PROPOSED TENTATIVE

On April 18, 2024, plaintiffs Joseph Raventos, Jack Raventos, Maile Raventos, Jacqueline Raventos, Lambert Val Hulst, Martin Van Hulst (a minor through his guardian ad litem Lambert Van Hulst), Loic Van Hulst (a minor through his guardian ad litem Lambert Van Hulst), and Genevieve Val Hulst (a minor through her guardian ad litem Lambert Van Hulst) (hereafter, when individual names are not used, plaintiffs collectively) filed a complaint against defendants Magner Maloney Funeral Home (Magner) and TLC Mortuary Services, Inc. (TLC) (when individual names not used, defendants collectively), raising five causes of action:1) breach of contract; 2) negligence; 3) intentional infliction of emotional distress; 4) negligent infliction of emotional distress; and 5) breach of the implied covenant of good faith and fair dealing.

According to the operative pleading, on August 27, 2023, Mary Celestina Raventos (decedent) passed away in a care facility located in Santa Maria, and her "body was entrusted to the care of Magner [] . . . ." On September 4, 2023, plaintiff Joseph Raventos contracted with Magner to purchase a casket and "to perform certain services, including funeral arrangements, embalming, burial services to be held at Holy Cross Cemetery in Culver City [], California, and transport of decedent to the cemetery." Plaintiffs alleged they attached to the complaint Exhibit A, which is the contract at issue, although the complaint did not have an Exhibit A. This was corrected on April 19, 2024, via a "Notice of Errata[.]" Decedent's burial services in Culver City were scheduled for October 7, 2023, at 1 p.m. Plaintiffs are informed and believe that Magner hired TLC "to bring decedent from the mortuary in Santa Maria to the cemetery in Culver City . . . ," and this was not done without plaintiffs' knowledge or consent. Defendants failed to transport the decedent to the cemetery in time for the scheduled services; plaintiffs learned on October 7, 2023, shortly before the burial service, that decedent remained in Santa Maria. According to the operative pleading: "The absence of the decedent ruined the burial service and prevented Plaintiffs from properly laying decedent to rest on the scheduled date as planned." Magner and TLC were allegedly negligent in the handling of decedent's body and failing to arrange transport of her remains to the cemetery for burial. TLC eventually "delivered decedent to the cemetery long after the time scheduled for the service, and after the cemetery had closed"; plaintiffs were forced to reschedule the burial for the following weekend and go through "the entire process" again, including travel and lodging. Not all family members could attend the second service and were deprived of seeing decedent laid to rest. Plaintiffs are informed and believe that Magner "held itself out as having particular experience and ability to provide professional funeral services, and carry then out in a professional and timely manner with due care and respect for decedent and Plaintiffs," and plaintiffs relied on Magner to perform all services professionally with due care, dignity, and respect. Defendants actions left the plaintiffs "shocked and emotionally distraught by the absence of beloved family member from the burial services," instead left with a memory of "a debacle . . . ."

Magner and TLC have filed separate demurrers and separate motions to strike, meaning there are two demurrers and two motions to strike on calendar. Plaintiffs have filed opposition to all four motions. On June 26, 2024, both defendants filed replies to each motion. All briefing has been read.

The court will first address the meet and confer obligations as to all motions, and then examine both demurrers, summarizing the arguments by the moving and opposing parties, the relevant legal principles, and then the merits of both motions. The court will then address the motions to strike, using the same methodology as it did with the demurrers. The court will conclude with a summary of its conclusions.

A) Meet and Confer Declarations for the Demurrers and Motions to Strikes

All meet and confer obligations for all motions have been satisfied, and no party claims otherwise.

B) Demurrers

i) Parties' Arguments

Magner challenges the first (breach of contract), third (intentional infliction of emotional distress), fourth (negligent infliction of emotional distress), and fifth (breach of the implied covenant of good faith and fair dealing) causes of action. Magner files a special demurrer to all four causes of action, claiming fatal uncertainty. It also files a general demurrer to each of causes of action above. As to the first and fifth causes of action, Magner claims that the nonsignatory plaintiffs have no standing to advance both contractual causes of action. As to the third cause of action for intentional infliction of emotional distress, Magner contends that plaintiffs have not alleged that the conduct at issue was a) outrageous as to exceed all bounds of civilized society; b) directed at plaintiffs; and c) involved severe emotional distress, all elements of the cause of action. And as to the fourth cause of action for negligent infliction of emotional distress, Magner argues that it is not a separate cause of action from the second cause of action for negligence, and thus is duplicative of the second.

