PROPOSED TENTATIVE

On April 30, 2024, the court provided a very detailed order, in which it ultimately rejected defendant's claims that plaintiff had failed adequately to plead 1) "neglect" under the Elder Abuse Act; and 2) a 'robust" and "significant" caretaking relationship. The court, however, sustained defendant's demurrer with leave to amend based on plaintiff's failure to plead, as to Dignity Health (as a corporate employer), that an officer, director, or managing agent acted with recklessness, a prerequisite to obtain the heightened remedies under the Elder Abuse Act. The court permitted plaintiff 30 days to file a first amended pleading. Plaintiff filed a first amended complaint on May 6, 2024.

Defendant Dignity Health demurs to the first amended complaint on the same ground the court sustained the demurrer to the complaint.

The court will not recount the overall substance of the prior tentative; it is incorporated by reference into this tentative order fully for all intents and purposes. The reason for this should be self-evident: the challenge raised by Dignity Health in the present demurrer is based exclusively on the defect the court identified in its earlier order – plaintiff's failure to plead sufficient facts to hold Dignity Health liable for elder abuse as a corporate employer. As the court previously indicated in this regard, to the extent plaintiff seeks to hold a corporate defendant liable for the acts or omissions of its employees when seeking heightened remedies, plaintiff also must satisfy the standards set forth in Civil Code section 3294, subdivision (b). (Health & Saf. Code, § 15657, subd. (c)) As relevant here, that section provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b).) Allegations regarding authorization or ratification must also be pled with particularity. That means "the plaintiff must set forth facts in his complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5; see also *Covenant Care* (2004) 32 Cal.4th 771, 790 [citing "the general rule that statutory causes of action must be pleaded with particularity"]; *College Hospital Inc v. Superior Court* (1994) 8 Cal.4th 704, 721-722.) Put another way, with respect to a corporate employer, the availability of enhanced remedies under the Elder Abuse Act requires proof of authorization, ratification or personal participation in an act of oppression, fraud or malice by an officer, director or managing agent of the corporation.

The parties will remember what the court had determined on this topic in its previous order, which is central to the present challenge:

> "The court . . . will sustain defendant's demurrer because as to Dignity Health plaintiff has failed to allege malice based on recklessness. Under the Elder Abuse Act, 'recklessness' "refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur [citations]. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' [Citation.]" (*Worsham, supra,* 226 Cal.App.4th at p. 337, quoting *Delany, supra,* 20 Cal.4th at pp. 31-32.) As Dignity Health seems to be a corporate employer (see, e.g., *St. Myers v. Dignity Health* (2019) 44 Cal.App.5th 301, 306 [Dignity Health is a national health care system, consisting of more than 40 hospitals and care centers]), plaintiff must allege conduct essentially equivalent of conduct that would support recovery of punitive damages to obtain the Elder Abuse Act's heightened remedies. (*Covenant Care, supra,* 32 Cal.4th at p. 789.) The punitive damages statute, Civil Code section 3294, subdivision (b), which is incorporated into the Elder Abuse Act by section 15657, subdivision (c), requires plaintiff to plead that an officer, director, and/or managing agent authorized the wrongful acts by said agents and employees, with factual particularity. (*Id.* at p. 790; see *CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [discussing the requirements of a managing agent].) Even if the court were to assume that plaintiff's allegations of recklessness were sufficient as to defendant's employees, the conclusory allegations in the complaint are insufficient to establish Dignity Health's liability for heightened remedies <u>*as an employer*</u>. All that is alleged is that MMRC 'continuously and recklessly, maliciously, and fraudulently made the decision to withhold from Plaintiff the most basic level of care'. . . .' and MRMC 'withheld necessary safety measures from Plaintiff'; and MRMC 'caused physical and mental harm to Plaintiff' through 'flagrant disregard . . . .' These bare allegations are insufficient, as they fail to identify an officer, director or managing agent, authorized or ratified the conduct. There are no allegations about the identity of a managing agent or that agent's authority to bind defendant. There likewise are no allegations that the unidentified managing agent was aware of these problems at all. The complaint consists entirely of legal conclusions, rather than necessary facts, on this critical issue. Merely asserting an elder's injury was the product of corporate recklessness, without more, does not satisfy the requirement for enhanced elder abuse remedies. (*Covenant Care, supra*, at p. 790.)" (Italics in original.)

In order to determine whether the plaintiff has remedied the pleading deficiencies as identified above, the court will 1) examine the nature and quality of the additions made to the first amended pleading; and then 2) assess the merits of defendant's arguments in the demurrer

and its reply, taking into account defendant's arguments offered in opposition. As part of this inquiry, the court will initially grant Dignity Health's unopposed request to take judicial notice of the following documents in this case file: the court's April 30, 2024 tentative; and the first amended complaint filed by plaintiff.

A) New Allegations in First Amended Complaint

The court in its previous order addressed whether the allegations were sufficient to show that employees of MRMC acted with alleged recklessness by allowing plaintiff to fall as a byproduct of their failure to exercise appropriate custodial oversight, as contemplated under the Elder Abuse Act. It found the allegations were sufficient to support the claim, as encapsulated in paragraph 52 of the original complaint. That, however, was not enough to secure the heightened remedies against Dignity Health as the corporate employer, based on the bare allegations advanced.

