

NO. 26-6441

IN THE SUPREME COURT OF THE UNITED STATES

KAMLESH BANGA

Petitioner

vs.

LAWRENCE R. LUSTIG, M.D.

Respondent

SUPPLEMENTAL APPENDIX TO REPLY BRIEF FOR
PETITIONER

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BANGA-APP-i

INDEX TO APPENDICES

APPENDIX AND DESCRIPTION OF DOCUMENTS	BATES RANGE
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APPENDIX A:

Opinion and Summary Order of the United States Court of Appeals for the Second Circuit, *Banga v. Lustig*, No. 24-140 (2d Cir. July 17, 2025) (Dkt. 110-1)

.....**BANGA-APP-001 to 008**

APPENDIX B:

Order Denying Petition for Rehearing En Banc, *Banga v. Lustig*, No. 24-140 (2d Cir. September 4, 2025) (Dkt. 117-1)

..... **BANGA-APP-009**

APPENDIX C:

Opinion and Order of District Judge Paul A. Engelmayer, *Banga v. Lustig*, No. 1:22-cv-09825-PAE-SN (S.D.N.Y. December 20, 2023) (Dkt. 62)

.....**BANGA-APP-010 to 021**

APPENDIX D:

Report and Recommendation of Magistrate Judge Sarah Netburn, *Banga v. Lustig*, No. 1:22-cv-09825-PAE-SN (S.D.N.Y. October 30, 2023) (Dkt. 58)

.....**BANGA-APP-022 to 035**

APPENDIX E:

California Court of Appeal Opinion, *Banga v. Regents of the University of California*, No. A151758 [nonpub. opn.] (October 1, 2019)

.....**BANGA-APP-036 to 043**

APPENDIX F:

California Court of Appeal Opinion, *Banga v. Regents of the University of California*, No. A162936 [nonpub. opn.] (November 18, 2022)

.....**BANGA-APP-044 to 053**

SUPPLEMENTAL APPENDIX TO REPLY BRIEF

Filed Pursuant to Supreme Court Rule 15.6

Respondent's Brief in Opposition, filed March 27, 2026, argues for the first time that Petitioner's objection concerning the California Unfair Competition Law claim was untimely because it first appeared in Petitioner's amended objections filed November 20, 2023. The district court record directly refutes that argument.

Appendix G is Petitioner's timely objections filed November 12, 2023, as ECF No. 59 in the United States District Court for the Southern District of New York, within the fourteen-day period prescribed by 28 U.S.C. section 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b). That filing contains Objection No. 4, presenting a full and specific objection to the magistrate judge's UCL recommendation, citing the California Court of Appeal's October 1, 2019 decision in *Banga I*, the four-year limitations period under Business and Professions Code section 17208, and the factual allegations in paragraphs 44, 45, and 47 of the Revised First Amended Complaint. Respondent's counsel received ECF No. 59 on November 12, 2023, filed no opposition, and has had this document in his possession continuously since that date.

Appendix H is Petitioner's amended objections filed November 20, 2023, as ECF No. 61, produced in excerpted form to establish that the UCL objection in Objection No. 3 of ECF No. 61 was carried over from Objection No. 4 of ECF No. 59 without alteration and was not first raised by ECF No. 61. Respondent's counsel received ECF No. 61 on November 20, 2023 and filed no opposition.

NOTE ON PURPOSE OF APPENDIX G

Appendix G is produced for two purposes:

First: To place before this Court the district court docket record establishing that ECF No. 59 was filed November 12, 2023, within the fourteen-day period under 28 U.S.C. section 636(b)(1)(C). The UCL objection designated as Objection No. 4 appears at pages 16 through 17 of that timely filing. It cites *Banga I*, Business and Professions Code section 17208, and paragraphs 44, 45, and 47 of the RFAC. The UCL objection was timely.

Second: To address the misrepresentation in Respondent's Brief in Opposition at pages 7 through 11. Respondent's counsel David T. Shuey represents to this Court that the UCL objection was untimely. That representation is contradicted by the district court docket and by the text of the document Respondent's counsel received on November 12,

2023 and did not oppose. Counsel has possessed this document for over two years before filing the Response Brief on March 27, 2026.

APPENDIX G:

Plaintiff's Timely Objections to Magistrate Judge Sarah Netburn's Report and Recommendations, *Banga v. Lustig*, No. 1:22-cv-09825-PAE-SN (S.D.N.Y. filed November 12, 2023) (Dkt. 59). Produced to establish the district court docket record of timely filing and to address the misrepresentation in Respondent's Brief in Opposition at pages 7 through 11 regarding the timeliness of Petitioner's UCL objection. Objection No. 4 at pages 16 through 17 of ECF No. 59 contains the full UCL argument citing the California Court of Appeal's October 1, 2019 decision in *Banga I* and Business and Professions Code section 17208. ECF No. 59 was filed within the fourteen-day statutory period. Respondent's counsel received it on the date of filing and filed no opposition.

.....**BANGA-APP-057 to 074**

NOTE ON PURPOSE OF APPENDIX H

Appendix H is produced for one purpose:

To establish that ECF No. 61, Petitioner's Amended Objections filed November 20, 2023, carried over the UCL objection from ECF No. 59 without alteration and did not first raise the UCL objection. Respondent's Brief in Opposition at page 10 represents that "over one week later, on November 20, 2023 [Petitioner] filed 'amended' objections to the Report, which included her Objection No. 3 which is the basis for this petition." That representation implies the UCL objection was first raised in ECF No. 61. The text of Objection No. 3 at pages 23 through 25 of ECF No. 61 is materially identical to Objection No. 4 at pages 16 through 17 of ECF No. 59. The UCL objection was raised within the fourteen-day statutory period by ECF No. 59 and was not first raised by ECF No. 61.

APPENDIX H:

Amended Plaintiff's Objections to Magistrate Judge Sarah Netburn's Report and Recommendations (excerpt), *Banga v. Lustig*, No. 1:22-cv-09825-PAE-SN (S.D.N.Y. filed November 20, 2023) (Dkt. 61). Excerpt produced to establish that ECF No. 61 carried over the UCL objection from ECF No. 59 without alteration. Excerpt includes the caption page, the table of contents, and pages 23 through 25 of ECF No. 61 containing Objection No. 3 in verbatim form. Respondent's counsel received ECF No. 61 on November 20, 2023 and filed no opposition.