TLC generally demurs to the third cause of action for intentional infliction of emotional distress, the fourth cause of action for negligent infliction of emotional distress, and the fifth cause of action for the breach of implied covenant of good faith and fair dealing. TLC's arguments concerning the causes of action for intentional infliction and negligent infliction of emotional distress mirror those advanced by Magner. TLC's challenge to the breach of the implied covenant of good faith and fair dealing cause of action is more narrowly tailored to its own situation. There is no breach of contract cause of action alleged against TLC – the first cause of action is only alleged against Magner. TLC contends that because plaintiffs have not alleged any contract with it, and thus any breach, plaintiffs cannot advance a breach of the implied covenant of good faith and fair dealing.

Plaintiffs have filed separate oppositions to both demurrers. Plaintiffs concede in opposition that the second and fourth causes of action for negligence and negligence infliction of emotional distress are duplicative, and thus plaintiffs should plead only one. Plaintiffs otherwise object to all other challenges.

ii) Legal Background

There are number of legal principles that frame the court's analysis.

As for breach of contract (the first cause of action, against Magner only), it is settled that to state a claim for breach of contract, a plaintiff must allege " '(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff.' " (*D'Arrigo Bros. of California v. United Farmworkers of America* (2014) 224 Cal.App.4th 790, 800.) It clear from the operative pleading and its attachments that the only signatories to the contract with Magner were plaintiff Joseph Raventos and Magner itself. Indeed, this is conceded in paragraph 14 of the operative complaint, which provides that plaintiff "Joseph Raventos entered into a contract with Defendant Magner to purchase a casket, and for the mortuary to perform certain services, including funeral arrangements, embalming, burial services, and transport of decedent to the chosen cemetery." No other plaintiff was a signatory to the contract.

This omission is not fatal, however for under certain circumstances, a nonsignatory plaintiff may enforce a contract against a signatory defendant, namely when the contract was made for the benefit of third parties. (Civ. Code, § 1559 [a contract, made for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it].) As observed in *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, a promise in such a situation is treated as having been made directly to the third party, even though the third party is not identified by name. It is sufficient if the third party belongs to a class of persons for whose benefit the contract was made. (*Id*. at p. 1064 [it is not necessary that the contract be exclusively for the benefit of the third party.) A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that third party *and such intent appears on the terms of the contract*. Where a third party is an intended or merely an incidental beneficiary to the contract involves construction of the parties intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. (*Ibid.*) Ascertaining whether there was an intent to confer a benefit on plaintiffs as third party beneficiaries is a question of ordinary contract interpretation, and the court must give effect to the parties' intent as it existed at the time of contracting, looking to the circumstances under which the contract was made. Thus, when a demurrer is presented challenging the standing of a nonsignatory party to sue on breach of contract, the court looks "to the allegations in, and documents attached to, the [operative pleading] to determine whether they demonstrate plaintiff as a third party beneficiary." (*The H.N. & Frances C. Berger Foundation of Perez* (2013) 218 Cal.App.4th 37, 43; see p. 45 [the court in a demurrer is limited to the pleaded facts and the documents attached to the documents]; see also *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 830 [court looks to the provisions of the contract and the relevant circumstances under which the contract was agreed, to determine whether third party would benefit, whether the motivating purpose of the contracting parties was to benefit the third party, and whether permitting a third party to bring its own breach of contract is consistent with the objectives of contract and reasonable expectations of the contracting parties].) It is insufficient that a contract, carried out to its terms, would simply inure to the third party's benefit. (*Jones v. Aetma Casualty Surety Co*. (1994) 26 Cal.App.4th 1717, 1724-1725; *Sessions Payroll Management v. Noble Constr. Co.* (2000) 84 Cal.App.4th 671, 680 [the party claiming to be a third party beneficiary bears the burden of

proving that the contracting parties actually promised the performance which the third party beneficiary seeks"]; see *Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.* (1958) 160 Cal.App.2d 290, 3000, fn. 3 [third party beneficiary status adequately alleged when plaintiff claimed that plaintiff "was and now is within in that class of persons for whom the contract aforesaid between Defendant[s] was expressly made"].)