Starting with new Paragraph 53 in the first amended complaint, plaintiff contends that the recklessness of plaintiff's custodial care was based on the "ongoing practice of understaffing," and MRMC's desire to "maximize profits at the expense of patient care . . . ." Plaintiff alleges that defendant Dignity Health's managing agents, including but not limited to their Manager of Patient Safety, MedSurg Director, and Nursing Director, "were all aware of an ongoing practice of understaffing MRMC" in this regard. "Specifically, the managing agents of Dignity Health knew that nursing staff routinely failed to assign" an Avasure remote monitoring system based on lack of training/education on how to prevent falls; and nursing staff were routinely unable to contact Avasure monitors. "These concerns were communicated to the Manager of Patient Safety, the MedSurg Director, and the Nursing Director, among other managing agents . . . ," who "disregarded these concerns and continued to understaff MRMC because profits would be impacted. . . . " These deficiencies were amplified because patient "acuity levels" were considered elevated, and "no additional staff were ordered. Indeed, at the time of [plaintiff's] fall, there was only 1 other RN in her unit caring for other patients despite MRMC's managing agents['] actual awareness that they had a high patient acuity that very day. The same nurse was also the break nurse for both the MedSurge and PEDs units[,] which meant this nurse was going back and forth between each unit to relive overworked nurses, and provide additional patient care." Records also indicate that not only was there understaffing, but nurses were also working excessive overtime hours.

New paragraphs 56 and 57 provide that not only did Dignity Health, through its managing agents, have "actual knowledge" of these deficiencies, which were not specific to plaintiff, "but also related to the patient population" (i.e., no other beds were available, deficient staffing practices, inappropriate training of Avasure system, etc.) "Dignity Health and its managing agents consciously disregarded nursing complaints which needlessly exposed patients such as [plaintiff] to injury." The managing agents "undertook a conscious decision to 1) admit more patients then they had staff to care for," in violation of California Code of Regulations, title

22, section 70217[1]; 2) continued to rely on ineffective Avasure monitoring systems, knowing they were ineffective because of nursing complaints; 3) all in the hope if reducing costs and maximizing profits. The managing agents were aware of these issues "and did nothing to protect [plaintiff] from known health and safety hazards. In failing to take steps to remedy these ongoing systemic practices and deficient nursing care, [] the managing agents ratified the reckless conduct and deficient practices of the nursing staff."

In new paragraph 59 plaintiff alleges that understaffing, as noted above, "amounts to a pattern and practice of neglect done with a conscious disregard of the safety of Plaintiff. These acts are malicious, reckless, oppressive . . . , and," underscored by the fact one nurse told the investigators when described plaintiff's fall as "shit happens.

B) Merits of Demurrer

Defendant Dignity Health recounts the substance of the detailed tentative previously provided by the court, and then contends, as a result, that plaintiff in the first amended complaint failed to "allege any officer, director, or managing agent at Defendant Dignity Health had advanced knowledge of the unfitness of RNI and employed her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. . . ." According to defendant, the first amended complaint is "replete with conclusory language and barren of specific factual allegations to support a claim for Elder Abuse/Neglect."

Preliminarily, the court finds that all meet and confer obligations have been satisfied.

On the merits, the court is not persuaded by defendant's challenges. As noted, to the extent the plaintiff seeks to hold a corporate defendant liable for the acts or omissions of its employee, the plaintiff also must satisfy the standards set forth in Civil Code section 3294, subdivision (b). (Welf. & Inst. Code, .§ 15657, subd. (c).) As relevant here, that section provides: "An employer shall not be liable for damages ... based upon the acts of an employee of the employer, unless the employer ... authorized or ratified the wrongful conduct for which the

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[1] This regulation provides as follows: "(a) Hospitals shall provide staffing by licensed nurses, within the scope of their licensure in accordance with the following nurse-to-patient ratios. Licensed nurse means a registered nurse, licensed vocational nurse and, in psychiatric units only, a psychiatric technician. Staffing for care not requiring a licensed nurse is not included within these ratios and shall be determined pursuant to the patient classification system. [¶] No hospital shall assign a licensed nurse to a nursing unit or clinical area unless that hospital determines that the licensed nurse has demonstrated current competence in providing care in that area, and has also received orientation to that hospital's clinical area sufficient to provide competent care to patients in that area. The policies and procedures of the hospital shall contain the hospital's criteria for making this determination. [¶] Licensed nurse-to-patient ratios represent the maximum number of patients that shall be assigned to one licensed nurse at any one time. There shall be no averaging of the number of patients and the total number of licensed nurses on the unit during any one shift nor over any period of time. Only licensed nurses providing direct patient care shall be included in the ratios . . . ."

damages are awarded or was personally guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (b).) Allegations regarding authorization or ratification must also be pled with particularity. That means "the plaintiff must set forth facts in his complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5; see also *Covenant Care, supra*, 32 Cal.4th at p. 790 [also citing "the general rule that statutory causes of action must be pleaded with particularity"].)