.....**BANGA-APP-075 to 079**

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6 **PLAINTIFF IN PRO PER**

7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF NEW YORK**

9 KAMLESH BANGA

10
11 Plaintiff,

12 v.

13 LAWRENCE R. LUSTIG, M.D., AND
14 DOES 1 THROUGH 5 INCLUSIVE.

15
16 Defendant

Case No. 1:22-cv-09825-PAE-SN

17 **PLAINTIFF'S OBJECTIONS TO**
18 **MAGISTRATE JUDGE SARAH**
19 **NETBURN'S REPORT AND**
20 **RECOMMENDATIONS**

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Honorable Paul A. Engelmayer

**PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE SARAH NETBURN'S
REPORT AND RECOMMENDATIONS**

Page 1

BANGA-APP-057

1 **1. INTRODUCTION**

2
3 Plaintiff, Kamlesh Banga hereby submits Plaintiff’s Objections Pursuant to 28 U.S.C. §
4 636(b) and Rule 72(b)(2), F. R. Civ. P., to Magistrate Judge Sarah Netburn’s October 30, 2023
5 Report and Recommendation (“R&R”) (ECF No. 58). Plaintiff submit these objections to the R&R
6 regarding the following claims: (1) violation of California Health & Safety §§ 123110 et seq.,(2)
7 common count, (3) violation of Bus. & Prof. Code §17200 et seq., (4) unjust enrichment, (5)
8 constructive fraud, (6) breach of fiduciary duty, and (7) emotional distress.

9 As a preliminary matter, the Plaintiff conveys to the court that while she acknowledges
10 having no right to bring a private cause of action under HIPAA; however, this fact has no
11 bearing on the merits of her claims pending before this court under California Health & Safety
12 §§123110 et seq. Hence, Plaintiff requests the Court to consider her claims and objections to
13 R&R solely under §§123110 et seq as she no longer wishes to rely on the provisions of HIPPA.

14 **A. CALIFORNIA APPELLATE PROCEEDINGS**

15 Health and Safety Code section 123110(b)(2), chapter 1, part 1, division 106,
16 states, The health care provider shall provide the patient or patient's personal
17 representative with a copy of the record in the form and format requested if it
18 is readily producible in the requested form and format, or, if not, in a readable
19 paper copy form or other form and format as agreed to by the health care
20 provider and the patient or patient's personal representative. (Amended by
21 Stats. 2017, Ch. 626, Sec. 1.5. (SB 575) Effective January 1, 2018.)
22 Health and Safety Code section § 123105(d), chapter 1, part 1, division 106,
23 states, “Patient records” means records in any form or medium maintained by,
24 or in the custody or control of, a health care provider relating to
25 the health history, diagnosis, or condition of a patient, or relating to treatment
26 provided or proposed to be provided to the patient. (Amended by Stats. 2017,
27 Ch. 513, Sec. 1. (SB 241) Effective January 1, 2018.)

28 On June 7, 2017, in an attempt to enforce her right to have access to her own medical records
under Health and Safety Code §§123110 and 123120, Plaintiff appealed from the judgment entered
by the trial court in San Francisco Superior Court Case No. CGC-16-549780. The medical records

1 Defendants failed to provide were the objective findings of Plaintiff's Auditory Brainstem Response
2 ("ABR") testing of April 6, 2012, November 5, 2012, October 7, 2013. On October 1, 2019, in
3 reversing the trial court, the Court of Appeal held:
4

5 **"A person should not have to file a lawsuit to obtain copies of her own medical**
6 **records. But faced with a health care provider's obdurate refusal to release**
7 **them, as Banga alleges here, section 123120 provides a remedy." *Banga v The***
8 ***Regents of the University of California, et al.* Appellate Case No. A151758.**
9 **(*"Banga I"*). [Emphasis added]**

10 [ECF 48, Banga Decl. ¶19, Exhibit 11]

11 On March 12, 2020, pursuant to the Court of Appeal's decision, Plaintiff requested Dr. Lustig
12 to provide copies of the objective findings related to her ABR testing of April 6, 2012 and November
13 7, 2013. On March 16, 2020, Plaintiff filed a Second Amended Complaint (SAC) and named Dr.
14 Lustig as a party defendant. Aside from violation of California Health & Safety §§ 123110 et seq.,
15 violation of Bus. & Prof. Code §17200 et seq., Plaintiff added the following four (4) causes of action
16 in the SAC: (1) breach of contract; (2) fraudulent concealment of medical records, (3) intentional
17 concealment of medical records; and infliction of emotional distress. Going forward, the Court's
18 decision should have brought an end to any issues pertaining to Plaintiff's entitlement to have access
19 to her own medical records but it did not happen. On October 7, 2020, the trial court sustained
20 demurrer to Plaintiff's claim for breach of contract; fraudulent concealment of medical records,
21 intentional concealment of medical records; and infliction of emotional distress without leave to
22 amend. On October 16, 2020, Defendant jointly filed verified Answer to the remaining two causes of
23 action of the Third Amended Complaint. On March 29, 2021, Plaintiff dismissed two remaining
24 causes of action without prejudice in order to perfect the appeal.
25

26 ¹ The Auditory Brainstem Response is an objective test that can be used to estimate hearing
27 sensitivity and to identify neurological abnormalities of the auditory nerve and the auditory pathway
28 up through the brainstem.

