NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

KAMLESH BANGA

Petitioner

vs.

LAWRENCE R. LUSTIG, M.D.

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDICES

APPENDIX NUMBER	DESCRIPTION OF DOCUMENTS	BATES RANGE

24-140-cv
Banga v. Lustig

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of July, two thousand twenty-five.

PRESENT:

STEVEN J. MENASHI,
EUNICE C. LEE,
MARIA ARAÚJO KAHN,
Circuit Judges.

Kamlesh Banga,

Plaintiff-Appellant,

v. 24-140

Lawrence R. Lustig, M.D., Does 1 through 5, Inclusive,

Defendants-Appellees,

The Regents of the University of California,

Defendant.

FOR PLAINTIFF-APPELLANT: KAMLESH BANGA, *pro se*, Vallejo, CA.

FOR DEFENDANT-APPELLEE: David T. Shuey, Rankin, Shuey, Mintz, Lampasona & Harper, Oakland, CA.

Appeal from a judgment of the United States District Court for the Southern District of New York (Engelmayer, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment is **AFFIRMED IN PART** and **VACATED IN PART**, and the case is **REMANDED**.

Plaintiff-Appellant Kamlesh Banga, proceeding *pro se*, sued Dr. Lawrence Lustig, invoking diversity jurisdiction and raising various California state law claims. Banga alleged that Lustig failed to provide her medical records for audiological testing, which negatively impacted her settlement in a personal injury action in California state court and caused her to undergo unnecessary testing, evaluation, and procedures. Lustig moved to dismiss Banga's complaint as barred by res judicata and the applicable statutes of limitations. A magistrate judge recommended granting Lustig's motion to dismiss, agreeing that Banga's claims were either barred by res judicata or time-barred. *See Banga v. Lustig*, No. 22-CV-9825, 2023 WL 9099985 (S.D.N.Y. Oct. 30, 2023). The district court adopted the magistrate judge's report and recommendation except as to one claim, which it concluded was timely, but over which it declined to exercise supplemental jurisdiction. *See Banga v. Lustig*, No. 22-CV-9825, 2023 WL 8805690 (S.D.N.Y. Dec.

20, 2023). Banga timely appealed. We assume the parties' familiarity with the facts, the procedural history, and the issues on appeal.

I

"We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Mazzei v. The Money Store*, 62 F.4th 88, 92 (2d Cir. 2023) (internal quotation marks omitted). "Our review of a district court's application of *res judicata* is also *de novo*." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 498 (2d Cir. 2014). "The application of a statute of limitations presents a legal issue and is also reviewed *de novo*." *Horror Inc. v. Miller*, 15 F.4th 232, 241 (2d Cir. 2021) (internal quotation marks omitted).

II

Banga argues that the district court erred by dismissing her claims for common count, unjust enrichment, constructive fraud, and breach of fiduciary duty as barred by res judicata based on her prior action in California state court. We disagree.

"The law governing the doctrine of *res judicata* in a diversity action is 'the law that would be applied by state courts in the State in which the federal diversity court sits.'" *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 195 (2d Cir. 2010) (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001)). New York courts "give the same preclusive effect to a judgment from another state as [the judgment] would have in the issuing state." *Miller v. Miller*, 152 A.D.3d 662, 664 (2d Dep't 2017); *see also O'Connell v. Corcoran*, 1 N.Y.3d 179, 184 (2003). In California, res judicata bars successive litigation when "(1) [a] claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in

privity with a party to the prior proceeding." *Boeken v. Phillip Morris USA, Inc.*, 230 P.3d 342, 348 (Cal. 2010) (internal quotation marks omitted).

In this case, Banga's claims for common count, unjust enrichment, constructive fraud, and breach of fiduciary duty assert the same primary rights as her California action, namely the right to receive medical records for paid-for testing and the right to be free from spoliation of evidence. In addition, both Banga and Lustig were parties to the California action, which resulted in a judgment on the merits when the demurrer was sustained for failure to state viable spoliation claims based on the same facts alleged in this case. The district court properly concluded that res judicata barred Banga's claims for common count, unjust enrichment, constructive fraud, and breach of fiduciary duty in this case.

III

Banga next argues that the district improperly dismissed her emotional distress claims and all but one of her California Health & Safety Code § 123110 claims as time-barred under California law. She also argues that the district court erred by failing to consider whether she stated a timely claim under California Business & Professions Code § 17200 based her alleged March 2020 request for medical records. We disagree on both points.

"Where jurisdiction rests upon diversity of citizenship, a federal court sitting in New York must apply the New York choice-of-law rules and statutes of limitations." *Stuart v. Am. Cyanamid Co.*, 158 F.3d 622, 626 (2d Cir. 1998). Under New York law, "[w]hen a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." *Global Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482, 484 (N.Y. 1999). Here, Banga is a California resident, and her causes of action accrued in California; therefore, her claims had to be timely under both California and New York law.

The district court correctly concluded that Banga's emotional distress claims were time-barred under California's two-year statute of limitations. *See* Cal. Civ. Proc. § 335.1; *Wassmann v. S. Orange Cnty. Cmty. Coll. Dist.*, 234 Cal. Rptr. 3d 712, 732 (Cal. Ct. App. 2018). "A cause of action for intentional infliction of emotional distress accrues, and the statute of limitations begins to run, once the plaintiff suffers severe emotional distress as a result of outrageous conduct on the part of the defendant." *Wassmann*, 234 Cal. Rptr. 3d at 732 (quoting Cantu v. Resol. Tr. Corp., 6 Cal. Rptr. 2d 151, 170 (Cal. Ct. App. 1992)). In this case, Banga's alleged unnecessary testing occurred in 2012, 2013, and 2014. The latest she could have discovered these tests were unnecessary was 2019, when she received a state investigative report. Because Banga filed this action more than two years after that, in November 2022, the district court properly dismissed her emotional distress claims as time-barred under California law.

As to Banga's claims under California Health & Safety Code § 123110, the district court properly concluded that all but one were time-barred. The limitations period for § 123110 claims is three years. *See* Cal. Civ. Proc. § 338(a). Under § 123110, health care providers must provide a copy of medical records within fifteen days of a patient's request. Cal. Health & Safety § 123110(b)(1). Banga alleged that she requested records from Lustig during the period 2012-2014, and again in March 2020. The district court correctly held that Banga's § 123110 claims based on record requests from 2014 or earlier were untimely but that she plausibly stated a timely § 123110 claim based on her request in March 2020, which was less than three years before she filed this action.

The district court did not err in dismissing as untimely Banga's claim under California Business & Professions Code § 17200, notwithstanding Banga's alleged March 2020 request for medical records. Under California law, a claim under the Unfair Competition Law must be brought within four years of accrual. *See* Cal. Bus. & Prof. § 17200. California applies "the traditional last element rule" to determine when such claims accrue. *Aryeh v. Canon Bus. Sols., Inc.*, 292 P.3d 871, 876 (Cal. 2013). Under this rule, a claim accrues "when it is complete with all of its

elements." *Id.* at 875 (internal quotation marks and alteration omitted). Here, all elements of Banga's § 17200 claim were complete by December 2014, when she settled her underlying lawsuit on unfavorable terms due to Lustig's alleged failure to provide her medical records. *See Kwikset Corp. v. Superior Ct.*, 246 P.3d 877, 887 (Cal. 2011) (requiring that the "unfair competition" caused an "economic injury" to sufficiently plead a claim). Her subsequent March 2020 request for the same records she had been denied in 2014 did not restart the limitations period, particularly in the absence of plausible allegations attributing an economic injury to the non-fulfillment of that request. Neither the continuous accrual doctrine nor the continuous violation doctrine applies here because Banga was requesting the same medical records previously denied—not suffering a separate or ongoing violation—and she was aware the denials warranted action when she had to settle her lawsuit in 2014. Accordingly, Banga's § 17200 claim was time-barred when filed in 2022.

IV

Finally, Banga argues that the district court erroneously dismissed her timely § 123110 claim for lack of jurisdiction. We agree.

The district court concluded that Banga stated a timely § 123110 claim based on her alleged request for records from Lustig in March 2020, but it dismissed the claim after it declined to exercise supplemental jurisdiction over it. The district court determined that because "the claims that supported diversity jurisdiction [had been] dismissed," the relevant question was "whether to exercise supplemental jurisdiction over the remaining claim under § 123110." *Banga*, 2023 WL 8805690, at *6. That was incorrect. The district court "confused (i) state-law claims that are supplemental to claims within the court's original jurisdiction (which are covered by 28 U.S.C. § 1367 and heard at the discretion of the district court) with (ii) state-law claims that are aggregated to satisfy the amount in controversy requirement for diversity (which are within the court's original

jurisdiction)." *Wolde-Meskel v. Vocational Instruction Project Cmty. Servs., Inc.*, 166 F.3d 59, 64-65 (2d Cir. 1999).