A cause of action for intentional infliction of emotional distress requires a showing of: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe emotional distress; and (3) the defendant's extreme and outrageous conduct was the actual and proximate cause of the severe emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) Further, it is not enough that the conduct be outrageous; it must be conduct directed at the plaintiff or occur in the presence of the plaintiff of whom the defendant is aware. (*Christenson v. Superior Court* (1991) 54 Cal.3d 868, 903.)[1] A defendant's conduct is considered to be outrageous if "it is so ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' " (*Hughes v. Pair, supra,* 46 Cal.4th at p. 1051, 95 Cal.Rptr.3d 636, 209 P.3d 963; see *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001, see also Rest.2d Torts, § 46, com. d, p. 73.) The requisite severe emotional distress must be such that no reasonable person in civilized society should be expected to endure it. (*Potter, supra,* at p. 1004.) Liability for emotional distress does not extend to " ' "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." ' " (*Hughes v. Pair, supra,* 46 Cal.4th at p. 1051.)

California's definition of extreme and outrageous conduct is based on comment d to section 46 of the Restatement Second of Torts. (See *Hughes v. Pair, supra,* 46 Cal.4th at p. 1051, 95 Cal.Rptr.3d 636, 209 P.3d 963.) Comment d to section 46 states: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him

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[1] Some explication is warranted here. Recovery on an intentional infliction of emotional distress theory based on reckless conduct has been allowed in the funeral-related services contexts. However, the cases which describe the tort as intentional mishandling of a corpse actually seek to protect the personal feelings of the survivors. Therefore, the tort is properly categorized as intentional infliction of emotional distress, and presupposes action directed at the plaintiff or undertaken with knowledge of the likelihood that the plaintiff will suffer emotional distress. Courts acknowledge the problems associated with permitting recovery for action that is not directed at the plaintiff or undertaken with knowledge of the likelihood of harm to the plaintiff. They suggest that to justify recovery, plaintiff is usually present at the time of the conduct and known by the defendant to be present. (*Christensen, supra,* 54 Cal.3d at p. 905 [egregious conduct must be directed toward plaintiff or defendant is aware but acts with reckless disregard, of the plaintiff and the probability that his or her conduct will cause severe emotional distress to that plaintiff].) *Christensen* makes it clear, however, that the complaint must allege that defendant either acted with intent of causing emotional distress to the plaintiffs, or if based on reckless disregard, plaintiff must be present when the misconduct occurred and knew that the conduct was substantially certain to cause severe distress. (*Id*. at p. 903.)

to exclaim, 'Outrageous!' " (Rest.2d Torts, § 46, com. d, p. 73; see *Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1007; see CACI 1602 [in deciding whether conduct was outrageous, trier of fact considers amount other factors whether defendant abused a position of authority or a relationship that gave real or apparent power; whether defendant knew that plaintiff was particularly vulnerable to emotional distress; and whether defendant knew his conduct would likely result in harm due to mental distress].) A cause of action for intentional infliction of emotional distress must allege facts showing outrageous conduct, which is intentional or reckless and which is outside the bounds of decency. It is also settled that objectively offensive conduct that exceeds standards of decency still may not be outrageous. (*Yurick v. Superior Court* 1989) 209 Cal.App.3d 1116, 1129 [alleged conduct, while objectively offensive and in breach of common standards of civility, was still not outrageous giving rise to claim of intentional infliction of emotional distress].) " ' "[I]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." ' " (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.)

As for breach of the implied covenant of good faith and fair dealing, " 'Every contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement.' [Citations.] Simply stated, the burden imposed is ' "that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." ' [Citation.] Or, to put it another way, the 'implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose.' [Citation.] This rule was developed 'in the contract arena and is aimed at making effective the agreement's promises.' [Citation.] The 'precise nature and extent of the duty imposed ... will depend on the contractual purposes.' [Citation.]" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393; *Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 429; see CACI No. 325 [elements of claim].) The plaintiff must allege "a reasonable relationship between the defendant's allegedly wrongful conduct and the express terms or underlying purposes of the contract." (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 528, disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13.) The implied covenant cannot, however, 'impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.' " (*Hewlett-Packard Co. v. Oracle Corp.* (2021) 65 Cal.App.5th 506, 554.) An implied covenant claim that "seeks simply to invoke" the express terms of the parties' contract "is superfluous." (*Guz, supra,* 24 Cal.4th at p. 352.) A trial court may properly dismiss a superfluous implied covenant cause of action. (See *id.* at pp. 352-353.) A claim for breach of the implied covenant of good faith and fair dealing requires the existence of a contract, whether express or implied. (See *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032 ["The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. [¶] ... [¶] [T]here is no obligation to deal

fairly or in good faith absent an existing contract"]; see also A*lameda Health System v. Alameda County Employees' Retirement Assn.* (2024) 100 Cal.App.5th 1159, 1190 [same].)