1 On May 12, 2021, Plaintiff appealed for the second time limited to four causes of action. On
2 November 18, 2022, the Court of Appeal affirmed dismissal of Plaintiff's (1) breach of contract; (2)
3 fraudulent concealment of medical records, (3) intentional concealment of medical records; and
4 infliction of emotional distress. While the Court of Appeal affirmed dismissal but at no point the
5 Court find that Plaintiff acted in bad faith. *Banga v. Regents of the Univ. of Cal.*, A162936, 2022 WL
6 17073900 (Cal. Ct. App. Nov. 18, 2022). ("*Banga II*") [ECF 48, **Banga Decl. ¶25, Exhibit 17**]
7 Although the Court of Appeal affirmed dismissal of the four claims, the court nonetheless upheld that
8 Banga is entitled to obtain her full medical records under Health & Saf. Code, §123110:
9

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

14 Accordingly, *Banga I* determined that the trial court abused its discretion by
15 denying Banga leave to amend so that she could plead claims seeking
16 equitable relief to enforce her requests for medical records (Health & Saf.
17 Code, § 123120; Bus. & Prof. Code, §§ 17200, 17203). The judgment was
18 reversed and remanded, with directions to the trial court to enter an order
19 sustaining the demurrer and granting Banga leave to file a second amended
complaint. (*Banga I*, supra, A151758.) (5) intentional infliction of emotional
distress and (6) violation of the Unfair Competition Law (Bus. & Prof. Code,
§ 17200 et seq.).

20 The court of Appeal goes onto state:

21 Banga is correct that our Supreme Court has recognized that a duty to preserve and
22 produce evidence may exist independently of tort law. (*Temple*, supra, 20 Cal.4th
23 at p. 477 ["to the extent a duty to preserve evidence is imposed by statute or
24 regulation upon the third party, the Legislature or the regulatory body that has
25 imposed this duty generally will possess the authority to devise an effective
26 sanction for violations of that duty".]) And *Banga I*, supra, A151758, determined
27 that Banga has a remedy for suppression of medical records under Health and
28 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.

1 Under the Full Faith and Credit Act, Magistrate Judge was required to give full preclusive
2 effect to the California Court of Appeal's judgment. As the Second Circuit has made clear, "It is
3 settled that a federal court must give to a state-court judgment the same preclusive effect as would
4 be given that judgment under the law of the State in which the judgment was rendered." *Migra v.*
5 *Warren City School District Board of Education*, 465 U.S. 75, 81 (1984). Magistrate Judge
6 abused her discretion by failing to comply with the provision of 28 U.S.C. § 1738 by upholding
7 Defendant Lustig's egregious, continuing refusal to produce unlawfully withheld portions of
8 Plaintiff's ABR test data as to date. By overlooking the factual allegations articulated in
9 paragraphs 142-152 of the RFAC, Magistrate Judge erroneously has trampled Plaintiff's right
10 afforded to her under California Health & Safety §§ 123110 et seq., and erred by concluding tht
11 Plaintiff filed this lawsuit in bad faith wherein the California Court of Appeal never made such a
12 outrageous determination. ECF 58 at pg. 12.

14 B. PROCEDURAL BACKGROUND BEFORE THIS COURT

15 1. This lawsuit concerns Dr. Lustig's failure to provide the objective findings of Plaintiff's
16 ABR testing conducted on April 6, 2012 and October 7, 2013. The objective findings from the ABR
17 tests were critical for establishing the medical causation of Plaintiff's left-sided profound hearing loss
18 in the underlying case.

19 2. On May 18, 2023, Defendant filed a motion to dismiss all of Plaintiff's claims pursuant to
20 Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

21 3. On August 28, 2023, Plaintiff filed his opposition to Defendant's motion to dismiss.

22 4. On September 8, 2023, Defendant filed his Reply and claimed for the first time that,

23
24 **Defendant submits that the records have been produced. Plaintiff even**
25 **acknowledges that her medical records have been produced. However,**
26 **she claims that "objective findings" from one of the evaluations is**
27 **"missing." Notwithstanding Plaintiff's claims regarding incomplete**
28 **records, her complete medical chart has been produced on numerous**
occasions. In her verified Revised First Amended Complaint, Plaintiff
admits to productions on October 10, 2013, "three weeks" after the April

1 **8, 2013 appointment with Dr. Lustig, August 2014, “shortly’ after**
2 **February 13, 2017, and July 24, 2019. [Emphasis added]**

3 Defense counsel further certifies, “

4 Additionally, further productions were made by defense counsel in the
5 course of the San Francisco litigation. [See Shafer Declaration in Reply at ¶
6 6.]

7 **ECF No. 47, Reply brief at pg. 5:14-22**

8 Ms. Pamela Shafer additionally swore in her Reply Declaration:

9 **Plaintiff’s medical records have been produced to her on numerous**
10 **occasions. Admittedly, each production differs somewhat, as is the**
11 **nature of obtaining medical records from a large university medical**
12 **facility, especially in a matter involving audiological testing and**
13 **evaluation comprised of both testing data and narrative charting in an**
14 **electronic medical record.**

15 **In light of the fact that these are confidential records, a copy will not be**
16 **provided herewith, however, with the Court’s permission and/or**
17 **plaintiff’s agreement, they can be produced.**
18 **[Emphasis added.]**

19 **ECF No. 47.1, Reply brief at pg. 2:15-20**

20 5. On September 9, 2023, Plaintiff filed motion to strike new arguments raised for the first
21 time in Defendant’s reply. She argued that any reasonable person reading the forgoing sworn
22 statements of Ms. Shafer would conclude that the plaintiff’s complete medical chart had been
23 produced on numerous occasions and the medical records withheld from the production were
24 confidential. As such, in the interest of resolving any dispute regarding these records as outlined in
25 the RFAC and which form the basis of this lawsuit, Plaintiff would provide written authorization to
26 Ms. Shafer consenting to the release of the April 6, 2012 and October 7, 2013 medical documents.
27 Plaintiff averred that withheld documents were not intended to be confidential because they were
28 specifically requested and prepared at the request of Plaintiff’s attorney to prove the medical
 causation of Plaintiff’s left sided hearing loss and therefore,

1 6. Accordingly, Plaintiff respectfully requests that the Court order Ms. Shafer to produce the
2 relevant medical records under seal for in camera review. This will allow the Court to determine
3 whether the "objective findings of April 12, 2012 and October 7, 2013" were properly designated
4 confidential. These records should be viewed by the Court alone to assess whether the confidential
5 designation is appropriate or if the records should be disclosed to Plaintiff with any necessary
6 redactions. Allowing in camera review of the contested medical documents will enable the Court to
7 rule on "Ms. Shafer's confidentiality claim and her claim that the plaintiff's complete medical chart
8 has been produced on numerous occasions" Therefore, Plaintiff requests that Ms. Shafer be
9 compelled to provide the April 6, 2012 and October 7, 2013 medical records for in camera review
10 ECF No. 50. However, Magistrate Judge did not provide any opportunity to address new arguments
11 raised in Defendant's Reply.