Section 1332(a) provides that in diversity suits the "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between ... citizens of different States." 28 U.S.C. § 1332(a)(1). "Since the diversity statute confers jurisdiction over 'civil actions' rather than specific claims alleged in a complaint, a plaintiff is permitted to aggregate claims in order to satisfy the amount in controversy requirement." *Wolde-Meskel*, 166 F.3d at 62. "[A]ggregated claims have never been treated individually for jurisdictional purposes." *Id.* at 65. Accordingly, "[w]hen state law claims are aggregated, regardless of the amounts at issue, all of them together are 'original,' and none of the constituent claims are 'supplemental.'" *Id.*

In this case, the district court had original, not supplemental, jurisdiction over Banga's timely § 123110 claim. Banga's complaint aggregated multiple state law claims to satisfy the amount-in-controversy requirement, thereby establishing "jurisdiction in diversity over [the] complaint as a whole." *Id.* at 61. Banga's § 123110 claim was part of this aggregation and was thus an "original" claim for jurisdictional purposes. The district court's dismissal of Banga's other claims did not change that fact. *See id.* at 62 ("Federal diversity jurisdiction is not lost by post-filing events that change or disturb the state of affairs on which diversity was properly laid at the outset."); *see also Scherer v. Equitable Life Assurance Soc'y of the U.S.*, 347 F.3d 394, 398-99 (2d Cir. 2003) (holding that a district court cannot use res judicata, an affirmative defense, to reduce the amount in controversy). Therefore, regardless of the value of the remaining § 123110 claim,[1] the district court's

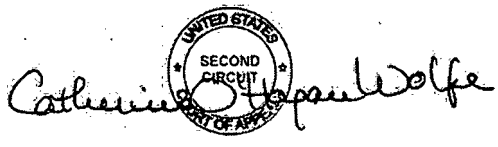
[1] "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Correspondent Servs. Corp. v. First Equities Corp. of Fla.*, 442 F.3d 767, 769 (2d Cir. 2006) (internal quotation marks omitted). "[T]he amount in controversy is calculated from the plaintiff's standpoint; the value of the suit's intended benefit or the value of the right being

dismissal of all Banga's other claims did not defeat diversity jurisdiction over that remaining claim.

* * *

We have considered Banga's remaining arguments, which we conclude are without merit. For the foregoing reasons, we affirm the judgment of the district court to the extent it (1) dismissed Banga's claims for common count, unjust enrichment, constructive fraud, and breach of fiduciary duty as barred by res judicata, and (2) dismissed her claims for emotional distress, her claims under California Business & Professions Code § 17200, and all but one of her claims under California Health & Safety Code § 123110 as time-barred. We vacate the judgment insofar as the district court dismissed the remaining § 123110 claim for lack of jurisdiction. We remand for further proceedings as to that claim.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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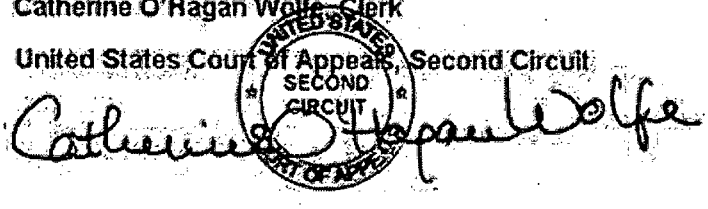
United States Court of Appeals, Second Circuit



protected or the injury being averted constitutes the amount in controversy when damages are not requested." *Id.* (internal quotation marks omitted). Therefore, even if Banga's remaining § 123110 claim had been the sole claim raised in her complaint, the fact that the claim was exclusively for injunctive relief, alone, would not necessarily bar diversity jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of September, two thousand twenty-five.

Kamlesh Banga,

Plaintiff - Appellant,

v.

Lawrence R. Lustig, M.D., Does 1 through 5, Inclusive,

Defendants - Appellees,

The Regents of the University of California,

Defendant.

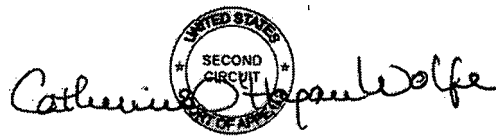
ORDER

Docket No: 24-140

Appellant, Kamlesh Banga, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMLESH BANGA, Plaintiff, -v- LAWRENCE R. LUSTIG, M.D., et al., Defendants.	22 Civ. 9825 (PAE) (SN) OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

On November 17, 2022, plaintiff Kamlesh Banga ("Banga"), proceeding *pro se*, brought this diversity action against Lawrence R. Lustig., M.D. ("Lustig") and Doe defendants 1–5, asserting seven claims or categories of claims: (1) violations of California Health & Safety Code § 123110 and 45 C.F.R. § 164.524; (2) common count; (3) violations of California Business & Professions Code § 17200, *et seq.*; (4) unjust enrichment; (5) constructive fraud; (6) breach of fiduciary duty; and (7) emotional distress. *See generally* Dkt. 1.

On December 2, 2022, the Court referred this case to the Hon. Sarah Netburn, Magistrate Judge, for general pretrial management. Dkt. 5. On January 25, 2023, Lustig filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] This Court referred the motion to Judge Netburn for a Report and Recommendation. Dkt. 19. On March 26, 2023, Banga filed a first amended complaint ("FAC"), Dkt. 25, and, on April 5, 2023, a proposed revised first

[1] As Judge Netburn notes in her Report and Recommendation, Lustig also purported to file his motion pursuant to Rule 12(b)(1), but that was because of a mistaken assumption that a *res judicata* defense goes to jurisdiction, which it does not. *See Thompson v. County of Franklin*, 15 F.3d 245, 253 (2d Cir. 1994). As such, the Court will omit reference to and discussion of the standards under Rule 12(b)(1).

amended complaint, Dkt. 26 ("RFAC"). On April 5, 2023, Judge Netburn accepted the RFAC as the operative complaint. Dkt. 27.

On May 18, 2023, Lustig, abandoning his first motion to dismiss as moot, filed a motion to dismiss the RFAC. Dkt. 26. The Court again referred this motion to Judge Netburn. Dkt. 37. On August 28, 2023, Banga filed a response and a supporting declaration, with exhibits. Dkts. 45, 46. On September 8, 2023, Lustig filed a reply. Dkt. 47. Banga then filed a motion to strike certain arguments in the reply that she maintained were raised for the first time there. Dkt. 50.

On October 20, 2023, Judge Netburn issued a Report and Recommendation, recommending that the Court grant the motion to dismiss on the grounds that Banga's claims all either lacked a private cause of action, were barred by the doctrine of *res judicata*, or were time-barred. Dkt. 58 (the "Report") at 7–13. On November 12, 2023, Banga timely objected, and submitted a declaration in support. Dkts. 59 ("Pl. Obj."), 60. On November 20, 2023, Banga submitted untimely amended objections to the Report. Dkt. 61. Lustig never filed a response.

For the following reasons, the Court adopts the Report, save for its recommendation that Banga's claims for injunctive relief under California Health & Safety Code § 123110 are time-barred. The Court finds one § 123110 claim, based on a March 12, 2020 records request, timely. For reasons articulated below, however, the Court declines to exercise supplemental jurisdiction over that one claim, which does not supply a basis for subject-matter jurisdiction. Banga filed this lawsuit in this Court based on diversity jurisdiction, 28 U.S.C. § 1332, with the amount in controversy based on her damages claims, but those have now been dismissed in full. The Court thus dismisses Banga's surviving claim under § 123110 without prejudice to Banga's right to pursue it elsewhere.

I. Background

The Court adopts the Report's detailed account of the facts and procedural history in substantial part. The following summary captures the limited facts necessary for an assessment of the issues presented.

Banga's factual allegations in the RFAC are as follows:

In 2008, Banga suffered hearing loss after involvement in a car accident. RFAC ¶ 13. Two years later, in January 2010, Banga filed a personal injury lawsuit in California state court against the driver of the other car involved in her accident. *Id.* In February 2010, Lustig, at that time a physician at the University of California Regents ("UC Regents"), performed hearing aid surgery on Banga. *Id.* ¶ 15.

To establish the extent of her hearing loss for the purposes of her personal injury litigation, Banga also underwent four separate auditory brainstem response ("ABR") tests. The first three were performed on April 6, 2012, November 5, 2012, and October 7, 2013, respectively, all at UC San Francisco ("UCSF") Medical Center; Lustig consulted on the second and third tests. *Id.* ¶¶ 17, 20, 22, 24, 26. The fourth ABR occurred at Stanford Hospital on June 13, 2014. *Id.* ¶ 31.

Banga asserts that the reason she needed to undergo successive ABR tests in the first place was because UCSF Medical Center and Lustig withheld the computerized data, or "objective findings," associated with each ABR test, and so Banga attempted additional tests to obtain that data. *Id.* ¶ 139. Although Banga was given a multi-page report of her results after each UCSF Medical Center-administered ABR test, these reports did not include the detailed computerized data she sought and that she considered necessary to prove causation in her personal injury lawsuit. *Id.* ¶¶ 17, 19, 23, 26; *see also id.* ¶ 139.

After the third ABR test, Banga had a follow-up appointment with Lustig in which she asked him for this computerized data for each test. Lustig responded that he had reviewed the results from each ABR test and had not seen any accompanying computerized data. *Id.* ¶ 27. When Banga pushed back, Lustig assured her that the audiologist who had performed the test was "excellent" and without motive to withhold Banga's test results. *Id.* Lustig recommended that Banga contact the audiologist directly about the computerized data. *Id.* Five months later, in April 2014, Banga again asked Lustig about the lack of computerized data in the reports she had been given. Lustig responded that "each audiologist used their preferred methodology to perform the ABR testing" and did not generate any computerized data in doing so. *Id.* ¶ 28.

