PARTIES/ATTORNEYS

Plaintiff	Heidi De Mayo	Daniel Knight
Defendant	Alfred Oseguera	Adrian Andrade

TENTATIVE RULING

For the reasons discussed below, the demurrer is sustained. Plaintiff has not requested a further opportunity to amend the pleading. In an abundance of caution, however, the court will allow her that opportunity, including as to the first cause of action for breach of contract cause of action. The court urges plaintiff to consider carefully how and whether the complaint can be amended to state any liability under the theories presented. The court does not permit leave to amend to add any new causes of action.

The request for sanctions is denied.

This is an action for partition and damages. Plaintiff Heidi De Mayo filed her complaint on June 6, 2024, against defendants Alfred Oseguera, Benjamin Lerner, Guaranteed Rate, Inc. dba Certainty Home Lending and Flagstar Bank. The complaint alleges the following causes of action: (1) partition and injunction against Oseguera; (2) breach of promissory notes against Oseguera; (3) breach of fiduciary duty against Lerner, Flagstar, and Guaranteed Rate Inc.; (4) accounting against Oseguera; (5) professional negligence against Lerner, Flagstar, and Guaranteed Rate Inc.; (6) fraudulent concealment against Lerner, Flagstar, and Guaranteed Rate Inc.; and (7) disgorgement of profits against Oseguera. On November 6, 2024, the court sustained the demurrer of Flagstar as the third, fifth, and sixth causes of action of the complaint. Plaintiff's first amended complaint was filed on November 30, 2024, alleging: (1) partition and injunction against Oseguera; (2) breach of promissory notes against Oseguera; (3) breach of implied and actual contract against Flagstar and Lerner; (4) breach of fiduciary duty against Lerner and Flagstar; (5) accounting against Oseguera; (6) professional negligence against Lerner and Flagstar; (7) fraudulent concealment against Lerner, Flagstar, and Oseguera; (8) disgorgement of profits [Bus. & Prof. Code § 7031(b)] against Oseguera; and (9) ouster against Oseguera.[1]

[1] On August 19, 2024, Alfred Oseguera filed a cross-complaint against De Mayo in which he alleges that he and De Mayo entered into a business arrangement to purchase and reconstruct residential properties. De Mayo would finance the properties and Oseguera would undertake reconstruction/repairs to resell the property for profit. In June 2020, De Mayo and Oseguera selected property located at 1148 Pinot Solo in Santa Maria with the intention that De

The FAC alleges that in June 2020, plaintiff owned property at 1148 Pino Solo Drive in Santa Maria without encumbrance. In July 2020, plaintiff discussed with defendant Lerner, who is employed by defendant Flagstar Bank, her business venture with defendant Oseguera, disclosing the fact she owned the Property free of encumbrances but that the ongoing improvements were becoming a burden on her cash flow. In August 2020, Lerner proposed a way for plaintiff to receive funds to cover the costs of improvements:

- Plaintiff would transfer a 1% interest in the Property to Oseguera, taking a deed of trust to secure a promissory note from Oseguera outlining his obligations thereunder;
- Oseguera would take a loan from Lerner and Flagstar in the form of a promissory note, which would be secured by a deed of trust in the Property signed by both plaintiff and Oseguera;
- the loan proceeds would be distributed partially to plaintiff to pay for costs already incurred; and
- on completion of the project, Oseguera would take a loan to buy plaintiff's 99 % interest in the Property and pay her the appreciation plus any remaining costs that Plaintiff had carried to that point.

In fact, the promissory note from Oseguera to plaintiff, which defendants were to prepare, never materialized. Instead, they encouraged plaintiff to simply take the deed of trust. Moreover, "Defendant Lerner and Flagstar in advising Plaintiff did not inform Plaintiff the consequences and ramifications and risks of co-tenancy to property wherein Plaintiff was a 99% owner and Defendant Oseguera was a 1% owner. For example, the right to occupy the land, collect rents, payment of mortgage note. Nor did Lerner and Flagstar in advising Plaintiff inform Plaintiff she would not have control of the loan even though her property was used as security. In fact, the advice given was the opposite that Plaintiff would have co-control of the property and security in the same along with being made aware of and have decision making power on the mortgage, all of which were and are false." (FAC, ¶ 23.)