12 7. On September 14, 2023, Plaintiff sent an email to defense counsel stating to consider this
13 email communication serves as the Plaintiff's full permission for you to release the specific medical
14 records that have been designated as confidential in this case to the court. The medical records
15 referred to are the objective findings from April 6, 2012 and October 7, 2013 ABR testing. The
16 Plaintiff hereby authorizes you to file these records with the court for camera review and remove any
17 confidentiality designation, in order to facilitate the court's review of them as part of the ongoing
18 litigation. [Banga Decl. ¶3, Exhibit 1] However, Defendant failed to produce the medical records that
19 had been withheld from disclosure due to confidentiality.

20 8. On October 19, 2023, Plaintiff filed a Motion for Leave to Depose Dr. Lustig On
21 Confidentiality of Medical Records Relevant to Defendant's Motion to Dismiss. ECF No. 55.
22 Plaintiff argues that she seeks to depose Dr. Lustig to determine why the April 6, 2012 and October 7,
23 2013 ABR test results, which contained objective data relevant to establishing the medical causation
24 of Plaintiff's left sided hearing loss, were designated by Dr. Lustig as confidential medical records
25 and withheld from production, wherein the purpose of conducting the ABR testing was specifically to
26 obtain evidence to prove the medical causation of Plaintiff's left sided profound hearing loss. As
27
28

1 such, pursuant to Rule 26(b)(1), Plaintiff should be permitted limited discovery related to this factual
2 issue raised by Defendant in his motion to dismiss.

3 9. In addition, Plaintiff argued that by allowing her limited request to depose Dr. Lustig is
4 crucial for Plaintiff to fully respond to the pending motion to dismiss and will assist the Court in
5 reaching a fully informed decision on the motion. This targeted deposition will provide Plaintiff the
6 opportunity to gather the facts necessary to address Defendant's claims of confidentiality and allow
7 the Court to weigh both parties' evidence and arguments. Plaintiff further believes that fairness and
8 justice support allowing Plaintiff to take Dr. Lustig's deposition on this one limited issue. Defendant
9 claims that certain medical records related to Plaintiff's hearing loss were confidential and withheld
10 from production, however, Plaintiff has the right to understand why Dr. Lustig decided these specific
11 records should be kept confidential when they directly relate to the injury at issue in the underlying
12 case. This limited deposition is unlikely to be burdensome, and will simply help ensure Plaintiff has
13 an opportunity to be heard on a critical issue before the case is potentially dismissed. In the interest
14 of justice and fairness to both parties, Plaintiff urges the Court to allow Plaintiff to take this deposition.
15 However, Magistrate Judge denied Plaintiff's motion for leave to depose Dr. Lustig. ECF No. 57.

17 II. ARGUMENT

18 A. The Legal Standard

19 When a party makes objections to an R&R:

20 A judge of the court shall make a de novo determination of those portions of
21 the report or specified proposed findings or recommendations to which
22 objection is made. A judge of the court may accept, reject, or modify, in
23 whole or in part, the findings or recommendations made by the magistrate
24 [magistrate judge]. The judge may also receive further evidence or recommit
the matter to the magistrate [magistrate judge] with instructions.

25 **28 U.S.C. § 636(b)(b)(1)(C). See also, Rule 72(b)(3), Fed. R. Civ. P.:**

26 Resolving Objections. The district judge must determine de novo any part
27 of the magistrate judge's disposition that has been properly objected to. The
28 district judge may accept, reject, or modify the recommended disposition;

**PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE SARAH NETBURN'S
REPORT AND RECOMMENDATIONS**

1 receive further evidence; or return the matter to the magistrate judge with
2 instructions.

3 **OBJECTION NO. 1**

4 **CRITICAL FACTS IN PARAGRAPHS 44-45 OF THE REVISED FIRST**
5 **AMENDED COMPLAINT OVERLOOKED IN MAGISTRATE'S R&R**
6 **REQUIRE REVERSAL BY DISTRICT COURT**

7 On Page 11 of the R&R concerning Statute of Limitations, the Magistrate Judge made the
8 following findings:

9 The statute of limitations for California Health & Safety Code § 123110 is
10 three years. Civ. Proc. § 338(a). The Health & Safety Code provides that after
11 a patient requests a copy of their medical records, "[t]he health care provider
12 shall ensure that the copies are transmitted within 15 days." Health & Safety §
13 123110(b)(1). Plaintiff's cause of action therefore accrued 16 days after she
14 most recently requested medical records from Defendant. Based on Plaintiff's
15 complaint, she most recently asked Defendant for her ABR data in 2014,
16 making this claim time-barred. RFAC, ¶ 28.

17 In granting Defendant's motion to dismiss, the Magistrate Judge overlooked the critical
18 factual allegations in paragraph 44 of the RFAC:

19 **44. On March 12, 2020, pursuant to the Court of Appeal's decision and**
20 **California Health & Safety Code Section 123110, Plaintiff sent a**
21 **medical authorization form requesting Defendants to provide a**
22 **complete copy of her ABR Testing of April 6, 2012 and October 7,**
23 **2013.**

24 **ECF 26; ECF No. 48, Banga Decl. ¶20, Ex. 12**

25 Next, paragraph 38 of the RFAC clearly articulated that Dr. Lustig was not previously named
26 as a party defendant in the lawsuit filed in 2016. Pursuant to the Court of Appeal's decision of
27 October 1, 2019, before naming Dr. Lustig as a party defendant, on March 12, 2020, Plaintiff
28 properly requested him to provide copies of her objective findings of the ABR testing of April 6,
2012 and November 7, 2013. By omitting Plaintiff's specific factual allegations in paragraph 44

1 regarding her timely March 2020 record request to Defendant Lustig, the Magistrate Judge
2 erroneously concluded Plaintiff most recently asked Defendant for her ABR data in 2014. This
3 oversight resulted in an erroneous finding that Plaintiff's claims are time-barred, disregarding her
4 well-pled facts.