Banga maintains that these statements by Lustig were false and that he in fact concealed the requested computerized data. In support, Banga states that a doctor at Stanford Hospital told her in 2015 that because ABR testing is performed with a specialized computer, there is always associated computerized data. *Id.* ¶ 36. In addition, in 2019, a California Department of Public Health investigator reviewing Banga's UCSF Medical Center records found the computerized data from Banga's second ABR test from November 2012. *Id.* ¶ 40. Those records include text added by staff in April 2014, on the same day that Lustig allegedly told Banga there was no computerized data. *Id.* ¶ 41.

Banga alleges that the concealment of computerized data undermined her ability to settle her personal injury lawsuit for a satisfactory amount, *id.* ¶ 131, denied her the "benefit of her bargain" as she paid for each ABR test yet did not receive computerized data in return, *id.* ¶ 114, and caused her to undergo successive ABR tests which resulted in emotional distress, *id.* ¶¶ 139–40.

In 2016, Banga sued UCSF Medical Center in California state court over these alleged injuries. *Id.* ¶ 38. In March 2020, after the California Court of Appeal ruled Banga was entitled to amend her complaint to add claims under § 123110, *Banga v. Regents of the Univ. of Cal.*, No. A151758, 2019 WL 4786955 (Cal. App. 1st Dist. Oct. 1, 2019) ("*Banga I*"), Banga filed a Second Amended Complaint in that action adding Lustig as a defendant, and subsequently filed her Third Amended Complaint, the operative complaint, bringing six claims against him and other defendants: for (1) breach of contract; (2) violations of § 123110; (3) fraudulent concealment of medical records; (4) intentional concealment of medical records; (5) emotional distress; and (6) violation of California Business & Professions Code § 17200, *et seq.* *See id.* ¶ 45. As here, Banga's California state law action alleged that Lustig's "suppression of her medical records reduced her settlement in the underlying personal injury litigation and caused emotional distress." *Banga v. Regents of the Univ. of Cal.*, A162936, 2022 WL 17073900, at *2 (Cal. App. 1st Dist. Nov. 18, 2022) ("*Banga II*"). Banga voluntarily dismissed her two statutory claims in that action after the trial court dismissed the four common law claims with prejudice. She then appealed from the judgment in defendants' favor. *Id.* at *3.

Banga filed the present lawsuit in this District the day before the California Court of Appeal, on November 17, 2022, affirmed the trial court's dismissal. *See* Dkt. 1.

II. Applicable Legal Standards

A. Report and Recommendation

In reviewing a Report and Recommendation, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). When specific objections are timely made, "[t]he district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected

to." Fed. R. Civ. P. 72(b)(3); *see also United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). "To accept those portions of the report to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record." *Ruiz v. Citibank, N.A.*, No. 10 Civ. 5950 (KPF) (RLE), 2014 WL 4635575, at *2 (S.D.N.Y. Aug. 19, 2014) (quoting *King v. Greiner*, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009)); *see also, e.g.*, *Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

If a party objecting to a Report and Recommendation makes only conclusory or general objections, or simply reiterates its original arguments, the Court will review the Report strictly for clear error. *See Dickerson v. Conway*, No. 08 Civ. 8024 (PAE), 2013 WL 3199094, at *1 (S.D.N.Y. June 25, 2013); *Kozlowski v. Hulihan*, Nos. 09 Civ. 7583, 10 Civ. 0812 (RJH) (GWG), 2012 WL 383667, at *3 (S.D.N.Y. Feb. 7, 2012). This is so even in the case of a *pro se* plaintiff. *Telfair v. Le Pain Quotidien U.S.*, No. 16 Civ. 5424 (PAE), 2017 WL 1405754, at *1 (S.D.N.Y. Apr. 18, 2017) (citing *Molefe v. KLM Royal Dutch Airlines*, 602 F. Supp. 2d 485, 487 (S.D.N.Y. 2009)). Furthermore, "[c]ourts do not generally consider new evidence raised in objections to a magistrate judge's report and recommendation," *Tavares v. City of New York*, No. 08 Civ. 3782 (PAE), 2011 WL 5877548, at *2 (S.D.N.Y. Nov. 23, 2011) (collecting cases).

III. Discussion

Banga raises several objections to the Report. The Court considers each in turn.

A. Characterization of California Court of Appeal's Holding

Banga states generally that the Report errs in dismissing her claims because the dismissal fails to give "full preclusive effect" to the California Court of Appeal's holding in her case before it. Pl. Obj. at 5. Banga misreads the Report.

The California Court of Appeal confirmed in *Banga I* that the state legislature had, via § 123110, created a right for patients to access their health care records and permitted a legal action for injunctive relief to enforce this right in court. *Banga I*, 2019 WL 47869555, at *1–2. That court found that it had been error for the trial court to refuse to allow Banga to amend her complaint to add such claims. *Id.* But by the time Banga's case returned to the Court of Appeal for *Banga II*, Banga had dismissed the statutory claims that *Banga I* had allowed her to add. *See Banga II*, 2022 WL 17073900, at *2. The Court of Appeal in *Banga II* commented on this aspect of its discussion in *Banga I* solely in recounting the case's procedural history. *See id.*

Contrary to Banga's objection, the Report does not take issue with the California Court of Appeal's affirmation of the California state statutory right to one's medical records and to bring an injunctive action to vindicate that right. The Report takes as a given that Banga has such rights under § 123110. It merely concludes that such claims here are time-barred. Report at 11. There is nothing about that finding that is inconsistent with the California Court of Appeal's holdings or analysis.

B. Request for *In Camera* Review and Leave to Depose Lustig

Reading the objections liberally, Banga next appears to assert that the Court should order Lustig to "produce the relevant medical records under seal for in camera review" and grant her motion for leave to depose Lustig, as such discovery would assist this Court in resolving Lustig's pending motion to dismiss. Pl. Obj. at 6–8. The basis for the Report's recommendation to dismiss, however, was that Banga's claims were all precluded by *res judicata* or time-barred. Report at 10.[2] Banga does not explain why discovery could undermine these determinations.

[2] The Report also noted that there is no private cause of action under HIPAA. *See* Report at 7. In her objections, Banga states that she is dropping her HIPAA claim. Pl. Obj. at 2.

Given the nature of the Report's conclusions, production of the allegedly withheld medical records or testimony from Lustig could not do so. The Court overrules this objection.

C. Banga's March 12, 2020 Correspondence With Lustig

Banga's objections centrally challenge the Report's finding that her claim to enforce via injunctive relief her right under § 123110 to request and promptly receive her medical records is time-barred. She contends that the Report errs in not recognizing an allegation in her complaint that, on March 12, 2020, she requested her computerized medical records from Lustig. Pl. Obj. at 9–12, 16–17. Based on that request date, Banga contends that her § 123110 claim accrued after Lustig failed to provide these records within 15 days (*i.e.*, March 28, 2020). *Id.* at 10–11. Because the limitations period for this claim is three years,[3] *see* Cal. Civ. Proc. § 338(a), and Banga filed this action on November 17, 2022, Dkt. 1, Banga argues that the Report erred in finding her § 123110 claim untimely to the extent based on this request.

This limited objection by Banga is meritorious. In holding the § 123110 claim time-barred, the Report determined that "[b]ased on Plaintiff's complaint, she most recently asked Defendant for her ABR data in 2014, making [the § 123110] claim time-barred." Report at 11. The Report did not address the March 12, 2020 request with specificity. Rather, it addressed Banga's requests from the 2012–2014 period, finding claims based on these requests untimely, and in a footnote, noted that Banga's requests in 2021 and 2022 were not alleged to have been made to Lustig, who by then was no longer affiliated with UC Regions. *See* Report at 11 & n.3. The Report also noted that, to the extent Banga's opposition to a motion to dismiss appeared to try to do so, a party cannot amend a complaint via such an opposition, and that, in any event, the exhibits attached to Banga's opposition did not reflect requests directed at Lustig. *Id.* at 11 n.3.

[3] Banga wrongly states that the statute of limitations is seven years. *See* Pl. Obj. at 10.

The Court agrees with Banga that the FAC did allege one request to Lustig as to which a § 123110 claim for injunctive relief is timely. It alleges that, "[o]n March 12, 2020 . . . Plaintiff sent a medical authorization form requesting Defendants to provide a complete copy of her ABR Testing of April 6, 2012 and October 7, 2013." FAC ¶ 44. *Pro se* Banga's reference to "Defendants"—although not identifying Lustig by name—is properly read to include him. Banga's RFAC contained the same allegation. RFAC ¶ 44.[4] On this basis, the Court finds Banga to have pled facts that plausibly make her § 123110 claim, based on the March 12, 2020 request, timely. The Court agrees with the Report, however, that Banga's allegations based on records requests from 2014 or earlier are untimely.[5]

D. Application of "Continuing Wrong" Doctrine to § 123110 Claims

In a separate objection, Banga argues that the Report erred in finding that the tort-law "continuing wrong" doctrine does not save her § 123110 claims for injunctive relief from a finding of untimeliness. She argues that this doctrine applies because Lustig, purportedly, has continued unlawfully to withhold her medical records. Pl. Obj. at 12–13. Banga, however, does not supply legal authority that this tort-law doctrine applies to a statutory claim under § 123110. *See* Report at 12. As the Report points out, Banga's theory, under which the limitations period would begin to run on the date the requested records are provided, is problematic for a separate reason. These claims seek solely injunctive relief. By definition, a request for such relief would

[4] Although not cognizable on the motion to dismiss, Exhibit 12 to Banga's opposition is the message that Banga claims she sent Lustig. It is addressed to him and dated March 12, 2020. *See* Dkt. 46, Ex. 12.