C) Merits of Demurrers

With these legal principles in mind, the court makes the following determinations:

- The court overrules Magner's special demurrer based on uncertainty. Demurrers for uncertainty are disfavored; a demurrer raising this contention is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures.(*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.) Any ambiguities are not fatal.
- The court will sustain both demurrers with leave to amend as to the negligence (second) and negligent infliction of emotional distress (fourth) causes of action. As plaintiffs concede in opposition, negligent infliction of emotional distress is not a different cause of action to negligence, but is subsumed thereunder. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.)
  Only one should be pleaded.
- The court will sustain Magner's demurrer to the first cause of action for breach of contract, alleged against defendant Magner only, as plaintiff has failed to allege any basis upon which a nonsignatory to the contract can sue, such as a third party beneficiary theory (as advanced in the opposition). There must be *allegations in the operative pleading that support* the intent of the contracting parties to show other plaintiffs were intended to benefit. No such allegations have been advanced. The court rejects plaintiff's reliance on the doctrine of "tort of another" as a basis for attorney's fees, as that theory allows attorney's fees as damages, not costs, and it has not been pleaded. Contrary to Magner's arguments advanced in reply, plaintiffs should be afforded an opportunity to support the third party beneficiary theory with new allegations, underscored by language in the contract. That being said, plaintiffs are placed on notice – vague and amorphous allegations will be insufficient. (*The H.N. & Francis C. Berger Foundation v. Perez* (2013) 218 Cal.App.4th 37, 44 [in determining a third-party beneficiary theory, courts are limited to the pleaded facts and documents attached to the operative pleading].)
- The court rejects both of defendants' challenges to the third cause of action for intentional infliction of emotional distress, on the ground that plaintiffs failed to allege an intent to harm or conduct directed at plaintiffs. Defendants overlook an exception to this rule, predicated on reckless disregard when defendants are aware of the probability that their conduct would cause severe emotional distress. (*Christenson, supra*, 54 Cal.3d at p. 905.) The exception is potentially implicated here, and it remains a factual question outside the scope of the demurrer whether defendants were actually aware – the allegations are sufficient to withstand

pretrial challenge on that point. The court also rejects TLC's claim in reply that it never had a special relationship with plaintiffs, for that is a sufficiently pleaded component of the negligent infliction of emotional distress cause of action, notably given the unique relationship between funeral-related service providers and the bereaved family, under the authority of *Christensen, supra,* 54 Cal.3d at p. 886 ["[T]he relationship between the family of a decedent and a provider of funeral related services exists in major part for the purpose of relieving the bereaved relatives of the obligation to personally prepare the remains for burial or cremation"].) TLC falls within that sphere, at least for pleading purposes.

- That being said, the court sustains both demurrers to the third cause of action for intentional infliction of emotional distress, for the following two reasons:
    - First, plaintiffs have not pleaded ***severe*** emotional distress ***as to each named plaintiff,*** making perfunctory statements about all plaintiffs collectively, rather than specific allegations as to each. The pleading requirement is intended to act as a high bar. (*Hughes v. Pair, supra*, 46 Cal.4th at p. 1051.) Viewed in the context of the inherent sadness of the event following the death of a family member, it is not enough simply to plead "extreme emotional distress," as plaintiffs do perfunctorily in paragraph 40 of the complaint. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1377.) Plaintiffs cursorily claim "shock" and contend they were "emotionally distraught[.]" This seems akin to the insufficient allegations identified in *Hughes* (discomfort, worry, anxiety, upset stomach, concern and agitation), and not emotional distress of such substantial and quality or enduring quality that no reasonable person in civilized society should be expected to tolerate. Severe emotional distress is that which disrupts a person's life, causes physical symptoms such as heart palpitations or panic attacks, or a mental health diagnosis such as depression or post-traumatic stress disorder. (*Wong v. Jing*, *supra*, 189 Cal.App.4th at pp. 1376-1377.) More must be pleaded. Leave to amend is granted.