5
6 **A. Plaintiff's Complaint Arising from Defendant's Health & Safety
Code Violation Is Timely Per Civil Code Procedure §338(a)**

7
8 **Medical Record Retention: Providers Of Health Services Must Keep
Records for At Least 7 Years**

9
10 The medical records that Defendant Lustig continue to withhold are Plaintiff's ABR test data
11 of April 6, 2012 and October 7, 2013. Section 123145 imposes no restriction on patient's right to
12 request for medical record as long as the request is made within seven (7) years after the patient is
13 discharged².

14 Pursuant to California Code of Civil Procedure §338(a), Plaintiff's first cause of action is
15 subject to a three-year statute of limitations. Plaintiff's request to obtain her medical record was
16

17
18 (a) ² Providers of health services that are licensed pursuant to Sections 1205,
19 1253, 1575 and 1726 have an obligation, if the licensee ceases operation,
20 to preserve records for a minimum of seven years following discharge of
21 the patient, except that the records of unemancipated minors shall be kept
at least one year after the minor has reached the age of 18 years, and in
any case, not less than seven years.

22 (b) The department or any person injured as a result of the licensee's
23 abandonment of health records may bring an action in a proper court
24 for the amount of damage suffered as a result thereof. In the event that
25 the licensee is a corporation or partnership that is dissolved, the person
injured may take action against that corporation's or partnership's
principle officers of record at the time of dissolution.

26 (c) Abandoned means violating subdivision (a) and leaving patients treated
27 by the licensee without access to medical information to which they are
entitled pursuant to Section 123110.
28

1 directly made to Defendant on March 12, 2020; therefore, Plaintiff's cause of action accrued 16 days
2 after she most recently requested medical records from Defendant. ECF No. 58 pg. 11:7-8. Applying
3 the 16-day period under the statute, Plaintiff's cause of action against Defendant Lustig for violating
4 Health & Safety Code Section 123110 accrued on March 29, 2020.

5 On March 16, 2020, Plaintiff filed a Second Amended Complaint (SAC) and named Dr.
6 Lustig as a party defendant. Subsequently, Dr. Lustig was served with the summons and SAC. Dr.
7 Lustig did not respond to the SAC. On August 9, 2020, Plaintiff filed a Third Amended Complaint
8 and Defendant was properly served by process server. On October 16, 2020, Defendant Lustig,
9 jointly represented by counsel, filed a verified Answer admitting to not intentionally violating the
10 Health & Safety Code §123110. Specifically, Defendant Lustig stated in his jointly filed Answer,
11

12 AS A EIGHTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE
13 Plaintiffs Third Amended Complaint, these answering Defendants assert they
14 have specifically performed and met the requirements of Health & Safety Code
15 § 123110 and, as such, there are no remedies available to Plaintiff.

16 AS A NINTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE, to
17 the Plaintiffs Third Amended Complaint, these answering Defendants assert
18 they have not intentionally violated the requirements of Health & Safety Code
19 §123110 and, as such, there are no remedies available to Plaintiff.

19 [ECF 48, Banga Decl. ¶21, Exhibit 13, at page 15:12-19.]

20 Under Code of Civil Procedure Section 338(a), the limitations period for Plaintiff to bring an
21 action against Defendant Lustig's failure to produce the objective findings of April 6, 2012 and
22 October 7, 2013 under Health & Safety Code Section 123110 accrued on March 29, 2020 and expired
23 on March 29, 2023. Plaintiff filed the current lawsuit against Dr. Lustig on November 17, 2022,
24 before the March 29, 2023 expiration date. Plaintiff's commencement of the lawsuit against Dr.
25 Lusting on November 2022 was within the limitations period under CCP 338(a), which did not expire
26 until March 29, 2023.

27
28

**PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE SARAH NETBURN'S
REPORT AND RECOMMENDATIONS**

1 Therefore, Plaintiff requests the District Court conduct an independent review of the record and
2 reconsider the Magistrate Judge's statute of limitations analysis. As discussed above, the Magistrate
3 Judge erred by overlooking Plaintiff's factual allegations regarding her March 2020 request for
4 records in paragraphs 44 of the RFAC. These critical allegations warrant reversal of Magistrate
5 Judge's R&R because Complaint was filed on November 17, 2022 within limitations period i.e.
6 prior to the March 29, 2023 expiration date.
7

8 **OBJECTION NO. 2**

9 **Plaintiff's Statutory Claims Asserted In RFAC Are Timely Under**
10 **Ongoing Doctrine And Within CCP 338(A) Limitations Period**

11 Where a tort involves a continuing or repeated injury, however, the statute of limitations does
12 not begin to run until the date of the last injury or when the tortious acts ceases. (*City of Rock Falls v.*
13 *Chicago Title & Trust Co.* (1973), 13 Ill. App. 3d 359, 364, 300 N.E.2d 331.) The continuing violation
14 doctrine provides that "[w]hen a plaintiff experiences a continuous practice and policy [that violates
15 his or her rights], . . . the commencement of the statute of limitations period may be delayed until the
16 last [violation]." *Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994) (citations and internal
17 quotation marks omitted) (discussing the doctrine in the 42 U.S.C. §§1983, 1985 contexts).

18 On Page 12 of the R&R concerning Statute of Limitations with respect to Plaintiff's statutory
19 right, the Magistrate Judge made the following findings:

20 Plaintiff also argues that because Defendant has not yet provided her with the
21 April 2012 and October 2013 ABR data, Defendant is committing a "continuing
22 wrong" and the statute of limitations has not yet started to run. Plaintiff argues
23 that "[w]here a tort involves a continuing wrong, the statute of limitations does
24 not begin to run until the date of the last injury or when the tortious acts cease."
25 *Pugliese v. Superior Court*, 146 Cal. App. 4th 1444, 1452 (Cal. Ct. App. Jan. 23,
26 2007). First, these are statutory violations, not torts, so this doctrine does not
27 apply. Second, it would not make sense for the statute of limitations to start
28 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.