[5] The Court separately adopts the Report's conclusion that the RFAC does not allege requests on July 7, 2021, December 8, 2021, or November 4, 2022 directed to Lustig. Report at 11 n.3. And Banga's post-RFAC submissions bely that claim. *See* Dkt. 48, Ex. 18. The requests it attaches, made via UCSF Health authorization forms for release of health information, do not reference Lustig. *See id.*; Report at 11 n.3.

be moot from the point the medical records are provided. *See id.* The Court thus adopts the Report's finding that Banga's untimely statutory claims are not rescued by this tort doctrine.

E. Untimely Objections

In addition to her timely objections, reviewed above, Banga, on November 20, 2023, filed what she termed "Amended Objections." Dkt. 61. Because the Report issued on October 30, 2023, these were filed outside of the 14-day window for objections. *See* 28 U.S.C. 636(b). They are untimely and the Court need not consider them. *See Henry v. Miller*, No. 11 Civ. 1273 (PAE) (SLC), 2019 WL 6038090, at *1 (S.D.N.Y. Nov. 14, 2019).

Nonetheless, in the interest of completeness, the Court has reviewed these objections. Even reviewed *de novo*, they do not disturb the Report's conclusions. These largely contest the Report's findings that the doctrine of *res judicata* bars most of Banga's common law claims. Banga contends that the Report erred in finding that she had pursued, in previous action(s), the primary rights underlying these claims. Dkt. 61 at 21–23. Banga misunderstands the primary rights test under California *res judicata* law, as thoughtfully addressed in the Report. As for Banga's new objection that her emotional distress claim should be subject to the same three-year statute of limitations as her statutory claims, it is clearly incorrect. *See* Dkt. 61 at 17–18; Report at 10 ("In California, negligent or intentional infliction of emotional distress causes of action are subject to a two-year statute of limitations. Civ. Proc. § 335.1.")

F. Supplemental Jurisdiction

For the foregoing reasons, with the one exception noted above, the Court adopts the Report's recommendations and dismisses the claims in Banga's RFAC with prejudice. The one exception is Banga's § 123110 claim for injunctive relief based on her request for records from Lustig from March 12, 2020. That claim is timely and viable.

The question then arises whether to exercise supplemental jurisdiction over that claim. The Court has diversity jurisdiction over this case, based on the pleadings. Banga is a citizen of California, Lustig is a citizen of New York, and Banga's complaints plausibly alleged damages in excess of $75,000. *See* Dkt. 1 ¶¶ 1–9, 131; 28 U.S.C. § 1332.[6] Banga's damages claims, however, have all been dismissed. And the surviving § 123110 claim permits only injunctive relief. *See Lanham v. County of Los Angeles*, No. B252156, 2014 WL 1682896, at *4 (Cal. App. 2d Dist. Apr. 29, 2014) (damages unavailable on § 123110 claim); *Maher v. County of Alameda*, 168 Cal. Rptr. 3d 56, 66 (App. 1st Dist. 2014) (same). With the claims that supported diversity jurisdiction dismissed, the Court must decide whether to exercise supplemental jurisdiction over the remaining claim under § 123110.

"The question whether to exercise supplemental jurisdiction following the pretrial disposal of the jurisdiction-conferring claim is addressed to the sound discretion of the district court. The exercise of such discretion requires consideration of 'judicial economy, convenience, and fairness to litigants.'" *Nat'l Westminster Bank, PLC v. Grant Prideco, Inc.*, 343 F. Supp. 2d 256, 258 (S.D.N.Y. 2004) (quoting *Ametex Fabrics, Inc. v. Just In Materials, Inc.*, 140 F.3d 101, 105 (2d Cir. 1998)).

Particularly where the claims supporting diversity jurisdiction have been dismissed on the pleadings, "the ordinary case 'will point toward declining jurisdiction over the remaining state-law claims.'" *Ergowerx Intern., LLC v. Maxwell Corp. of Am.*, 18 F. Supp. 3d 453, 456 (S.D.N.Y. 2014) (quoting *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 61 (2d Cir. 1998)). Such is so here, as judicial economy, convenience, and fairness to the parties all favor

[6] Although Banga's FAC attempted to add UC Regents as a defendant, once alerted that this would almost certainly destroy diversity jurisdiction, Banga dropped it as a party. Dkt. 33.

declining to exercise supplemental jurisdiction. This case is at an early stage; the parties have not yet undertaken discovery; and the sole remaining claim is under a California state law which this Court has no experience or expertise applying. For these reasons, the relevant factors all disfavor a continued exercise of jurisdiction. The Court therefore declines to exercise supplemental jurisdiction over the remaining § 123110 claim.

CONCLUSION

For the foregoing reasons, the Court adopts the Report in principal part. The Court declines to adopt the Report's recommendation to dismiss Banga's claims under California Health & Safety Code § 123110 claim, insofar as the Report recommended dismissal of these claims in their entirety under Rule 12(b)(6). The Court finds one claim under § 123110 well-pled—that based on her request for records on March 12, 2020. The Court grants the motion to dismiss all of Banga's other claims, with prejudice. As to the surviving claim under § 123110, the Court declines to exercise supplemental jurisdiction over it, and dismisses it, without prejudice to Banga's right to pursue this claim elsewhere.

The Clerk of Court is respectfully directed to resolve the motion pending at Docket 36 and close this case.

SO ORDERED.

Paul A. Engelmayer
United States District Judge

Dated: December 20, 2023
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

KAMLESH BANGA,

Plaintiff,

-against-

LAWRENCE R. LUSTIG, M.D., et al.,

Defendants.

----------X

22-CV-09825 (PAE)(SN)

REPORT AND RECOMMENDATION

SARAH NETBURN, United States Magistrate Judge.

TO THE HONORABLE PAUL A. ENGELMAYER:

Kamlesh Banga ("Plaintiff") brings this action against Lawrence R. Lustig, M.D. ("Defendant") and Does 1-5. Plaintiff, proceeding *pro se*, asserts seven claims: (1) violations of California Health & Safety Code § 123110 and 45 C.F.R. § 164.524; (2) common count; (3) violation of California Business & Professions Code § 17200, et seq.; (4) unjust enrichment; (5) constructive fraud; (6) breach of fiduciary duty; and (7) emotional distress. Defendant moves to dismiss the complaint pursuant to Rule 12(b)(6) for failure to state a claim.[1] I recommend that the Court grant Defendant's motion to dismiss.

PLAINTIFF'S ALLEGATIONS

In 2008, Plaintiff suffered hearing loss after a car accident. ECF No. 25, Plaintiff's Revised First Amended Complaint ("RFAC"), ¶ 13. Following the accident, Defendant, at the

[1] Defendant also moves to dismiss pursuant to Rule 12(b)(1) under the theory that Plaintiff's claims are barred by res judicata. However, res judicata is not a jurisdictional matter, and a motion to dismiss based on res judicata is properly made under Rule 12(b)(6), not Rule 12(b)(1). See Thompson v. Cty. of Franklin, 15 F.3d 245, 253 (2d Cir. 1994). Accordingly, the Court will evaluate Defendant's res judicata arguments under Rule 12(b)(6).

time a UC Regents physician, performed hearing aid surgery on Plaintiff. Id. at ¶ 15. Two years later, Plaintiff filed a personal injury lawsuit against the driver of the other car. Id. at ¶ 13. To establish the extent of her hearing loss for that litigation, Plaintiff underwent four auditory brainstem response ("ABR") tests. The first three tests were performed by an audiologist at UCSF Medical Center on April 6, 2012, November 5, 2012, and October 7, 2013. Id. at ¶¶ 17, 22, 26. The second and third ABR tests were performed with Defendant's consultation. Id. at ¶¶ 20, 24. Plaintiff's fourth and final ABR test was performed at Stanford Hospital on June 13, 2014. Id. at ¶ 31.

According to Plaintiff, she needed repeated ABR tests because UCSF Medical Center and Defendant withheld the computerized data, or "objective findings," associated with each ABR test; each subsequent test was Plaintiff's attempt to acquire that data. Id. at ¶ 139. Plaintiff claims that the ABR test data, or "objective findings," were crucial for proving causation in her personal injury lawsuit. Id. at ¶ 19. Following each UCSF Medical Center ABR test, Plaintiff was provided with a multi-page report of the results, but those reports did not include the detailed computerized data Plaintiff was seeking. Id. at ¶¶ 17, 23, 26. Weeks after the third ABR test, Plaintiff had a follow-up appointment with Defendant and asked him for the computerized data from each test, explaining the importance of the data for her personal injury settlement negotiations. Id. at ¶ 27. Defendant responded that he had reviewed the results from each ABR test, and that he had not seen any accompanying computerized data. Id. When Plaintiff expressed skepticism, Defendant told Plaintiff that the audiologist was "excellent" and had "no motive to withhold [Plaintiff's] test result[s]." Id. Defendant recommended that Plaintiff contact the audiologist's office directly about the records-related issue. Id. Five months later, on April 8, 2014, Plaintiff again raised with Defendant the issue about the lack of computerized data in the

ABR reports. Id. at ¶ 28. Defendant told Plaintiff that "each audiologist used their preferred methodology to perform the ABR testing," and that this particular audiologist did not generate any computerized data in her reports. Id.