Mayo would purchase the property for Oseguera to have a place to reside for himself and his daughters. Oseguera would have a one percent (1%) interest and De Mayo would have ninety-nine (99%) per cent interest in the property while Oseguera would perform all repairs and needed construction. De Mayo would then sell her 99% interest to Oseguera for $395,000, plus reimbursement of $20,000 advanced for renovations upon the close of his purchase. Oseguera alleges that the loan from Flagstar in the amount of $450,000 was his payment for De Mayo's interest in the property. He paid DeMayo the sum of $440,000. De Mayo refuses to convey her 99% interest to Oseguera. His cross-complaint alleges: (1) specific performance; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; and (4) breach of fiduciary duty. The court sustained DeMayo's demurrer to this complaint on December 18, 2024.

On August 6, 2020, plaintiff executed the grant deed conveying a 1% interest in the Property to Oseguera. On December 14, 2020, a deed of trust encumbering the Property in favor of Flagstar in the principal sum of $450,000.00 was recorded. The studio on the property was rented and Oseguera began renting the 3-bedroom house and collecting rents thereon. Plaintiff and Oseguera allegedly agreed that all rents would be used to pay the note secured by Flagstar.

Plaintiff continued to fund Oseguera's improvements to the Property, specifically the construction of an ADU. On July 27, 2021, Oseguera executed a promissory note in favor of plaintiff in the amount of $76,942.02. Oseguera subsequently damaged and misappropriated property belonging to plaintiff. On March 14, 2022, Oseguera agreed to pay plaintiff $20,000 by March 28, 2022 in settlement of that claim.

In May of 2023, Oseguera stopped making payments on the loan from Flagstar Bank, apparently converting the rent being generated by the property to his own use. On December 22, 2023, Flagstar initiated a nonjudicial foreclosure on the Property. The FAC does not allege the current status of the nonjudicial foreclosure but since plaintiff requests partition of the Property, the nonjudicial foreclosure has presumably not been completed. The parties should confirm this. Plaintiff alleges that as the owner of 99% of the Property, she will incur the greater share of the costs of partition and is presumably exposed to the greater share of costs associated with foreclosure, should it be completed.

Defendants Flagstar and Lerner (defendants) again demurrer to the third, fourth, sixth and seventh causes of action. Opposition has been filed.

Legal Standards Applicable to Demurrer

A demurrer tests the legal sufficiency of a complaint. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) Code of Civil Procedure §430.10(e) provides for a demurrer on the ground that a complaint fails to state a cause of action. A demurrer admits, provisionally for purposes of testing the pleading, all material facts properly pleaded. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1247.)

Flagstar's Liability

Flagstar is alleged to be vicariously liable for Lerner's conduct as Lerner's employer. (FAC, ¶ 64; see *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967.) Absent this relationship, Flagstar has no liability because there are no allegations that it participated in any wrongdoing independent of Lerner's actions. (See CACI 3701.)

In the FAC, Plaintiff alleges: "Defendant Benjamin J. Lerner . . . at all relevant times was employed by either defendant Guaranteed Rate, Inc., a Delaware corporation dba Certainty Home Lending; or Defendant Flagstar Bank. . ." (FAC, ¶ 7.) In the original complaint, however, plaintiff alleged: "Defendant Benjamin J. Lerner ("Lerner") is . . . employed by Defendant Guaranteed Rate, Inc. a Delaware corporation dba Certainty Home Lending." Flagstar asserts these allegations are contradictory and amount to a sham pleading.