    - Second, plaintiffs have not alleged sufficient facts to show that defendants conduct was outrageous – that is, beyond what a civilized society will tolerate. True, our high court has indicated that recovery "on intentional infliction of emotional distress and based on reckless conduct ***has been allowed in the funeral related services context***. [Citation.].) (*Christenson, supra,* 54 Cal.3d at p. 905, emphasis added.) Yet it is noteworthy that the misconduct in *Christensen, supra,* 54 Cal.4th 868, involved mortuaries "mishandling and mutilating remains," involving commingling human remains; the removal and harvesting or organs and body parts (along with the taking of corneas, eyes, hearts, lungs, bones and other body parts, for profit); conducting cremations in the "pottery kiln of

defendant Oscar Ceramics"; cremating remains in a "disrespectful manner"; cremating as many as 10 to 15 bodies together at the pottery kiln; taking and selling gold and other metals from remains; and placing "cremated remains in urns or other containers without preserving their integrity or identified. (*Christenson, supra*, 54 Cal.3d at p. 879) It can be said beyond cavil, and without too much fanfare, that "the conduct of the crematory defendants, and that of the mortuary and Carolina defendants that are alleged to have known or should have known that the crematory defendants were engaging in misconduct, was outrageous and reprehensible." (*Id*. at p. 896; see *Catouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 882-883.)

- But can the same be said here, at least based on the nature of the allegations made? Defendants allegedly failed to deliver the decedent's remains (after transporting the decedent some 155 miles from Santa Maria to Culver City) in a timely way, necessitating the cancelation of the decedent's funeral services and requiring the funeral to occur the following week. This is unquestionably distressing (and no one doubts the special sensitivities that must be afforded family members in this situation), but is the misconduct outrageous, beyond the pale of what a civilized society will tolerate? Nothing in *Christensen* suggests that the same label applies whenever funeral- related services are implicated. Our high court has made it clear that that the two torts (negligent infliction and intentional infliction) are "entirely different" and do not rest on the same theory. (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 165, fn. 5, cited by *Christensen, supra*, at p. 904.) The court is not persuaded by plaintiff's conclusory allegations in opposition that it is "outrageous for a mortuary and its agent to break its promise to a bereaved family to have their loved ones brought to the funeral service on a date and time certain"; or that the very nature of defendant's "business dictates that the failure to have decedent at the gravesite" is itself outrageous misconduct. Plaintiff offers no authority for such a broad claim, and in the end it appears to the court that plaintiffs are impliedly doing what our high court has expressly indicated cannot be done -- equating negligent and intentional infliction theories. The allegations here are manifestly unlike the ones presented in *Christensen*. Delay is all that has been alleged, and delay alone is not enough to support a conclusion that the acts went beyond what a civilized society would accept.[2] More must be pleaded so the court can determine

[2] Plaintiffs tell us only the following in the operative pleading. Decedent's gravesite burial services were scheduled for October 7, 2023, at 1:00 p.m.; shortly before the burial service was to begin, "Plaintiff Joseph Raventos called the mortuary several times and was eventually able to determine the decedent was still at the

whether a prima facie case of outrageousness had been pleaded. The court therefore sustains both demurrers for this reason, with leave to amend

- As to the fifth cause of action for breach of the implied covenant of good faith and fair dealing, which is alleged against both defendants, the court examines the two demurrers separately, for the court's resolution for each, while related, is slightly different:
    - As for Magner's demurrer, because plaintiff fails to plead breach of contract (on a third beneficiary theory), as noted above, plaintiffs have not stated a cause of action for the implied covenant of good faith and fair dealing. The demurrer is sustained. Leave to amend is granted.
    - As for TLC's demurrer, plaintiffs fail to allege ***any*** meaningful basis for a contractual relationship with TLC. The law is settled (outside the insurance contract context) that if there is no contractual obligation, there can be no breach of the implied covenant of good faith and fair dealing. "Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract." (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885.) A plaintiff asserting a claim for breach of the implied covenant must plead and prove "(1) the parties entered into a contract; (2) the plaintiff fulfilled his [or her] obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct. [Citation.]" (*Rosenfeld v. JPMorgan Chase Bank, N.A.* (N.D. Cal. 2010) 732 F.Supp.2d 952, 968, citing CACI No. 325.) Plaintiffs offer no basis upon which to sue based on a contract between Magner and TLC. ***Unless plaintiffs can convince the court at the hearing that they can amend to meet this requirement, the demurrer will be sustained without leave to amend.***

D) Motions to Strike

mortuary in Santa Maria and had not been transported as agreed." The cemetery does not permit burial services after 2:00 p.m., and the burial service was cancelled and rescheduled for the next weekend. A number of critical issues are left unaddressed. Was the decedent in transit when Mr. Ravento called? What was the reason for the delay? How close to 2:00 p.m. was the decedent delivered? What were defendants' responses to Mr. Raventos' inquires? These facts seem crucial in helping the court to determine whether there is a prima facie showing that defendants' misconduct was beyond what a civilized society will tolerate. What is clear is that the misconduct in *Christensen* as pleaded was clearly and manifestly outrageous, and when juxtaposed against defendants' misconduct as alleged in the operative pleading, seems qualitatively more egregious than the misconduct at issue here.