Plaintiff claims that Defendant lied when he told her that there was no computerized data associated with her ABR tests, and that he unfairly concealed that data. A doctor at Stanford Hospital told Plaintiff in 2015 that Defendant was incorrect when he stated that some audiologists do not produce computerized data in their ABR test reports. Id. at ¶ 36. That doctor explained that because ABR testing is performed with a specialized computer, there is always associated computerized data. Id. Additionally, in 2019, a state investigator from the California Department of Public Health ("CDPH") reviewed Plaintiff's UCSF Medical Center records and found the computerized data from Plaintiff's second ABR test in November 2012. Id. at ¶ 40. The records included text added by staff at Defendant's office on April 8, 2014, the same day that Defendant told Plaintiff that there was no computerized data accompanying her ABR tests. Id. at ¶ 41. The CDPH investigation did not uncover the computerized data from the April 2012 and October 2013 ABR tests; that data remains outstanding.

According to Plaintiff, Defendant's alleged concealment of the computerized data harmed her in three ways. First, Plaintiff alleges that without the computerized data from each ABR test, she settled her personal injury lawsuit for $890,000 less than she otherwise could have. Id. at ¶ 131. Second, Plaintiff paid the UC Regents about $2,000 for each ABR test. She alleges that because she did not receive the computerized data for those tests, she was denied "the benefit of her bargain." Id. at ¶ 114. Third, Plaintiff alleges that Defendant's concealment of the ABR computerized data caused her to unnecessarily undergo repeat ABR tests, resulting in emotional distress. Id. at ¶ 139.

PROCEDURAL BACKGROUND

This is not Plaintiff's first lawsuit alleging Defendant's concealment of the computerized data from her 2012 and 2013 ABR tests. In 2016, Plaintiff sued UCSF Medical Center in California state court. Id. at ¶ 38. In 2020, Plaintiff filed a Second Amended Complaint adding Defendant to that case and alleging six causes of action: (1) breach of contract; (2) violation of California Health & Safety Code § 123110; (3) fraudulent concealment of medical records; (4) intentional concealment of medical records; (5) emotional distress; and (6) violation of California Business & Professions Code § 17200, et seq. Id. at ¶ 45. As in this case, Plaintiff alleged that Defendant's "suppression of her medical records reduced her settlement in the underlying personal injury litigation and caused emotional distress." Banga v. Regents of the Univ. of Cal., A162936, 2022 WL 17073900, at *4 (Cal. Ct. App. Nov. 18, 2022). Plaintiff voluntarily dismissed the two statutory claims, and the trial court dismissed the four common law claims with prejudice. Id. at *5. The California Court of Appeal affirmed. Id. at *10.

Plaintiff filed this lawsuit the day before the California Court of Appeal affirmed the trial court's dismissal with prejudice. Banga, A162936, 2022 WL 17073900. In this case, Plaintiff filed a Revised First Amended Complaint – the operative complaint here – to add the UC Regents as a Defendant. ECF No. 25. The Court then issued an Order to Show Cause why the addition of the UC Regents did not destroy diversity. ECF No. 29. In response, Plaintiff filed a motion to drop the UC Regents, which the Court granted. ECF No. 33. Defendant then filed this motion to dismiss Plaintiff's Revised First Amended Complaint. ECF No. 36.

DISCUSSION

I. Legal Standard

A complaint must be dismissed if it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To state a legally sufficient claim, a complaint must plead "enough facts to state a claim for relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In evaluating a complaint under this standard, a court must accept as true the well-pleaded factual allegations set forth in the complaint and draw all reasonable inferences in favor of the plaintiff. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Twombly, 550 U.S. at 556. While the plausibility standard "does not require detailed factual allegations," it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678; see also Cantor Fitzgerald Inc. v. Lutnick, 313 F.3d 704, 709 (2d Cir. 2002) (stating that a court need not give "credence to [a] plaintiff's conclusory allegations"). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action" is insufficient to survive a motion to dismiss under Rule 12(b)(6). Id. (internal quotation marks omitted). A motion to dismiss on grounds of preclusion is treated as a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), not as a motion to dismiss for lack of jurisdiction under Rule 12(b)(1). See Thompson v. Cty. of Franklin, 15 F.3d 245, 253 (2d Cir. 1994).

Where a plaintiff proceeds *pro se,* her complaint "must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quotation marks omitted) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). When addressing a motion

to dismiss, "courts must construe [a *pro se* complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggest[s]." Weixel v. Bd. of Educ. of City of New York, 287 F.3d 138, 145-46 (2d Cir. 2002).

A complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. See, e.g., Hart v. FCI Lender Servs., Inc., 797 F.3d 219, 221 (2d Cir. 2015) (citing Fed. R. Civ. P. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.")). "[I]n ruling on a 12(b) motion to dismiss," courts are also "permitted to consider matters of which judicial notice may be taken." Simmons v. Trans Express Inc., 16 F.4th 357, 360 (2d Cir. 2021) (internal quotation omitted). Court records are subject to judicial notice, and so may be properly considered on a motion to dismiss. See Akhenaten v. Najee, LLC, 544 F. Supp. 2d 320, 327 n.9 (S.D.N.Y. 2008).

A complaint does not include allegations raised for the first time in opposition to a motion to dismiss, and such allegations do not automatically amend the complaint. See O'Brien v. Nat'l Prop. Analysts Partners, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) ("[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss."); Capers v. Kirby Forensic Psychiatric Ctr., No. 13-cv-6953 (AJN), 2016 WL 817452, at *2 (S.D.N.Y. Feb. 25, 2016) (applying rule against amending complaint by the briefs to *pro se* plaintiff). A court may, however, consider new allegations in an opposition brief "in determining whether to grant [the plaintiff] leave to file a[n] . . . Amended Complaint." Capers, 2016 WL 817452, at *2; see also Jordan v. Chase Manhattan Bank, 91 F. Supp. 3d 491, 500 (S.D.N.Y. 2015).

II. Private Right of Action

Plaintiff's first cause of action is made under the Health Insurance Portability and Accountability Act ("HIPAA"), 45 C.F.R. § 164.524. HIPAA provides "no private right of action, and enforcement of HIPAA is reserved exclusively to the Secretary of Health and Human Services." Rzayeva v. U.S., 492 F. Supp. 2d 60, 83 (D. Conn. May 31, 2007); see also Acara v. Banks, 470 F.3d 569, 571 (5th Cir. 2006) (citing 42 U.S.C. §§ 1320d–5). Plaintiff's HIPAA claim should, therefore, be dismissed with prejudice.

III. Res Judicata

Defendant argues that Plaintiff's common law claims are barred by res judicata. "The law governing the doctrine of res judicata in a diversity action is 'the law that would be applied by state courts in the State in which the federal diversity court sits.'" Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190, 195 (2d Cir. 2010) (citing Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001)). Under New York law, courts are "required to give the same preclusive effect to a judgment from another state as it would have in the issuing state." Miller v. Miller, 152 A.D.3d 662, 665 (2d Dep't 2017); see also O'Connell v. Corcoran, 1 N.Y.3d 179, 184 (2003) ("In accordance with the Full Faith and Credit Clause, a 'judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.'"). Accordingly, the preclusive effect of Plaintiff's prior California state court judgment is governed by California law.

Res judicata bars a "second suit between the same parties on the same cause of action." Boeken v. Philip Morris USA, Inc., 48 Cal. 4th 788, 797 (2010). Under California law, three requirements must be met for a prior judgment to bar a second claim. First, the parties to the second action must have been parties to the first action. Id. Here, Plaintiff and Defendant were

both parties to the California case. Second, the first action must have "resulted in a final judgment on the merits." Id. Under California law, "for purposes of applying the doctrine of res judicata . . . a dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action." Id. at 793. Here, Plaintiff's prior case was dismissed with prejudice and was therefore a final judgment on the merits.

For res judicata to apply, the third requirement is that the claims raised in the first and second cases are "identical." Id. at 797. To determine whether claims in successive cases are identical, California courts evaluate the claims under a "primary rights theory." Id. Under that theory, two causes of action are identical if they arise from the same primary right, even if they are framed under different legal theories. Id. "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief.'" Slater v. Blackwood, 15 Cal. 3d 791, 795 (1975).

In this case, Plaintiff's common count and unjust enrichment claims assert the same "primary right" asserted in her dismissed breach of contract claim. Under Plaintiff's breach of contract claim in the prior case, Plaintiff asserted the right to receive all medical records related to paid-for medical testing. In that complaint, Plaintiff wrote that she "paid a total of $6,830.66 to the Defendants for both ABR and Stenger tests" and was therefore "entitled to receive a complete report of her med-legal evaluations." ECF No. 36, Ex. B at 9. Familiarly, Plaintiff asserts in her common count and unjust enrichment claims in this case that, "[b]y accepting the payments of $2,632.20, $2,021, and $2,177.46, Defendants were legally required to provide Plaintiff with the complete copy of each of the ABR Testing that Defendants administered for

which they collected payments of $6830.66." RFAC, ¶¶ 74, 110-13. Because Plaintiff's breach of contract claim was dismissed with prejudice, and she again asserts the same primary right here through the common count and unjust enrichment claims, the causes of action are "identical" and are barred by res judicata.

