fiduciary duty, breach of the duty of loyalty, intentional legal malpractice,[3] and declaratory judgment rested on his theory of fraudulent inducement, the Court dismissed those claims as well. *Id.* at 13–15. The Court dismissed

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[3] The Court noted Defendants' argument that California does not recognize a claim for "intentional legal malpractice" as distinct from a general malpractice claim, which requires only negligence, but held that addressing Christopher Chamberlin's claim based on intentional misconduct (i.e., Defendants allegedly choosing to act in Michael Levin's interest rather than Christopher Chamberlin's) separately from his claim asserting negligent error furthered the federal pleading standard's goals of elevating practical concerns of efficiency and notice over legal formalism. 1st MTD Order at 14.

or struck Christopher Chamberlin's prayer for punitive damages for the same reason. *Id.* at 15–16.

Defendants did not seek dismissal of Christopher Chamberlin's claim for negligent legal malpractice against Defendants HBH, Baer, and Hartog, and the Court allowed that claim to proceed against those defendants. *Id.* at 15. The Court granted Defendants' motion to dismiss the negligent malpractice claim against Defendant Hand with leave to amend, because Christopher Chamberlin had not alleged that Hand represented him. *Id.* The Court denied Christopher Chamberlin's motion for summary judgment. *Id.* at 16–18.

C. The First Amended Complaint

Christopher Chamberlin's first amended complaint asserts the same claims as his original complaint: (1) declaratory judgment that the "retainer agreement is void as against public policy because it created an undisclosed, unwaivable, and irreconcilable conflict of interest," 1st Am. Compl. ("FAC," dkt. 47) ¶¶ 337–47; (2) fraudulent inducement, based on concealment, *id.* ¶¶ 348–404; (3) breach of fiduciary duty, *id.* ¶¶ 405–28; (4) breach of the duty of loyalty, *id.* ¶¶ 429–48; (5) "intentional legal malpractice," *id.* ¶¶ 449–72; and (6) "negligent legal malpractice," *id.* ¶¶ 473–87. The factual allegations of Christopher Chamberlin's first amended complaint are similar to his original complaint, with relevant new allegations addressed in context in the Court's analysis below.

D. The Parties' Arguments

Defendants move once again to dismiss Christopher Chamberlin's fraudulent inducement claim, arguing that his new allegations that Baer "must have been aware" Hartog's brother-in-law was related to former Senator Carl Levin and former Representative Sander Levin (and thus also to Michael Levin) are too speculative to be credited. Mot. (dkt. 48) at 9–10. Defendants also argue that even if Baer knew that Hartog's brother-in-law Daniel Levin was Michael Levin's cousin, the relationship between Baer and Michael Levin was too attenuated to create a conflict of interest or duty to disclose under applicable rules of professional conduct. *Id.* at 10–12. Defendants move to dismiss Christopher Chamberlin's claims for breach of fiduciary duty, breach of the duty of loyalty, declaratory judgment, and intentional malpractice for the same reasons. *Id.* at 12–13. Defendants also move to dismiss again Christopher Chamberlin's malpractice claims against Hand, arguing that he still has not alleged that Hand herself represented Christopher Chamberlin and breached her professional obligations. *Id.* at 14.

Citing caselaw discussing the general principles of conflicts of interest in representation, Christopher Chamberlin argues that "any reasonable person would perceive an actual (not apparent) conflict of interest in doing what's best for a sister and her family (Daniel Levin, and those supported by him) on the one hand; and Chamberlin's litigations goals—exposing Mike Levin's fraud and seeking legal redress for it—on the

other." Opp'n (dkt. 49) at 12–14.[4] Christopher Chamberlin asserts that upon a "verbal request to go easy on Mike Levin from Hartog's and Hand's brother-in-law . . . to miss an appellate deadline or wait until it was too late to serve discovery . . . it would be done," *id.* at 13, although his first amended complaint does not allege any such request. Christopher Chamberlin notes that he explicitly conditioned his retention of HBH on the lack of conflict of interest, and cites California cases recognizing that an attorney may not recover fees for services rendered in violation of professional responsibilities. *Id.* at 14. Christopher Chamberlin also cites former California Rule of Professional Conduct 3-310(B)(3), in effect at the time of the events at issue, which required a client's written consent where an attorney had a relationship with someone the attorney knew or should have known would be substantially affected by the representation. *See id.* at 16–19. According to Christopher Chamberlin, the purported conflict of interest and errors in representation warrant rescission of the retainer agreement, *id.* at 19–20,