Both defendants have filed motions to strike, filed under separate cover. They mirror each other for the most part, and thus will be treated similarly (except when different arguments have been advanced).

Magner asks the court to take judicial notice of the Statement of Information Corporation it filed with the State of California (Office of the Secretary of State). The request is granted, as there is no opposition.

Both defendants ask the court to strike the following allegations: 1) statutory attorney fees pursuant to Health and Safety Code, sections 7100, 7103, and 7109, associated with the second cause of action; 2) any and all claims for prejudgment interest because there are insufficient facts alleged in support; and 4) punitive damages associated with all identified causes of action. The court's conclusions with regard to both demurrers technically moots both motions to strike, but for future pleading purposes, the court will address the merits of both motions to strike.

i) Attorney Fees Pursuant Health and Safety Code sections 7100, 7103, and 7109

Pursuant to the second cause of action for negligence (which as noted above implicates the theory of negligent infliction of emotional distress per *Christensen* and progeny), plaintiffs contend that defendants violated Health and Safety Code section 7100 and 7103, which entitles plaintiffs to attorney's fees pursuant to Health and Safety Code section 7109. Health and Safety Code section 7100(a) provides an order of priority concerning the right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services provided, and vests in (as relevant for our purposes) the agent that makes a specific agreement to pay the costs of disposition. Plaintiffs expressly rely on Health and Safety Code section 7100(e), which provides that "this section shall be administered and construed to the end that the expressed instructions of the decedent or the person entitled to control the disposition shall be faithfully and promptly performed." Health and Safety Code section 7103(a) provides that every person, upon whom the duty of interment is imposed by law, who omits to perform that duty within a reasonable time, is guilty of a misdemeanor. Health and Safety Code section 7109 provides that a "court shall allow costs and reasonable attorney's fees to a prevailing plaintiff against all defendants, other than the coroner." Both defendants contend that none of these provisions applies.

Plaintiffs offer no support for the proposition that these statutory provisions provide them with a statutory basis for attorney's fees against a mortuary or its agent for negligence (negligent infliction of emotional distress), based on the allegations in the operative pleading. Plaintiffs in fact seem to concede in opposition that the "moving papers are persuasive on the application of

this code section to the facts of this case, Plaintiffs contend the trier of fact should determine whether Plaintiffs are entitled to attorney fees on this statutory basis or any other theory." Defendants in the end seem correct to challenge the basis for attorney's fees under these statutory provisions, at least to the extent the requests are associated with tort, not contract. For tort, the general rule that each side bears its own costs for attorney's fees would apply.

Plaintiff argues in opposition that the attorney's fees requests are permitted under the concept of "tort of another." The tort of another doctrine, sometimes called the third-party tort doctrine, provides that a party may be awarded attorney fees ***as damages*** (not costs) in a situation where one person commits a wrongful act that he or she can reasonably foresee would cause another to have to defend or prosecute a lawsuit involving a third party. The doctrine is not an exception to the rule that parties bear their own attorney fees, "but an application of the usual measure of tort damages. The theory of recovery is that the attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action. In such cases there is no recovery of attorney fees qua attorney fees. . . . [¶] . . . [N]early all of the cases which have applied the doctrine involve a clear violation of a traditional tort duty between the tortfeasor who is required to pay the attorney fees and the person seeking compensation for those fees." (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310.) As the Supreme Court has described it: "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620.) The attorney fees recoverable are those incurred *litigating against the third party, not those incurred litigating against the tortfeasor*. Particularly apt, the rule is that tort of another attorney fees must be "pleaded and proved to the trier of fact." (*Hsu v. Abbara* (1995) 9 Cal.4th 893, 899, fn. 4; accord, *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 79.) And the issue is for the jury. (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 56; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819 ["Since the attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise"].) Under these rules, it is unclear who would liable for attorney fee damages; more significantly, tort of another has not been pleaded in the operative pleading as damages. Accordingly, the tort of another doctrine does not save plaintiffs from the motion to strike.