Plaintiff's constructive fraud and breach of fiduciary duty claims also assert a primary right asserted in the prior case. There, Plaintiff's dismissed emotional distress claim was rooted in the right to receive all medical records pertinent to pending litigation – or the right to be free from spoliation of evidence, as the California courts interpreted. Ex. B at 14; Banga v. Regents of the Univ. of Cal., A162936, 2022 WL 17073900, at *6 (Cal. Ct. App. Nov. 18, 2022) ("The trial court properly recognized that [Plaintiff] is, in substance, asserting tort claims for spoliation of evidence."). Under that claim, Plaintiff alleged that "Defendants were on notice that the litigation was pending involving the Plaintiff and medical legal evaluation was pivotal for establishing the liability of" the defendant in the personal injury case, and that by failing to provide Plaintiff with the ABR computerized data, Plaintiff "ended up settling the underlying case on less favorable terms." Ex. B at 14. Plaintiff asserts that same spoliation theory under the constructive fraud and breach of fiduciary duty causes of action in this case. In those causes of action, Plaintiff claims that Defendant unfairly withheld or concealed her medical records, leading to the unfavorable settlement in her personal injury case. RFAC, ¶¶ 119, 131. Because the constructive fraud and breach of fiduciary duty claims assert the same primary right as the dismissed emotional distress claim, they are barred by res judicata.

Although Plaintiff's emotional distress claim in her prior case was dismissed with prejudice, Plaintiff's claim for "emotional distress" in this case is not barred by res judicata, as it is rooted in a different primary right. As noted above, the prior emotional distress claim asserted

a right to be free from spoliation of evidence. Ex. B at 14. In this case, Plaintiff asserts under the emotional distress claim the right to be free from unnecessary medical testing. RFAC, ¶¶ 139-41. Plaintiff alleges that "Defendants' conduct has directly and proximately caused Plaintiff to undergo unnecessary ABR Testing, multiple audiological evaluation, hospital visits, and procedures," leading to Plaintiff's emotional distress. Id. at ¶ 141. Plaintiff did not assert that same primary right in the prior case, and so the emotional distress cause of action in this case is not barred by res judicata.[2]

IV. Statute of Limitations

Plaintiff's remaining claims are, however, time-barred. A federal court sitting in diversity applies the forum state's substantive statute of limitations law. See Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Under New York law, "[w]hen a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." Global Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525, 528 (1999). Plaintiff is a California resident, and the causes of action accrued in California. Plaintiff's claims must therefore be timely in both New York and California to survive Defendant's motion to dismiss. Plaintiff's emotional distress and statutory causes of action are all time-barred under California law, so it is unnecessary to also evaluate them for timeliness under New York law.

In California, negligent or intentional infliction of emotional distress causes of action are subject to a two-year statute of limitations. Civ. Proc. § 335.1. Plaintiff's emotional distress

[2] Defendant correctly notes that "emotional distress" is not a claim, but an element of a tort. Def. Rply. at 6. In light of Plaintiff's pro se status, the Court liberally interprets this claim as one asserting either intentional or negligent infliction of emotional distress.

cause of action accrued when she underwent unnecessary ABR testing in 2012, 2013, and 2014 – far longer than two years ago. Plaintiff's emotional distress cause of action is therefore time-barred.

The statute of limitations for California Health & Safety Code § 123110 is three years. Civ. Proc. § 338(a). The Health & Safety Code provides that after a patient requests a copy of their medical records, "[t]he health care provider shall ensure that the copies are transmitted within 15 days." Health & Safety § 123110(b)(1). Plaintiff's cause of action therefore accrued 16 days after she most recently requested medical records from Defendant. Based on Plaintiff's complaint, she most recently asked Defendant for her ABR data in 2014, making this claim time-barred.[3] RFAC, ¶ 28.

The statute of limitations for California Business & Professions Code § 17200 is four years. Bus. & Prof. § 17208. Under this cause of action, Plaintiff alleges that Defendant engaged in an unfair business practice by failing to provide her with the computerized data from the 2012 and 2013 ABR tests, harming her personal injury settlement in 2014 and leading to unnecessary ABR testing in 2013 and 2014. RFAC, ¶ 95. This cause of action accrued nine years ago and is therefore time-barred.

[3] In Plaintiff's complaint, she alleges that she requested her ABR data from the UC Regents – the dismissed defendant – on July 7, 2021, December 8, 2021, and November 4, 2022. RFAC at ¶¶ 50-52. In Plaintiff's opposition to Defendant's motion to dismiss, she alleges that those requests were made to Defendant personally (even though Defendant is no longer affiliated with the UC Regents), which might mean that the Health & Safety Code claim would not be time-barred. ECF No. 48. at 7. But because allegations first raised in Plaintiff's opposition cannot amend her complaint, the Court will not consider Plaintiff's new allegations against Defendant regarding the 2021 and 2022 records requests. O'Brien v. Nat'l Prop. Analysts Partners, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) ("[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss."). Further, leave to amend should not be granted because exhibit 18 to Plaintiff's opposition shows that those record requests were directed at UCSF Medical Center, not Defendant personally. ECF No. 48, Ex. 18.

Plaintiff argues, without merit, that her statutory claims are not time-barred because she filed them timely in the prior proceeding in 2016. But Plaintiff voluntarily dismissed those statutory claims. Banga v. Regents of the Univ. of Cal., A162936, 2022 WL 17073900, at *5 (Cal. Ct. App. Nov. 18, 2022). A voluntarily dismissed claim does not toll the statute of limitations. "[I]nstead, such a dismissal includes the very real risk that an applicable statute of limitations will run before the party is in a position to renew the dismissed cause of action." Hill v. City of Clovis, 63 Cal. App. 4th 434, 445 (Cal. Ct. App. Apr. 21, 1998). Plaintiff took that risk, and the statutory claims are now time-barred.

Plaintiff also argues that because Defendant has not yet provided her with the April 2012 and October 2013 ABR data, Defendant is committing a "continuing wrong" and the statute of limitations has not yet started to run. Plaintiff argues that "[w]here a tort involves a continuing wrong, the statute of limitations does not begin to run until the date of the last injury or when the tortious acts cease." Pugliese v. Superior Court, 146 Cal. App. 4th 1444, 1452 (Cal. Ct. App. Jan. 23, 2007). First, these are statutory violations, not torts, so this doctrine does not apply. Second, it would not make sense for the statute of limitations to start running "when the tortious acts cease," or when Defendant provides Plaintiff with the outstanding ABR test data. That would mean, paradoxically, that for these claims seeking injunctive relief, the statute of limitations would only start to run once there was no longer a need for injunctive relief. Therefore, the above analysis applies, and Plaintiff's statutory claims are time-barred.

LEAVE TO AMEND

Rule 15(a)(2) requires that leave to amend be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). "However, in determining whether leave to amend should be granted, the district court has discretion to consider, *inter alia*, the apparent futility of amendment." Grace v.

Rosenstock, 228 F.3d 40, 53 (2d Cir. 2000) (internal citations and quotation marks omitted); Cancel v. New York City Hum. Res. Admin./Dep't of Soc. Servs., 527 F. App'x 42, 44 (2d Cir. 2013) ("While district courts should generally not dismiss *pro se* claims without affording leave to amend, it need not do so when amendment would be futile."). Leave to amend may properly be denied for "for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007) (citing Foman v. Davis, 371 U.S.178, 182, (1962)). The defects in Plaintiff's complaint – preclusion, untimeliness, and no private right of action – cannot be cured by amendment, making amendment futile. Additionally, the Court finds that Plaintiff filed this lawsuit in bad faith. Plaintiff litigated Defendant's alleged concealment of her ABR test data extensively in California for six years. Banga v. Regents of the Univ. of Cal., A162936, 2022 WL 17073900 (Cal. Ct. App. Nov. 18, 2022). The same week the California Court of Appeal affirmed the dismissal of the prior case with prejudice, Plaintiff filed this case in a transparent attempt to evade the California court's decision. Accordingly, I recommend Plaintiff not be afforded leave to amend her complaint.

CONCLUSION

I find that Plaintiff's common count, unjust enrichment, breach of fiduciary duty, and constructive fraud claims are barred by res judicata. Additionally, I find that Plaintiff's emotional distress and statutory claims are time-barred, and that there is no private right of action for Plaintiff's HIPAA claim. I recommend that the Court grant Defendant's motion to dismiss with

prejudice in its entirety, and without leave to amend.

SARAH NETBURN
United States Magistrate Judge

DATED: October 30, 2023
New York, New York

* * *

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen days from the service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Paul A. Engelmayer at the United States Courthouse, 40 Foley Square, New York, New York 10007, and to any opposing parties. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Engelmayer. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); Thomas v. Arn, 474 U.S. 140 (1985).

Filed: 10/01/2019

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KAMLESH BANGA,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants and Respondents.