The first amended complaint satisfies these requirements, in contradistinction to the initial complaint. True, plaintiff does allege or provide a specific name or names of the managing agent or agents; she does, however, identify them ***by job title*** (Manager of Public Safety, MedSurg Director, and Nursing Director),[2] and clearly indicates that the managing agents are separate and distinct from the MRMC's employees; plaintiff also claims the managing agents were charged with alleviating the understaffing and excessive overtime use and other deficiencies responsible for plaintiff's alleged elder abuse, "but chose not to" in order to "maximize profits. . . " and had the authority "to bind Dignity Health with respect to their employment decisions" (through reasonable inference suggesting the managing agents may well have had a significant discretionary power as managing agent, to the extent these positions (and thus the people in those positions) have authority over corporate policy). (See, e.g., *Major v. Western Home Ins., Co*. (2009) 169 Cal.App.4th 1197, 1221 [a true managing agent must have substantial discretionary authority over significant aspects of a corporation's business].)[3] Plaintiff also alleges that the managing agents were consciously aware of the understaffing (e.g., they were aware that there was only 1 RN caring for patients at the time plaintiff was admitted), which was a violation of an existing regulation. Additionally, the managing agents were allegedly aware that nursing staff routinely failed to assign an Avasure remote monitoring system to patients like plaintiff, and knew nurses were not adequately trained on how to prevent falls; were aware of complaints by nurses about these problems, as the complaints were communicated directly to the managing agents; were aware of the high risks of falling by patients such as plaintiff (given the high patient acuity); and consciously disregard the risks in the hope of maximizing profits. These factual allegations reveal that Dignity Health consciously disregarded a probable risk of injury to plaintiff. While the allegations could have been pleaded with more precision, they are far cry from the bare legal assertions articulated originally, and in the end are sufficient to withstand the present challenge.

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[2] There is no requirement as far as the court can determine that a specific person be named in order to satisfy the specificity requirements in this regard. The actual name can be developed and revealed in discovery.

[3] No doubt plaintiff could have done a better job of pleading this requirement. That being said, the court finds the allegations (coupled with a reasonable, liberal inference to which the court must afford the pleading), sufficient to show that these positions, for pleading purposes, had more than supervisory authority and were responsible for decisions establishing corporate policy (based on profitability). Plaintiff's allegations suggest these position have substantial management duties with respect to a number of hospital facilities. Whether this is true or not is an inappropriate inquiry at this stage; the evidence can be developed through discovery and the matter can be resolved more definitively at summary judgment.

The court agrees with plaintiff that the allegations here are similar to the allegations pleaded against defendant Hospital in *Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339 (*Fenimore I*), in which the appellate court found the trial erred in sustaining a demurrer based on insufficient allegations of recklessness. (See also *Cochrum v. Costa Victoria Healthcare LLC* (2018) 25 Cal.App.4th 1034, 1047 [understaffing can amount to recklessness under the right the circumstances].) In *Fenimore I*, plaintiff alleged (inter alia) that the "Hospital had a pattern and knowing practice of improperly understaffing to cut costs, and had the Hospital been staffed sufficiently, [plaintiff] would have been properly supervised and would not have suffered injury." (*Id*. at p. 1349.) The appellate court observed that plaintiff "has alleged more than a simple understaffing here. The FAC identified the staffing regulation the Hospital allegedly violated and suggested a knowing pattern or violated it constituted recklessness. A jury may see that a knowing flouting of staffing regulations as a pattern and practice to cut costs, thereby endangering the facility's elderly and dependent patients, as qualitatively different than simple negligence." (*Id*. at p. 1350.) ". . . [I]f a jury were to find the Hospital knew of the staffing regulations, violated them, and had a significant pattern of doing so, it could infer recklessness i.e., a conscious choice of a course of action, with knowledge of the serious danger to others involved in it. (*Ibid.*)

The same is true here. Plaintiff has alleged that defendant had a pattern and knowing practice of improperly understaffing to cut costs, with knowledge that this was a violation of a staffing regulation, in the hopes of enhancing profits, thus consciously disregarding the safety of the patients such as plaintiff. This court must assume the plaintiff can ultimately prove by clear and convincing evidence that Marian was understaffed at the time plaintiff fell; that understaffing and inadequate training was part of a pattern and practice; and that this was done with conscious disregard by those who made policy for Dignity Health. Plaintiff has sufficiently alleged the elements of employer corporate liability in order to secure the heightened remedies under the Elder Act.

Nothing in defendant's reply alters the court's conclusions. The allegations show ratification based on allegations that Marian was understaffed and that the managing agents knew about this understaffing, in conscious disregard to the safety of the plaintiff. They withstand defendant's pretrial challenges. (See *Carter v. Prime Healthcare Paradise Valley LLC, supra,* 198 Cal.App.4th at p. 410.) Plaintiff has cured the deficiencies present in the original complaint.

The court therefore overrules defendant's demurrer to the first amended pleading. Defendant has 20 days from today's hearing to file an answer.

The parties are directed to appear at the hearing either personally or by Zoom.