An amended pleading that contradicts facts alleged in an earlier pleading is subject to challenge. Unless the contradiction is satisfactorily explained (e.g., new information discovered), the rule requiring truthful pleading render the pleading subject to demurrer or motion to strike as a "sham." (*Amid v. Hawthorne Comm. Med. Group* (1989) 212 Cal.App.3d 1383, 1390; *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.) Here, plaintiff alleges: "The employment status of Mr. Learner was ascertained by representations of counsel for defendant Guaranteed Rate and Flagstar Bank respectively and therefore Plaintiff has relied on those representations for pleading this amended complaint." (FAC, ¶ 7, fn. 2.) The court is satisfied that plaintiff has explained this contradiction for purposes of pleading.

3rd (Breach of Implied and Actual Contract) Cause of Action

Defendants' demur to this cause of action on the basis that it exceeds the scope of permissible amendment. When a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not add entirely new causes of action. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015; *Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456.) The original complaint contained no cause of action for breach of contract against these defendants. Therefore, the addition of this cause of action was outside the scope of the court's ruling. The demurrer may be sustained for that reason alone.

Additionally, the cause of action is inadequately pled. 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.) "Like an express contract, an implied-in-fact contract requires an ascertained agreement of the parties." (*Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 636.)

Defendants assert that no contract has been alleged, either express or implied, from which a breach could occur. Plaintiff asserts she did indeed allege a contract, specifically "that an agreement was made between Defendants Lerner, Flagstar and Plaintiff whereby Plaintiff would carry out certain required duties

(which Plaintiff complied with) and in exchange, Lerner would carry out certain duties which he (ostensibly) did for the parties common benefit." (Opposition, p. 7, ll. 6-8.) The object of the contract was: "On the one hand, Lerner and Flagstar obtaining a first mortgage against Subject Property along with the prospect of a refinance and future mortgage and fees from the carrying out of the duties of the contract, and Plaintiff, on the other hand, securing funding for the underlying construction project and providing the collateral for the future contract and mortgage." (Opposition, p. 7, ll. 10-13.)

Despite plaintiff's assertions, the FAC does not satisfactorily allege the existence of a contract between the parties. While the FAC alleges that defendants entered into a mortgage relationship with plaintiff (FAC, ¶ 62), it does not appear that the FAC alleges any contract related thereto. This leaves the court and defendants to speculate about the existence of the contract. Is plaintiff alleging that she entered into a contract with defendants to give her sound business advice on how to proceed and that defendants breached that contract by giving her advice that was against her interest? It's simply unclear from this pleading. (See *Holcomb v. Wells Fargo Bank, N.A.*, (2007)155 Cal. App. 4th 490, 501—"Without specifying . . . the specific terms Holcomb claims the bank had breached, the complaint fails to adequately state a cause of action for breach of contract.")

Further, the cause of action fails for uncertainty. Demurrers for uncertainty under Code of Civil Procedure section 430.10, subdivision (e) are disfavored. (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612; *Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.) Here, however, allegations of material facts are left to surmise and are subject to special demurrer for uncertainty. (See *Ankeny v. Lockheed Missiles and Space Co*. (1979) 88 Cal.App.3d 531, 537.)

Finally, the special demurrer is warranted because it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct. (Code Civ. Proc. § 430.10, subd. (g).)

The demurrer to this cause of action is sustained.

4th (Breach of Fiduciary Duty) Cause of Action

This cause of action alleges that Lerner was a licensed real estate broker and provided mortgage brokerage services; that Lerner was a fiduciary to her; that

Lerner and Flagstar (as Lerner's employer) violated their duties "in that they had her transfer a 1% interest in the Subject Property to Defendant Oseguera, without explaining the consequences of such transfer or not obtaining certain agreements from Defendant Oseguera to protect Plaintiff as promised" and that "Lerner further violated his fiduciary duties to Plaintiff when he recommended Plaintiff reconvey her deed of trust securing the 1% owned by Defendant Oseguera rather than subordinate said deed of trust to the Flagstar DOT."