1 The District Court must decline to adopt the Magistrate Judge's R&R for the following
2 reasons:

3 Under CCP 338(a), the limitations period for Plaintiff's claims against Defendant Lustig for
4 violating Health and Safety Code 123110 accrued on March 29, 2020 and expired on March 29,
5 2023. Plaintiff filed this lawsuit against Dr. Lustig on November 17, 2022, before the March 29, 2023
6 expiration date. Therefore, Plaintiff's complaint is timely filed within the 3-year limitations period
7 under CCP 338(a) and is not time-barred.

8 Next, while Defendant's violation of Health and Safety Code 123110 involve statutes rather
9 than torts, the continuing violation doctrine can still apply where statutory breaches are ongoing
10 rather than discrete acts. Plaintiff suffers a persistent deprivation of rights so long as the records are
11 withheld.

12 Second, the statute of limitations starting when violations cease is not paradoxical for claims
13 seeking injunctive relief. There is still a limited timeframe, just based on the last violation rather than
14 the first. Moreover, Plaintiff seeks remedies beyond just an injunction including damages related to
15 past withheld records. Additionally, Defendant's violations are not confined to past failures to provide
16 records, but include the ongoing refusal to grant access. The claims thus encompass present, recurring
17 statutory breaches within the limitations period in addition to past deprivations.

18 Furthermore, in Defendant's September 8, 2023 Reply supporting dismissal, Defendant
19 claimed for the first time that "the medical records which were withheld from the production were
20 confidential." ECF No. 47. This belated confidentiality argument itself confirms Defendant
21 possesses Plaintiff's April 6, 2012 and October 7, 2013 ABR test data. Hence, Defendant's
22 confidentiality assertion proves the unlawfully withheld records exist to this day, making Plaintiff's
23 claims timely under the continuing violation doctrine. The Magistrate Judge's statute of limitations
24 analysis should be reconsidered based on Defendant's admission they possess relevant records
25 claimed to be confidential.
26
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28

**PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE SARAH NETBURN'S
REPORT AND RECOMMENDATIONS**

Page 13

BANGA-APP-069

1 Given the continuing nature of Defendant's statutory violations, the limitations period
2 accrues from the most recent wrongful withholding of records. Plaintiff's claims are aimed at
3 remedying both past and present violations. As such, they are not wholly time-barred merely
4 because some past acts occurred outside the statutory window. The continuing violation doctrine
5 exists precisely to provide redress for persistent unlawful conduct like that suffered by Plaintiff.
6 Thus, Plaintiff respectfully requests the District Court conduct an independent review of the
7 Magistrate Judge's flawed statute of limitations findings and decline to adopt them in their
8 entirety because Plaintiff's statutory claims are not time-barred under CCP 338(a) nor under the
9 continuing .

10
11 **OBJECTION NO. 3**

12 **Magistrate Erred in Imposing Nonexistent Requirement for Individual**
13 **ABR Test Data Requests to Jointly Represented Defendants**

14
15 The Magistrate Judge erred in footnote 3 on page 11 by imposing non-existent requirements
16 for identifying specific defendants in discovery requests as follows:

17 In Plaintiff's complaint, she alleges that she requested her ABR data from the
18 UC Regents – the dismissed defendant – on July 7, 2021, December 8, 2021,
19 and November 4, 2022. RFAC at ¶¶ 50-52. In Plaintiff's opposition to
20 Defendant's motion to dismiss, she alleges that those requests were made to
21 Defendant personally (even though Defendant is no longer affiliated with the
22 UC Regents), which might mean that the Health & Safety Code claim would
23 not be time-barred. ECF No. 48, at 7. But because allegations first raised in
24 Plaintiff's opposition cannot amend her complaint, the Court will not consider
25 Plaintiff's new allegations against Defendant regarding the 2021 and 2022
26 records requests. *O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222,
27 229 (S.D.N.Y. 1989) (“[I]t is axiomatic that the Complaint cannot be amended
28 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.

1 Plaintiff properly directed requests for ABR data to all defendants collectively on July 7,
2 2021, December 8, 2021, and November 4, 2022, pursuant to the California and Federal Rules of
3 Civil Procedure. However, the Magistrate Judge erroneously imposed a nonexistent requirement
4 that jointly represented defendants must be individually served with requests for production of
5 documents. For instance, Rule 5(a) requires service of pleadings after the complaint on every
6 party but does not mention unique service demands for discovery requests. Similarly, Rule 34,
7 governing document requests, outlines service requirements for requests to a party without
8 differentiating between single and jointly represented parties. Relevant case law confirms
9 individual service is not needed for discovery requests on defendants represented by the same
10 counsel. See Booth v. Galveston County, 2019 WL 3713442, at *2 (S.D. Tex. 2019); Lutzeier v.
11 Citigroup Inc., 2015 WL 527721, at *2 (S.D. Ind. 2015). Thus, the Magistrate Judge's implied
12 requirement of individual service on jointly represented defendants is unfounded.
13

14 The Magistrate cited no authority imposing unique service obligations for jointly
15 represented parties receiving discovery. Under the Federal Rules and persuasive caselaw,
16 Plaintiff properly requested for ABR data collectively from all defendants, Therefore, magistrate
17 judge's non-existent requirement that Dr. Lustig should have been served univocally is contrary
18 to law. Importantly, Plaintiff requested the ABR data individually from Dr. Lustig on March 12,
19 2020, before he was represented by counsel or named as a defendant in the state court action.
20 Subsequently, Plaintiff properly requested the ABR data collectively from all defendants in
21 compliance with both state and federal procedural rules on July 7, 2021, December 8, 2021, and
22 November 4, 2022. As such, the Magistrate Judge's failure to account for these appropriate joint
23 ABR data requests when analyzing the statute of limitations constitutes clear legal and factual
24 error necessitating reconsideration. Plaintiff requested the relevant evidence univocally in line
25 with procedural rules, whether before or after Dr. Lustig obtained representation. The Magistrate
26 Judge wrongly disregarded the permissible collective requests to represented defendants in the
27 statute of limitations analysis.
28

1 To correct the fundamental flaws in the Magistrate Judge's analysis, Plaintiff asks that
2 the District Court exercise its own unfettered examination of the record. This independent
3 analysis will demonstrate Plaintiff complied with the statute of limitations. Plaintiff believes the
4 District Court's impartial review mandated by Rule 72(b) will result in rejection of the
5 Magistrate Judge's erroneous recommendation.
6