[4] Christopher Chamberlin submits a declaration with his opposition brief. *See* Chamberlin Decl. (dkt. 50). Motions under Rule 12(b)(6) are generally resolved solely on the allegations of a plaintiff's complaint and legal arguments presented in the parties' briefs, without reference to extraneous evidence. Regardless, and taking into account that such a declaration might in some cases shed light on whether a pro se plaintiff could amend a deficient complaint to state a valid claim, nothing in the declaration informs the dispositive question of whether any defendant had a personal or professional relationship with someone they knew or should have known would be affected substantially by the outcome of Christopher Chamberlin's dispute with Michael Levin.

as well as a claim for fraudulent inducement based on either intentional concealment or constructive concealment, because Defendants breached a fiduciary duty in failing to disclose their relationship with the Levin family, *id.* at 21–28. Christopher Chamberlin also argues that such a breach supports his claim for malpractice and his prayer for punitive damages, *id.* at 28–30, and that Hand's alleged supervision of Woods's work representing Christopher Chamberlin supports his malpractice claim against Hand, *id.* at 30–31. Christopher Chamberlin requests leave to amend once again if the Court grants Defendants' motion. *Id.* at 31.

Defendants argue again in their reply brief that Christopher Chamberlin has not alleged that any defendant knew of any relationship with Michael Levin or intentionally concealed that relationship from Christopher Chamberlin, and that the Court should disregard Christopher Chamberlin's "implausible speculation that attorney David Baer 'must have' or 'would have known' of this attenuated and legally irrelevant relationship." Reply (dkt. 51) at 2–3. Defendants also argue that allegations of what any defendant should have known are not sufficient to show fraud. *Id.* at 3–4. Defendants contend that Christopher Chamberlin has not asserted a claim for "constructive fraud" in his first amended complaint, and should not be granted leave to do so because he cannot allege either any duty to disclose or any defendant's actual knowledge of the purportedly disqualifying relationship. *Id.* at 5–9. According to Defendants, Christopher Chamberlin's claims for declaratory judgment, breach of fiduciary

duty and the duty of loyalty, and intentional malpractice fail for the same reasons. *Id.* at 9–10. Defendants also argue that Christopher Chamberlin still has not alleged any involvement or error by Hand sufficient to support his negligent malpractice claim against her. *Id.* at 10–11.

III. ANALYSIS

A. Legal Standard

A complaint may be dismissed for failure to state a claim on which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. "The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a claimant's burden at the pleading stage is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that a "pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

In ruling on a motion to dismiss under Rule 12(b)(6), the court takes "all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A pleading must "contain either direct

or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "[C]ourts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Rather, the claim must be "'plausible on its face,'" meaning that the claimant must plead sufficient factual allegations to "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 570).

Rule 9(b) of the Federal Rules of Civil Procedure sets a heightened pleading standard for claims based on fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The Ninth Circuit has held that in order to meet this standard, a "complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity," *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993), or in other words, "'the who, what, when, where, and how' of the misconduct

charged," *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citation omitted). "Rule 9(b) demands that the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns*, 567 F.3d at 1124 (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)) (ellipsis in original).

Where the complaint has been filed by a pro se plaintiff, as is the case here, courts must "construe the pleadings liberally . . . to afford the petitioner the benefit of any doubt." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted). "A district court should not dismiss a pro se complaint without leave to amend unless 'it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (quoting *Schucker v. Rockwood*, 846 F.2d 1202, 1203–04 (9th Cir. 1988) (per curiam)). When it dismisses the complaint of a pro se litigant with leave to amend, "'the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively.'" *Id.* (quoting *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

B. Fraudulent Inducement

California law requires the following elements for a claim for fraudulent inducement based on concealment:

> (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.

Kaldenbach v. Mut. of Omaha Life Ins. Co., 178 Cal. App. 4th 830, 850 (2009). To establish a duty to disclose, Christopher Chamberlin relies on former California Rule of Professional Conduct 3-310(B)(3), which was in effect at the time he retained Defendants as his counsel, and which required written consent for representation where "[t]he member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter."