A151758

(San Francisco County
Super. Ct. No. CGC-16-549780)

While Kamlesh Banga pursued a personal injury lawsuit based on hearing loss, defendant health care providers tested her hearing and reported that she was exaggerating her injuries. Banga later sued defendants, claiming (among other theories) that they were negligent and that their reports dramatically reduced her recovery in the personal injury lawsuit. The trial court sustained a demurrer to her complaint, ruling it was barred by the statute of limitations.

Banga sought leave to amend her complaint to enforce her numerous requests to obtain copies of her medical records, which defendants refused to provide. (Health & Saf. Code, § 123100, et seq.)[1] The trial court denied her leave to amend. We reverse.

[1] All statutory references are to the Health and Safety Code unless otherwise indicated.

BACKGROUND

At the hearing on the demurrer, Banga argued she had requested her medical records several times, she had not received them, and she should be permitted leave to amend her first amended complaint to pursue them. The court sustained the demurrer without leave to amend, explaining that she "simply had filed [her] case too late."

On appeal, Banga's sole contention is that she should be permitted to amend her complaint to add a claim seeking the records, based on the following allegations.

Banga had medical tests on her hearing in 2012 and 2013. The tests were conducted by defendants Anga Lau, Au.D. and Andrew Dundas, Ph.D., who are employees of defendant The Regents of the University of California (collectively, the Regents). The first set of tests in April 2012 showed Banga had profound hearing loss and was not exaggerating her symptoms. After subsequent tests in November 2012 and October 2013, the Regents reported that she only had moderate hearing loss and *was* exaggerating her symptoms. Banga's attorney paid the Regents $2,177.46 for the October 2013 tests.

Banga requested copies of medical records related to the tests in October 2013, August 2014, September 2014, August 2015, September 2015 (twice), and February 2017. The Regents refused to produce the records.

DISCUSSION

A.

We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether, as a matter of law, the complaint states a cause of action on any available legal theory. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) We assume the truth of all material factual allegations together with those matters subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) When a trial court denies a party leave to amend, we apply the abuse of discretion standard. (*Roman v. County of*

Los Angeles (2000) 85 Cal.App.4th 316, 322.) If there is any reasonable possibility that the pleading could be cured by amendment, we must reverse. (*Ibid.*)

B.

Banga argues the trial court abused its discretion by refusing leave to amend her complaint to enforce her request for her medical records under sections 123110 and 123120. We agree.

The Legislature has declared that every person responsible for her own health care decisions has a right "to complete information respecting his or her condition and care provided." (§ 123100.) The Legislature therefore established procedures to ensure people have access to their health care records. (*Ibid.*) Section 123110 entitles any adult patient to receive copies of their "patient records" within 15 days of a request and upon payment of costs. (§ 123110, subd. (b)(1).) Section 123120 permits an aggrieved patient to bring an action to enforce these provisions, and the court may award attorney fees and costs to the prevailing party. (§ 123120; see generally *Person v. Farmers Ins. Group of Companies* (1997) 52 Cal.App.4th 813, 816-818 [discussing predecessor statutes and 1995 reenactment as § 123100 et seq.].)

The trial court should have allowed Banga to pursue this claim in an amended complaint. Banga alleges that she requested the October 2013 records repeatedly between October 7, 2013 and September 10, 2015. On appeal, she represents that she again requested them in 2017 and that she received no response to any of her requests. She does not allege that she tendered payment of the costs of copying the records, but the Regents do not claim that they requested payment or that their refusal to provide the records was based on nonpayment. In any case, we find there is a reasonable possibility that Banga's complaint may be cured by amendment.

The Regents' arguments are spurious. First, they suggest the type of records at issue here (transcripts of the hearing tests) are not "documents commonly found in a medical chart," but they make no reasoned legal argument that "patient records" under

section 123110 are limited to such documents. They do not even cite the definition of "patient records," which broadly includes "records in any form or medium maintained by, or in the custody or control of, a health care provider relating to the health history, diagnosis, or condition of a patient, or relating to treatment provided or proposed to be provided to the patient." (§ 123105, subd. (d); see also § 123100 [patients have a right to "complete information" concerning their health care].)

Second, the Regents argue that Banga cannot enforce her request for her records because her complaint seeks compensatory damages, which are not permitted in an action to enforce section 123110. (See *Maher v. County of Alameda* (2014) 223 Cal.App.4th 1340, 1354.) This argument makes no sense—the mere fact that Banga sought compensatory damages in her prior complaint does not preclude her from amending her complaint to seek other appropriate relief.

Finally, the Regents obliquely contend that Banga's claim is time-barred by the one-year limitations period for professional negligence claims. (Code of Civ. Proc., § 340.5.) But that statute applies to an action for professional negligence that causes "a personal injury or wrongful death." (*Id.*) The Regents make no attempt to explain why it also bars an action to obtain documents.

A person should not have to file a lawsuit to obtain copies of her own medical records. But faced with a health care provider's obdurate refusal to release them, as Banga alleges here, section 123120 provides a remedy.

C.

On remand, Banga may also be able to plead a claim under the Unfair Competition Law. (Bus. & Prof. Code, § 17200.)

Unfair competition claims may be based on violations of other statutes, including state laws that govern information-sharing practices. (See *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 563-564 [violations of credit and consumer reporting laws].) A single unfair or unlawful act may suffice. (*Klein v. Earth Elements, Inc.* (1997) 59

Cal.App.4th 965, 968, fn. 3.) Injunctive relief—e.g., an order to produce the medical records—is available (see Bus. & Prof. Code, § 17203), and the limitations period is four years. (See Bus. & Prof. Code, § 17208; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178-179 [four-year limitations period usually applies even if claim is based on violation of statute with shorter limitations period]).

Here, Banga may be able to base an unfair competition claim on the Regent's violation of section 123110. Indeed, she arguably did so in her first amended complaint. She alleges a violation of Business and Professions Code section 17200, including allegations that she requested copies of her patient records and the Regents failed to provide them, although she appears to allege that this is a violation of the Regent's policies rather than the Health and Safety Code. In her prayer, she does not specify relief available under Business and Professions Code section 17200, such as restitution or an injunction, but she does request "other relief as the Court deems proper." On remand she may revisit the remedies in a second amended complaint.

The Regents suggest that Banga cannot establish standing because she has not suffered any loss of money or property.[2] (See Bus. & Prof. Code, § 17204 [limiting relief to persons who have lost money or property].) However, Banga may have standing by alleging she paid $2,177.46 for the October 2013 tests and did not receive the full benefit of her bargain. (See *Kwikset Corp. v. Superior Court, supra,* 51 Cal.4th at p. 323 ["There are innumerable ways in which economic injury from unfair competition may be shown."].) She may be able to allege other costs caused by the Regents' refusal to provide the underlying test data, such as the cost of additional tests that she obtained at Stanford.

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[2] The Regents confuse standing with eligibility for restitution. It is irrelevant whether an economic injury posited for standing can be remedied by an award of restitution. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 335-336.)

To be clear, we do not hold that Banga can successfully plead an unlawful competition claim, but she should be given an opportunity to do so.

D.

Finally, Banga claims the trial court erred by not issuing a statement of decision under Code of Civil Procedure, section 632. She is incorrect. The statute applies when there has been a trial on a question of fact by the court (Code Civ. Proc., § 632), not an order on a demurrer, which decides only questions of law. (See *Lazar v. Hertz Corp., supra,* 69 Cal.App.4th at p. 1501).

DISPOSITION

The judgment and the order sustaining the demurrer without leave to amend are reversed. On remand, the trial court shall enter an order sustaining the demurrer and granting Banga leave to file a second amended complaint. The Regents shall bear Banga's costs on appeal.

BURNS, J.

WE CONCUR:

JONES, P. J.

SIMONS, J.

A151758

Filed: 11/18/22

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KAMLESH BANGA,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,

Defendants and Respondents.

A162936

(San Francisco City and County Super. Ct. No. CGC-16-549780)

While Kamlesh Banga pursued a personal injury lawsuit against a third party based on hearing loss she suffered as a result of a car accident, defendant health care providers tested her hearing and reported that she was exaggerating her injuries. After settling her personal injury lawsuit, Banga (representing herself) sued defendants. She originally asserted negligence causes of action and later asserted that she was injured by the defendants' intentional refusal to provide complete medical records. Banga argues that the trial court erred in sustaining (without leave to amend) defendants' demurrer with respect to four of her six causes of action. We disagree and affirm.

BACKGROUND

A.

Banga filed her personal injury lawsuit in 2010 and had "medical legal evaluation[s]" of her hearing in 2012 and 2013. The tests were conducted by defendants Anga Lao, Au.D., and J. Andrew Dundas, Ph.D., in consultation with Banga's treating physician Lawrence Lustig, M.D., who were all employees of defendant The Regents of the University of California (collectively, the Regents).

The first report indicated that Banga's first set of tests (in April 2012) showed she had profound hearing loss and was not exaggerating her symptoms. After subsequent tests (in November 2012 and October 2013), the Regents reported that she only had moderate hearing loss and was exaggerating her symptoms. Banga's attorney paid the Regents $2,632.20 for the April 2012 tests, $2,021.40 for the November 2012 tests, and $2,177.46 for the October 2013 tests.

Before she settled her personal injury action (in 2014), Banga underwent similar medical testing at Stanford Hospital, and thereafter received a report more favorable to her and her underlying lawsuit. Stanford's report also included computerized data from the tests.