7 **OBJECTION NO. 4**

8 **Magistrate Judge Abused Her Discretion By Overlooking Factual**
9 **Allegations of Paragraphs 44-45; 47 of the RFAC and Evidence**
10 **Concerning Defendant's Violation of Bus. & Prof. Code §17200 Et Seq.**

11 Paragraph 39 of the complaint alleges that on June 7, 2017, Plaintiff appealed a February
12 15, 2017 Superior Court judgment seeking to enforce her right to access her medical records
13 and pursue the Section 17200 claim. [ECF 26, pg. 9:25-26] **On October 1, 2019, the Court of**
14 **Appeal held in relevant part that on remand, Banga may also be able to plead a claim under**
15 **the Unfair Competition Law. (Bus. & Prof. Code, § 17200.)**
16

17 "Unfair competition claims may be based on violations of other statutes, including state
18 laws that govern information-sharing practices. (See *Cisneros v. U.D. Registry, Inc.*
19 (1995) 39 Cal.App.4th 548, 563-564 [violations of credit and consumer reporting laws].)
20 A single unfair or unlawful act may suffice. (Klein v. Earth Elements, Inc. (1997) 59
21 Cal.App.4th 965, 968, fn. 3.) Injunctive relief-e.g., an order to produce the medical
22 records-is available (see Bus. & Prof. Code, § 17203), and the limitations period is four
23 years. (See Bus. & Prof. Code, § 17208; *Cortez v. Purolator Air Filtration Products Co.*
24 (2000) 23 Cal.4th 163, 178-179 [four-year limitations period usually applies even if
25 claim is based on violation of statute with shorter limitations period]).

26 Here, Banga may be able to base an unfair competition claim on the Regent's violation
27 of section 123110. Indeed, she arguably did so in her first amended complaint. She
28 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.

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

7 The Regents confuse standing with eligibility for restitution. It is irrelevant whether an
8 economic injury posited for standing can be remedied by an award of restitution.
9 (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 335-336.) To be clear, we do
10 not hold that Banga can successfully plead an unlawful competition claim, but she
11 should be given an opportunity to do so."

11 Paragraph 43 alleges that on February 24, 2020, the Court issued an Order Sustaining
12 Defendants' Demurrers to Plaintiff's First Amended Complaint with Leave to Amend and
13 permitted Plaintiff to file a second amended complaint within 20 days of the Order.

14 Paragraph 44 alleges that pursuant to the Court of Appeal's decision, Plaintiff directly
15 requested Defendant Lusting to provide a complete copy of her ABR Testing of April 6, 2012
16 and October 7, 2013.

17 Paragraph 45 of the complaint alleges that on March 16, 2020, Plaintiff filed a Second
18 Amended Complaint. On October 15, 2020, Defendant Lustig, jointly represented by counsel,
19 filed a verified Answer admitting to not intentionally violating Business and Professions Code
20 Section 17200. Specifically, Defendant Lustig stated in his jointly filed Answer:

21
22 AS A TENTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE, to
23 the Plaintiffs Third Amended Complaint, these answering Defendants assert
24 they have not committed any unlawful, unfair or fraudulent business act or
25 practice and, as such, there are no remedies available to Plaintiff.

25 AS AN ELEVENTH SEPARATE AND DISTINCT AFFIRMATIVE
26 DEFENSE, to the Plaintiffs Third Amended Complaint, these answering
27 Defendants assert they have not intentionally committed any unlawful, unfair
28 or fraudulent business act or practice and, as such, there are no remedies
available to Plaintiff.

**PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE SARAH NETBURN'S
REPORT AND RECOMMENDATIONS**

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Dated: November 12, 2023

Respectfully Submitted;

By: /s/ Kamlesh Banga
Kamlesh Banga

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6 **PLAINTIFF IN PRO PER**

7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF NEW YORK**

9 KAMLESH BANGA

Case No. 1:22-cv-09825-PAE-SN

10
11 Plaintiff,

12 v.

13 LAWRENCE R. LUSTIG, M.D., AND
14 DOES 1 THROUGH 5 INCLUSIVE.

AMENDED
PLAINTIFF'S OBJECTIONS TO
MAGISTRATE JUDGE SARAH
NETBURN'S REPORT AND
RECOMMENDATIONS

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16 Defendant

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18 Honorable Paul A. Engelmayer

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AMENDED: PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE SARAH NETBURN'S
REPORT AND RECOMMENDATIONS

TABLE OF AUTHORITIES

1

2 **I. INTRODUCTION.....1**

3 **A. STATEMENT OF FACTS.....1**

4 **B. CALIFORNIA APPELLATE PROCEEDINGS.....2**

5 **C. PROCEDURAL BACKGROUND BEFORE THIS COURT.....5**

6 **II. LEGAL STANDARD.....8**

7 **ARGUMENT.....8**

8 **III. OBJECTIONS TO THE REPORT AND RECOMMENDATIONS8**

9

10 **OBJECTION NO. 1**

11 **A. Magistrate Judge Erred In Ruling That Plaintiff’s Statutory Claims Stemmed**

12 **From Defendant’s Violation Of Health And Safety Code §§123110, Et Seq.**

13 **Are Time-Barred.....8**

14 **B. Plaintiff’s Statutory Claims Arising from Defendant’s Health & Safety**

15 **Code Violation Are Timely Per Civil Code Procedure §338(a).....10**

16 **C. Plaintiff’s Statutory Claims Are Not Barred Under the Doctrine Of**

17 **Continuing Violation and The Limitations Period Prescribed Under CCP §338(a)...12**

18 **D. Magistrate Judge Erred By Imposing Requirement For Individual ABR**

19 **Testing Data Requests To Jointly Represented Defendant.....14**

20 **E. Plaintiff’s Statutory Claims Under CCP §338(a) Remained Unaffected By the**

21 **Voluntary Dismissal Without Prejudice16**

22 **OBJECTION NO. 2**

23 **Plaintiff’s Emotional Distress Claim Is Premised On The Same Statutory Claims.....17**

24 **OBJECTION NO. 3**

25 **Magistrate Judge Abused Her Discretion By Overlooking Factual Allegations of**

26 **Paragraphs 44,45,47 of the RFAC and Evidence Concerning Defendant’s**

Violation of Bus. & Prof. Code §17200 Et Seq.....18

1 as well. Plaintiff's emotional distress claims should be allowed to proceed together with the predicate
2 statutory claims and the District Court decline to adopt the R&R in its entirety.