Despite the Court previously noting this deficiency, *see* 1st MTD Order at 12–13, Christopher Chamberlin still has not alleged that any defendant "had a legal, business, financial, professional, or personal

relationship" with Michael Levin. Nothing in Christopher Chamberlin's first amended complaint or opposition brief alters the Court's previous conclusion that "an attorney's sister's husband's cousin is [not] the sort of 'personal relationship' contemplated by the rule." *See id.* at 12. Nor has Christopher Chamberlin plausibly alleged that any person more closely related to any defendant—e.g., Hartog's sister Fay Levin, who is Michael Levin's cousin's wife—"would be affected substantially by resolution of" the dispute between Christopher Chamberlin and Michael Levin, much less that any defendant knew or should have known of such an effect.

Christopher Chamberlin alleges that "Daniel Levin, Ambassador Fay Levin, and Mike Levin share an interest in protecting Mike Levin's personal and professional reputation" and "in protecting the Levin name, generally." FAC ¶ 267–68. Even taking that allegation as true for the purpose of a motion to dismiss, none of those people represented Christopher Chamberlin, and none of them is named as a defendant in this action. Looking to the named defendants, Christopher Chamberlin still does not allege that Hartog or Hand knew that Michael Levin was Hartog's brother-in-law's cousin.[5] To the extent he alleges that Baer had some

[5] The first amended complaint states that Christopher Chamberlin "believes that John Hartog provided [another lawyer's] name for Mike Levin through Daniel Levin." FAC ¶ 265. Assuming for the sake of argument that Christopher Chamberlin's belief is sufficiently plausible to be taken as true, that allegation does not address whether Hartog actually knew who Michael Levin was, as opposed to Hartog merely providing his

knowledge of a relationship between Michael Levin and Hartog's brother-in-law—because Christopher Chamberlin told Baer that Michael Levin was related to the Levins who served in Congress, and Baer "must have been aware" that Hartog's brother-in-law was also related to those Levins, FAC ¶¶ 133, 284—there is still no indication that Baer knew any details of that relationship, or that even if he had, he would have considered such an attenuated connection relevant to the representation. In any event, despite the assertions of Christopher Chamberlin's opposition brief, some vague extended familial relationship between an adverse party and a law partner's sister's husband does not, in itself, create a "profound personal conflict of interest." *Cf.* Opp'n at 18. The Court concludes that the familial relationship alleged in the first amended complaint does not constitute a conflict of interest under California law.

Christopher Chamberlin appears to put much stock in Hartog's sister Fay Levin's appointment as an ambassador in 2009, alleging that Hartog and his wife Hand were required to disclose their political contributions that year as a result. *See* Opp'n at 18 (citing FAC ¶¶ 269–79, 281–85). But Fay Levin's status as a public figure does not indicate that any defendant knew that *Michael* Levin—who is not alleged to have held any public office or otherwise been in the public eye—was her husband's cousin, much less support a conclusion that such a relationship, had they been aware of it,

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brother-in-law Daniel Levin with the name of a California probate lawyer.

would have influenced how any defendant carried out their professional responsibilities in representing Christopher Chamberlin. Nor does Hartog and Hand's attendance at their niece's and nephew's weddings, *see* FAC ¶ 280, evince that they would hold loyalty to anyone bearing the fairly common surname "Levin."

The Court therefore concludes once again that Christopher Chamberlin has not plausibly alleged a violation of former Rule 3-310(B)(3). Christopher Chamberlin has identified no other potential source of legal duty to disclose any defendant's several-steps-removed relationship with Michael Levin. Defendants' motion to dismiss Christopher Chamberlin's claim for fraudulent inducement is GRANTED.

Despite the Court previously granting leave to amend this claim to cure the same defect in the original complaint, nothing in Christopher Chamberlin's first amended complaint, opposition brief, or declaration suggests that Christopher Chamberlin could state a claim based on any conflict of interest or loyalty of Defendants to Michael Levin if granted leave to amend again. The Court therefore concludes that further leave to amend would be futile, and dismisses this claim with prejudice.