But leave to amend nevertheless is given, although not for reasons articulated or recognized by the parties. It is true, as noted by TRL in reply, that plaintiffs have provided "no authority which supports the contention that Section 7109 is applicable to this action." But authority arguably ***does*** not exist. The court has found one case, overlooked by the parties, that suggests a party (an agent) who contracts with a mortuary (and in this case that would be Joseph Raventos), which in turn has failed to follow the instructions of the agent as part of the contractual obligation, may be liable for emotional distress damages under Health and Safety

Code section 7100, and thus, by logic per Health and Safety Code section 7109, attorneys fees, ***as a result of the breach of contract***. (*Saari v. Jongordon Corp*. (1992) 5 Cal.App.4th 797, Cal.App.4th 797, 803-804.) "The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years. (See, e.g., *Chelini v. Nieri* (1948) 32 Cal.2d 480, 481–482[].)" (*Saari, supra, at pp.* 803–804.) Because Joseph Raventos may be entitled to seek emotional distress damages for breach of the contractual duty at issue with regard to the first cause of action, it would appear that he may be able to request attorney fees pursuant to Health and Safety Code section 7109. The court recognizes that no party has briefed this issue; all the court is indicating at this time in this order is that plaintiff is afforded an opportunity to plead the theory attendant to the first cause of action (breach of contract) per *Saari*. Defendants in turn can address the issue in any future motion to strike, if appropriate.

ii) Prejudgment Interest

Defendants contend that plaintiffs have failed to allege facts to support a claim for prejudgment interest. The motions to strike are appropriate as to any request for prejudgment damages associated with the three tort causes of action (second, third, and fourth), because those damages are uncertain and can only be determined by verdict or judgment. (See, e.g., *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.4th 948, 958 [the general rule is that prejudgment interest cannot be awarded in cases in which an amount of damages cannot be determined except by verdict or judgment, and rule applies to tort actions].) In that regard, the court grants both motions to strike.

But the motions to strike are denied as to the breach of contract and breach of the implied covenant of good faith and fair dealing causes of action. Under the statute governing prejudgment interest (Civil Code, § 3287(a)), prejudgment interest is allowable where the amount due plaintiff is fixed by the terms of a contract. (*State of California v. Continental Ins. Co*. (2018) 15 Cal.App.5th 1017, 1038.) Both causes of action allege damages made certain by calculation, and courts generally apply a liberal construction in determining whether a claim is certain. As we are at the pleading stage, this is no ground to strike the requests for prejudgment interest with regard to those two causes of action.

iii) Punitive Damages

The complaint asks for punitive damages as to the third cause of action for intentional infliction of emotional distress; the fourth cause of action for negligent infliction of emotional distress; and the fifth cause of action for breach of the implied covenant of good faith and fair dealing.

The court rejects the proposition, as a matter of law, that a plaintiff can never recover punitive damages in a negligence cause of action, *as long as* plaintiff has pleaded that the defendant's acts disclosed a conscious disregard of the probable consequences of the act as

required under the punitive damages statute. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895 [there is no bright line distinction between negligence and intentional torts when plaintiff alleges conscious disregard of probable dangerous consequences].) Both motions to strike are denied on this ground.

The court does agree, however, that punitive damages can never be awarded in a breach of contract cause of action (*Brewer v. Premier Golf Properties, LP* (2008) 168 Cal.App.4th 1243, 1255 [punitive damages are limited to actions not arising from contract]), and outside the context of the insurance area, breach of the implied covenant of good fair and fair dealing sounds in contract, not tort. (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 93–95.) It follows that in noninsurance cases, such as this, breach of the implied covenant of good faith and fair dealing does not permit an award of punitive damages as a matter of law. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1054, citing cases.) The court grants both motions to strike punitive damages claims without leave to amend as to the fifth cause of action.

Aside from these arguments, the court grants both motions to strike all punitive damage allegations based on a more fundamental pleading deficiency. Both defendants are corporate employers, and the pleading rules for punitive damages and corporate employers are settled. Civil Code section 3294, subdivision (b), provides in pertinent part: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer ... was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the ... act of oppression, fraud, or malice *must be on the part of an officer, director, or managing agent of the corporation.*" (Italics added; see *Colucci v. T-Mobile USA, Inc.* (2020) 48 Cal.App.5th 442, 451.) The complaint is conspicuously silent about any managerial conduct or managerial authorization of any reckless conduct committed by the employees of defendants; the facts must be pleaded specifically and they are not. (*Grieves v. v. Superior Court* (1984) 157 Cal.App.3d 159, 164; *Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority* (2022) 83 Cal.App.5th 1137, 1193 [in addition to the requirement that the operative complaint set forth the elements as stated in section 3294, it must include specific factual allegations showing that defendant's conduct was oppressive, fraudulent, or malicious to support a claim for punitive damages].) Leave to amend is granted. Plaintiff is put on notice, however, of the following: vague and conclusory allegations that simply mimic the statutory language will be insufficient.