"The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach." (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405.) " 'Whether a fiduciary duty exists is generally a question of law." (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915.)

Defendants point out that the FAC is internally inconsistent about Lerner's status. Plaintiff alleges that Lerner provided mortgage brokerage services. (FAC, ¶¶ 75-76.) It also alleges that he obtained the mortgage as an employee of Flagstar (FAC, ¶ 64), from which the court can infer that he was acting as a lender instead of a broker. Defendants assert this is important to ascertain whether a fiduciary duty was owed. In short, "[a] mortgage broker has a fiduciary duty to a borrower. A mortgage lender does not." (*Smith v. Home Loan Funding, Inc.* (2011) 192 Cal.App.4th 1331, 1332' see also see, e.g., *Nymark v. Hart Federal Savings & Loan Assoc.* (1991) 231 Cal.App.3d 1089, 1092, fn.1 ["The relationship between a lending institution and its borrower–client is not fiduciary in nature"].)[2] Defendants argue that the inconsistency makes the FAC fatally uncertain.

But plaintiff's argument seems to be that regardless of Lerner's status as a broker or lender he is alleged to have stepped outside that relationship to give plaintiff financial or investment advice, and that is the source of the fiduciary duty. (FAC, ¶¶ 66, 69, 72, 78, 88, 90.) "Fiduciary duties are imposed by law in certain technical, legal relationships such as those between partners or joint venturers [citation], ... trustees and beneficiaries, principals and agents, and attorneys and clients [citation]." (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 416 disapproved on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154.) "The investment adviser/client relationship is one such relationship, giving rise to a fiduciary duty as a matter of law." (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 140—fiduciary relationship imposed by law under Corporations Code definition of financial advisor.) Alternatively, a fiduciary duty under common law may arise "when one person

[2] As explained in *Sierra–Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 334, "[a] commercial lender is not to be regarded as the guarantor of a borrower's success and is not liable for the hardships which may befall a borrower. [Citation.] It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid. [Citations.] And in this state a commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights. [Citation.]"

enters into a confidential relationship with another." (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc., supra,* 83 Cal.App.4th at p. 417.) Before a person can be charged with a fiduciary obligation, he or she must knowingly undertake to act on behalf and for the benefit of another. (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338.)

Nevertheless, there are no factual allegations that would support the finding of a fiduciary relationship imposed by law; nor are there allegations of a special relationship which would support formation of fiduciary duty under common law, as argued by plaintiff. Plaintiff alleges in various ways that defendants, through Lerner's conduct, gave investment advice to Plaintiff with full knowledge that she would rely on the advice. There are no allegations that there exists a relationship under which a duty would be imposed by law.

Moreover, there are no allegations that would permit a finding of the formation of such relationship under common law. We start from the premise that "[t]he relationship between a lending institution and its borrower–client is not fiduciary in nature." (*Nymark v. Hart Federal Savings & Loan Assoc.* (1991) 231 Cal.App.3d 1089, 1092, fn.1.) This is because a commercial lender is entitled to pursue its own economic interests in a loan transaction and this right is inconsistent with the obligations of a fiduciary which require that the fiduciary knowingly agree to subordinate its interests to act on behalf of and for the benefit of another. (*Id.*) Plaintiff alleges that nevertheless, "a fiduciary relationship was formed when Defendant Lerner and the mortgage company specifically gave investment advice to Plaintiff, with full knowledge that she would rely on said advise (sic) and would change her position in accordance with this advice, as opposed to Lerner without bias simply advising Plaintiff of all of the potential ramifications that could arise from making certain moves." (FAC, ¶ 69.) She asserts that this is what distinguishes this case from the cases holding that a fiduciary relationship does not traditionally exist. But plaintiff alleges that defendants advised her how to meet the guidelines of the loan. (FAC, ¶ 63—"Defendant Flagstar and Defendant Lerner gave independent advice to Plaintiff having to do with how to make substantial financial changes in their position in order to make the loan conforming and meeting certain guidelines by the Defendants.") The advantage that defendants allegedly obtained was that Lerner obtained a commission and Flagstar and Lerner may secure business in the form of the loan Oseguera would take to pay off plaintiff. (FAC, ¶ 24.) None of these allegations amount to actions beyond the domain of the usual money lender. Nor do the alleged benefits obtained imply that defendants exceed the scope of its conventional role as a money lender. Absent factual allegations that are sufficient to find the existence of a fiduciary relationship, this cause of action is deficient.