C. Remaining Claims Based on Conflict of Interest

Christopher Chamberlin's claims for declaratory judgment voiding the retainer agreement, *see* Opp'n at 11–20, breach of fiduciary duty, *see id.* at 267–28,

breach of the duty of loyalty, *see id.* at 28, and intentional malpractice, *see id.* at 28–30, are all based on the same purported conflict of interest as his claim for fraudulent inducement. Because, as discussed above, Christopher Chamberlin has not plausibly alleged any conflict of interest under California law, and there is no indication that he could do so if granted further leave to amend, Defendants' motion to dismiss these claims with prejudice is GRANTED.

D. Negligent Malpractice Claim Against Hand

"In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." *Coscia v. McKenna & Cuneo*, 25 Cal. 4th 1194, 1199 (2001). The Court previously dismissed Christopher Chamberlin's claim for negligent malpractice against Hand, holding that "[n]either Christopher Chamberlin's allegation that 'HBH' oversaw the matter in which it represented him when Baer was unavailable, nor the suggestion in his opposition brief that Hand might have supervised Julie Woods in the latter's representation of Christopher Chamberlin, is a substitute for factual allegations in the complaint that Hand *herself* represented Christopher Chamberlin and acted in a manner that fell short

of her professional obligations, to Chamberlin's detriment." 1st MTD Order at 15.[5]

Although Christopher Chamberlin's first amended complaint is replete with allegations describing Hand's twice-by-marriage relationship to members of the Levin family, it still includes little in the way of allegations regarding malpractice on her part. Christopher Chamberlin now alleges only that Hand "supervised and worked with associate, Julie R. Woods, who was assigned to work on Plaintiff's case," and that "Hand directed Woods' legal work and had access to Plaintiff's confidential material." FAC ¶¶ 384–85. Christopher Chamberlin does not allege that Hand even worked on his matter, made any particular error with respect to his case, or that her conduct had any particular effect on him. Based on Christopher Chamberlin's failure to cure the defect identified in the Court's previous order, Defendant's motion to dismiss this claim against Hand, with prejudice, is GRANTED.

IV. CONCLUSION

For the reasons discussed above, Defendants' motion to dismiss in part Christopher Chamberlin's first amended complaint is GRANTED, and all of Christopher Chamberlin's claims, except for negligent malpractice against Defendants HBH, Baer, and Hartog,

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[5] Defendants did not then, and do not now, move to dismiss this claim against Baer, Hartog, or HBH.

are DISMISSED with prejudice. Defendants shall file their answer no later than September 15, 2020

Christopher Chamberlin, who is representing himself, is encouraged to contact the Federal Pro Bono Project's Pro Se Help Desk for assistance. Lawyers at the Help Desk can provide basic assistance to parties representing themselves but cannot provide legal representation. In-person appointments are not currently available due to the COVID-19 public health emergency, but Christopher Chamberlin may contact the Help Desk at 415-782-8982 or FedPro@sfbar.org to schedule a telephonic appointment.

IT IS SO ORDERED.

Dated: September 1, 2020

/s/ Joseph C. Spero
JOSEPH C. SPERO
Chief Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER BAYRE CHAMBERLIN, Plaintiff-Appellant, v. HARTOG, BAER & HAND, APC; et al., Defendants-Appellees, v. COLDWELL BANKER REALTY, Third-Party Defendant.	No. 22-16049 D.C. No. 3:19-cv-08243-JCS Northern District of California, San Francisco ORDER (Filed May 17, 2023)

Before: FERNANDEZ, FRIEDLAND, and H.A. THOMAS, Circuit Judges.

Chamberlin's motion to stay issuance of the mandate (Docket Entry No. 27) is denied. *See* Fed. R. App. P. 41(d); 9th Cir. R. 41-1. The mandate shall issue in due course.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER BAYRE CHAMBERLIN, Plaintiff-Appellant, v. HARTOG, BAER & HAND, APC; et al., Defendants-Appellees, v. COLDWELL BANKER REALTY, Third-Party Defendant.	No. 22-16049 D.C. No. 3:19-cv-08243-JCS Northern District of California, San Francisco ORDER (Filed May 11, 2023)

Before: FERNANDEZ, FRIEDLAND, and H.A. THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Chamberlin's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 25) are denied.

No further filings will be entertained in this closed case.