Banga repeatedly requested copies of medical records related to defendants' reports and evaluations—specifically the objective findings from the testing—in October 2013, September 2014, January 2016, February 2017, and April 2019. However, the Regents did not produce complete records for any of the testing dates until July 2019—when defendants released a 24-page report for her November 2012 testing, which included for the first time underlying objective test data. According to her operative complaint, defendants continue to withhold at least the objective findings from Banga's October 2013 testing.

B.

This is the second appeal Banga has filed in this litigation. In her first appeal, this court reversed the trial court's order sustaining defendants' demurrer to her first amended complaint without leave to amend. (*Banga v. Regents of the Univ. of Cal.* (Oct. 1, 2019, A151758) [nonpub. opn.] (*Banga I*).)

In *Banga I*, this court observed that the Legislature had established procedures to ensure patient access to health care records (Health & Saf. Code, § 123110),[1] and also permitted an action, with discretionary award of fees and costs to the prevailing party, to enforce these provisions. (§ 123120; see *Person v. Farmers Ins. Group of Companies* (1997) 52 Cal.App.4th 813, 816-818.)

Accordingly, *Banga I* determined that the trial court abused its discretion by denying Banga leave to amend so that she could plead claims seeking equitable relief to enforce her requests for medical records (Health & Saf. Code, § 123120; Bus. & Prof. Code, §§ 17200, 17203). The judgment was reversed and remanded, with directions to the trial court to enter an order sustaining the demurrer and granting Banga leave to file a second amended complaint. (*Banga I, supra,* A151758.)

C.

On remand, Banga filed a second amended complaint and then, after defendants' demurrer was granted with leave to amend *some* of her causes of action, a third amended complaint (her operative complaint). Banga's operative complaint alleged causes of action for: (1) breach of contract; (2) violation of Health and Safety Code section 123110; (3) fraudulent concealment of medical records; (4) intentional concealment of medical records;

[1] Undesignated statutory references are to the Health and Safety Code.

(5) intentional infliction of emotional distress and (6) violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.).

With the exception of her two statutory (second and sixth) causes of action that sought equitable relief, Banga sought compensatory damages, alleging that defendants' suppression of her medical records reduced her settlement in the underlying personal injury litigation and caused emotional distress.

Defendants demurred again, arguing Banga's first, third, fourth, and fifth causes of action failed to allege facts sufficient to state a cause of action. The trial court sustained the demurrer without leave to amend with respect to those four causes of action. Banga then dismissed her remaining second and sixth causes of action (without prejudice) and appealed from the judgment entered in defendants' favor.

DISCUSSION

A.

With respect to Banga's third, fourth, and fifth causes of action, the trial court did not err when it sustained defendants' demurrer without leave to amend because these are barred tort claims for spoliation of evidence.

1.

We review an order sustaining a demurrer de novo, considering whether the complaint states a cause of action on any available legal theory. (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 458 (*Rosen*).) We assume the truth of all material facts that are properly pled, but disregard contentions, deductions, or conclusions of fact or law. (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 346.) We also look past the form of the pleading (and its labels) and focus on its substance, giving it a reasonable construction in context. (*Rosen, supra*, at p. 458.)

2.

In her third through fifth causes of action, Banga alleges in substance that defendants intentionally withheld, concealed, or altered some of the medical records from her hearing tests, which entitles her to compensatory damages because she could not use the undisclosed records to support her personal injury action. She alleges this suppression of evidence caused her emotional distress and a reduced recovery in her personal injury lawsuit.[2]

The trial court properly recognized that she is, in substance, asserting tort claims for spoliation of evidence. Intentional destruction, suppression, or alteration of evidence is spoliation. (See *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 469, 476-477 (*Temple*); *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 497.)

The law is clear that, for numerous policy reasons (including discouraging endless and speculative litigation by disappointed litigants), there is no tort remedy for the spoliation of evidence, regardless of whether it is brought against a party to the underlying litigation or a third party (as Banga alleges). (See *Temple, supra,* 20 Cal.4th at p. 466; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 17-18 (*Cedars-Sinai*); *Strong v. State of California* (2011) 201 Cal.App.4th 1439, 1458-1459.) Defendants are correct that this rule applies to all substantive claims of spoliation, notwithstanding the label a

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[2] To the extent Banga's third cause of action alleges she relied on a purportedly false statement by Dr. Lustig (that the objective findings did not exist), she does not state an independent cause of action for fraud because she does not allege any harm she suffered as a result of her reliance on that statement. The harm she allegedly suffered was from the withholding of the objective findings, not from her reliance on anything Dr. Lustig said.

plaintiff attaches to a particular cause of action. (*Rosen, supra,* 193 Cal.App.4th at pp. 455-457, 462.)

Banga suggests that defendants acted as her fiduciaries because of the existence of a doctor-patient relationship and thereby had a duty, as a matter of law, to produce any and all medical records including the data that she seeks. She does not explain, however, how we could allow her to seek tort damages from defendants for withholding, concealing, or altering her medical records without violating *Cedars-Sinai* and *Rosen*—both of which also involved alleged spoliation of a patient's medical records. (See *Cedars-Sinai, supra,* 18 Cal.4th at pp. 4-5, 17-18; *Rosen, supra,* 193 Cal.App.4th at p. 456; *Rosen* at p. 463 ["general, preexisting relationships are not sufficient to support a spoliation of evidence claim"].)

Banga is correct that our Supreme Court has recognized that a duty to preserve and produce evidence may exist independently of tort law. (*Temple, supra,* 20 Cal.4th at p. 477 ["to the extent a duty to preserve evidence is imposed by statute or regulation upon the third party, the Legislature or the regulatory body that has imposed this duty generally will possess the authority to devise an effective sanction for violations of that duty"].) And *Banga I, supra,* A151758, determined that Banga has a remedy for suppression of medical records under Health and Safety Code section 123120, and that she might have an additional remedy (for the same alleged statutory violation) under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) However, Banga voluntarily dismissed those statutory claims, which she pled after remand, and they are *not* before us on this appeal.

We also reject Banga's assertion that *Banga I* established law of the case relevant to her spoliation tort claims. There were no such claims before the court on the prior appeal. And the law of the case doctrine has no application to points of law that were

not presented and determined in a prior appeal. (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1127.)

The Legislature devised a system of rights and procedures to ensure patient access to health care records. (Health & Saf. Code, §§ 123110, 123120.) Health and Safety Code section 123120 permits an aggrieved patient to bring an action to enforce these provisions, and to potentially obtain attorney fees and costs if they prevail. (See *Person v. Farmers Ins. Group of Companies, supra,* 52 Cal.App.4th at pp. 816-818.) When a patient is represented by counsel (as Banga was in her personal injury action), additional procedures and enforcement mechanisms for obtaining medical records are provided in the Evidence Code. (Evid. Code, § 1158.) Criminal penalties are also provided for alteration of medical records with fraudulent intent. (Pen. Code, § 471.5.)

Our Supreme Court has decided that non-tort remedies such as these are sufficient to deter spoliation and to protect its victims. (*Temple, supra,* 20 Cal.4th at p. 471; *Cedars-Sinai, supra,* 18 Cal.4th at p. 11.) We are bound by that conclusion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The trial court did not err in sustaining defendants' demurrer to Banga's third through fifth causes of action without leave to amend.

B.

Banga also contends that the trial court erred by sustaining defendants' demurrer to her breach of contract cause of action. We disagree.

Notwithstanding the absence of a tort remedy for spoliation, a defendant who expressly promises to preserve evidence can be held liable on breach of contract or promissory estoppel theories. (*Temple, supra,* 20 Cal.4th at p. 477; *Rosen,*

supra, 193 Cal.App.4th at pp. 460-461; *Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 Cal.App.4th 876, 894.)

In her first cause of action, Banga alleges (in conclusory fashion) that defendants breached a contractual obligation to provide her with *all* medical records from her tests, including underlying objective findings, thereby causing her to receive a reduced personal injury settlement. But, despite the trial court's previous demurrer ruling pointing out the flaw in Banga's pleading, her third amended complaint does not allege the existence of any such express agreement or promise—to provide *all* the underlying data in her medical records.

Instead, Banga provides the full text of two emails that Lao sent to Banga's personal injury attorney before the November 2012 tests. These emails mention " '[m]ed legal' " testing and a " '[m]ed legal report' " but contain no explicit agreement or promise to preserve or provide all underlying records, data, or findings. Implied obligations are insufficient to support a contractual spoliation claim. (*Rosen, supra*, 193 Cal.App.4th at pp. 462-464; *Cooper v. State Farm Mutual Automobile Ins. Co., supra,* 177 Cal.App.4th at p. 904.)

In her opening brief, Banga fails to meet her burden to show how she can amend her complaint to change its legal effect. (See *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.) She forfeited the points raised for the first time in her reply brief or at oral argument. (See *Rubinstein v. Fakheri* (2020) 49 Cal.App.5th 797, 809.)

The trial court did not err in sustaining defendants' demurrer to Banga's first cause of action without leave to amend. We have considered Banga's remaining arguments and find them either unpersuasive or mooted by our decision to affirm the trial court's order sustaining defendants' demurrer.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

BURNS, J.

We concur:

JACKSON, P.J.

SIMONS, J.

A162936