E) Summary of Court's Conclusions as to Demurrers and Motions to Strike

The court grants Magner's unopposed request for judicial notice.

As for both demurrers:

- The court overrules Magner's special demurrer based on uncertainty.

- The court will sustain both demurrers with leave to amend as to the negligence (second) and negligent infliction of emotional distress (fourth) causes of action. They are not separate causes of action, and only one should be pleaded.
- The court will sustain Magner's demurrer to the first cause of action for breach of contract (as Magner is the only named defendant to this cause of action), given plaintiffs' failure to plead a third party beneficiary theory of enforcement, with leave to amend
- The court rejects both of defendants' challenges to the third cause of action for intentional infliction of emotional distress, on the ground that plaintiffs failed to allege an intent to harm or conduct directed at plaintiffs, as an exception based on reckless disregard has been pleaded per *Christensen, supra,* 54 Cal.3d at page 905. The court sustains both demurrers with leave to amend as to this cause of action, however, because plaintiffs have failed to allege sufficient facts to show severe emotional distress as to each plaintiff; and have failed to allege sufficient facts to show outrageous conduct that cannot be tolerated by a civilized society.
- As to the fifth cause of action for breach of the implied covenant of good faith and fair dealing, the demurrers will be treated slightly differently:
    - As for Magner's demurrer, the court will sustain with leave to amend because plaintiff has failed to plead a breach of contract as to the first cause of action (on a third party beneficiary theory); as such, plaintiffs have not stated a cause of action for the implied covenant of good faith a fair dealing. Leave to amend is granted.
    - As for TLC's demurrer, plaintiffs do not allege a contractual obligation it had with plaintiff under any possible theory, which is a condition precedent to advancing this cause of action. Plaintiffs have failed to allege how it can sue based on the contract between Magner and TLC. ***Unless plaintiffs can convince the court they can amend to meet this requirement, the demurrer will be sustained without leave to amend.***

As for both motions to strike (although technically moot, the court makes the following determinations for future pleading efficiency):

- The court grants both motions to strike as to the plaintiff's request for attorney's fees pursuant to Health and Safety Code, sections 7100, 7100, and 7109, associated with the second cause of action for negligence (a tort cause of action). Tort theories will not support attorney's fees under these statutes. However, leave to amend is granted, for plaintiff may be able to allege ***statutory*** attorney's fees ***for breach of contract*** as to Joseph Raventos (as the signatory to the contract at issue in the first cause of action) pursuant to *Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, a case overlooked by both parties. The court is affording plaintiff the opportunity to advance this theory

without resolving *Saari*'s application, given the parties' failure to address the case; the matter can be addressed in future challenges, if appropriate. The court rejects plaintiff's reliance on the "tort of another" theory as basis to deny the motions to strike, as attorney's fees have not been pleaded as a form of damages.

- The court grants both motions to strike without leave to amend based on plaintiffs' requests for prejudgment interest associated with the tort causes of action (second, third, and fourth), as those damages are uncertain. The court denies both motions to strike as to plaintiffs' requests for prejudgment interest as to the first and fifth causes of action, as the damages are associated with contract and thus more certain (at least enough so for pleading purposes).
- As for plaintiffs' requests for punitive damages: The court denies both motions to strike based on the claim that negligence can never give rise to punitive damages, as long as punitive damages are properly pleaded. That being said, the court grants both motions to strike as to plaintiffs' request for punitive damages as to the fifth cause of action for breach of the implied covenant of good faith and fair dealing, without leave to amend, as that cause of action cannot as a matter of law support punitive damages. More globally, as to ***all*** punitive damages allegations, the court grants both motions to strike, for plaintiffs, at the very least, have failed to meet the pleading requirements for a corporate employer as to each defendant (which plaintiffs concede they are in the operative pleading), pursuant to Civil Code section 3294(b), and cases interpreting that provision. Leave to amend is granted.
- Plaintiff has 30 days from today's hearing date to submit an amended pleading.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information/Superior Court of California/County of Santa Barbara.)