3
4 **OBJECTION NO. 3**

5 **Magistrate Judge Abused Her Discretion By Overlooking Factual**
6 **Allegations of Paragraphs 44,45,47 of the RFAC and Evidence**
7 **Concerning Defendant's Violation of Bus. & Prof. Code §17200 Et Seq.**

8 Paragraph 39 of the complaint alleges that on June 7, 2017, Plaintiff appealed a February 15,
9 2017 Superior Court judgment seeking to enforce her right to access her medical records and pursue
10 the Section 17200 claim. [ECF 26, pg. 9:25-26] **On October 1, 2019, the Court of Appeal held in**
11 **relevant part that on remand, Banga may also be able to plead a claim under the Unfair**
12 **Competition Law. (Bus. & Prof. Code, §17200.) Specifically, the Court of Appeal stated:**

13
14 "Unfair competition claims may be based on violations of other statutes, including state
15 laws that govern information-sharing practices. (See *Cisneros v. U.D. Registry, Inc.*
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27 provide them, although she appears to allege that this is a violation of the Regent's
28 policies rather than the Health and Safety Code. In her prayer, she does not specify relief
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AMENDED: PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE SARAH NETBURN'S
REPORT AND RECOMMENDATIONS

1 benefit of her bargain. (See *Kwikset Corp. v. Superior Court*, *supra*, 51 Cal.4th at p. 323
2 ["There are innumerable ways in which economic injury from unfair competition may
3 be shown."].) She may be able to allege other costs caused by the Regents' refusal to
4 provide the underlying test data, such as the cost of additional tests that she obtained at
5 Stanford.

6 The Regents confuse standing with eligibility for restitution. It is irrelevant whether an
7 economic injury posited for standing can be remedied by an award of restitution.
8 (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 335-336.) To be clear, we do
9 not hold that Banga can successfully plead an unlawful competition claim, but she
10 should be given an opportunity to do so."

11 Paragraph 44 alleges that pursuant to the Court of Appeal's decision, Plaintiff directly
12 requested Defendant Lustig to provide a complete copy of her ABR Testing of April 6, 2012 and
13 October 7, 2013. Paragraph 45 of the complaint alleges that on March 16, 2020, Plaintiff filed a
14 Second Amended Complaint in the California lawsuit and named Dr. Lustig as a party defendant. On
15 October 16, 2020, Defendant Lustig, jointly represented by counsel, filed a verified Answer
16 admitting to not intentionally violating Business and Professions Code Section 17200. Specifically,
17 Defendant Lustig stated in his jointly filed Answer:

18 AS A TENTH SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE, to
19 the Plaintiffs Third Amended Complaint, these answering Defendants assert
20 they have not committed any unlawful, unfair or fraudulent business act or
21 practice and, as such, there are no remedies available to Plaintiff.

22 AS AN ELEVENTH SEPARATE AND DISTINCT AFFIRMATIVE
23 DEFENSE, to the Plaintiffs Third Amended Complaint, these answering
24 Defendants assert they have not intentionally committed any unlawful, unfair
25 or fraudulent business act or practice and, as such, there are no remedies
26 available to Plaintiff.

27 [ECF 48, Banga Decl. ¶21, Exhibit 13, at page 15:20-27.]

28 Paragraph 47 of the complaint states that on March 29, 2021, Plaintiff voluntarily dismissed
the Section 17200 claim without prejudice in order to perfect an appeal. Plaintiff then refiled the
Section 17200 claim on November 17, 2022. The Magistrate Judge overlooked the key details that
Defendant Lustig jointly admitted that "they have not intentionally committed any unlawful, unfair

**AMENDED: PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE SARAH NETBURN'S
REPORT AND RECOMMENDATIONS**

1 or fraudulent business act or practice and, as such, there are no remedies available to Plaintiff.” By
2 overlooking allegations of the RFAC, Magistrate Judge erred by concluding this cause of action
3 accrued nine years ago and was time-barred, when Defendant's admission and Plaintiff's voluntary
4 dismissal and refiling prove otherwise.

5 The District Judge must conduct a de novo review as required under Rule 72(b) and decline
6 to adopt the Magistrate Judge's Report and Recommendations. . Therefore, upon conducting an
7 independent review of the record, the District Judge will find that Plaintiff's claims were asserted
8 within the limitations period based on the factual allegations overlooked by the Magistrate Judge. As
9 alleged in paragraph 90 of the RFAC that Defendant Lustig knowingly and intentionally violated
10 and continue to violate California Health and Safety Code § 123110 by withholding Plaintiff's
11 ABR testing of April 6, 2012 until October 7, 2013 at to date. Importantly, Defendant Lustig and
12 defense counsel claimed in their Reply brief that “the plaintiff's complete medical chart had been
13 produced on numerous occasions and the medical records withheld from the production were
14 confidential.” In this case, Plaintiff is only seeking the objective findings of ABR testing of April 6,
15 2012 and October 7, 2013 which Defendant Lustig claimed had been withheld from production due
16 to confidently. Defendant's continuing violation by unlawfully withholding Plaintiff's ABR data of
17 April 6, 2012 and October 7, 2013 further shows the claims remain timely, unresolved and constitute
18 continuing violation of Section 17200. *As held in Pugliese v. Superior Court*, where a tort involves a
19 continuing wrong, the statute does not begin to run until the tortious acts end. Here, Defendant's
20 tortious denial of the data is continuing. The limitations period has not started, let alone expired.

21 Plaintiff believes that an impartial analysis by the District Judge, without deference to the
22 Magistrate Judge's errors, will reveal Plaintiff's compliance with the statute of limitations and
23 defendant's ongoing violations. Plaintiff respectfully seeks only a fair de novo review to correct the
24 clear mistakes in the R&R.
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**AMENDED: PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE SARAH NETBURN'S
REPORT AND RECOMMENDATIONS**

Page 20