The demurrer to this cause of action is sustained.[3]

6th (Professional Negligence) Cause of Action

To state a cause of action for professional negligence, a party must show "(1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence." (*Giacometti v. Aulla, LLC* (2010) 187 Cal.App.4th 1133, 1137.) Case law, statutes, and secondary sources suggest that the scope of those held to a 'professional' standard of care—a standard of care similar to others in their profession, as opposed to that of a 'reasonable person'—is broad enough to encompass a wide range of specialized skills. As a general matter, '[t]hose undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence.' " (*LAOSD Asbestos Cases* (2016) 5 Cal.App.5th 1022, 1050.)

Here, plaintiff alleges that Lerner (and his employer by vicarious liability) had a duty to use such skill, prudence, and diligence as other members of his profession as a licensed mortgage broker. (FAC, ¶ 88.) Plaintiff further alleges: "This is specifically true whereas alleged above the relationship between Flagstar and Lerner and Plaintiff exceeded that of a typical borrower and lender relationship and instead transmuted into giving financial and investment advice, knowing that the advice would be relied on, and not otherwise admonishing Plaintiff that they were not acting in her best interest, despite giving her advice on how to proceed ostensibly to benefit her while at the same time placing her in a poorer position for the benefit of Flagstar and Lerner." (FAC, ¶ 88.)

This cause of action fails to the same extent the fourth cause of action for breach of fiduciary duty fails. Here, *Nymark* is again instructive. As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. (*Nymark*, *supra,* 231 Cal.App.3d at 1096.) Plaintiff's argument that she was left in a worse position than if Lerner had not advised her is insufficient to overcome this general rule: "The success of the [borrower's]

[3] Plaintiff includes three case citations in the FAC in support of the proposition that exceptions exist to the proposition that the lender relationship is not fiduciary in nature where the lender's conduct or the specific circumstances of the transaction warrant a different conclusion. (FAC, ¶¶ 78-79.) Although each case suggests exceptions exist, not one found a duty under the facts presented by each case. They thus have limited value as they do not contribute to the understanding of what conduct qualifies as an exception.

investment is not a benefit of the loan agreement which the [lender] is under a duty to protect." (*Id.*) As concluded above, plaintiff has failed to allege facts in support of such a claim.

The demurrer to this cause of action is sustained.

7th (Fraudulent Concealment) Cause of Action

Plaintiff alleges that Lerner and Flagstar knowingly concealed and/or misrepresented the consequences of its loan requirements to Plaintiff. In order to state a claim for concealment (a form of deceit, which in turn is a subspecies of fraud), plaintiff must allege specific facts to support the following elements: (1) defendant concealed or suppressed a material fact; (2) defendant had a duty to disclose the fact to plaintiff; (3) defendant intentionally concealed or suppressed the fact with the intent to defraud plaintiff; (4) plaintiff was unaware of the fact and would not have acted as they did had they known of the concealed or suppressed fact; and (5) plaintiff was damaged as a result of the concealment. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp*. (1992) 6 Cal.App.4th 603, 12–613; CACI No. 1901.) Every element of a fraud cause of action must be alleged both factually and specifically. (*Cooper v. Equity General Insurance* (1990) 219 Cal.App.3d 1252, 1262.)

"There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiffs; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiffs; (3) when the defendant actively conceals a material fact from the plaintiffs; and (4) when the defendant makes partial representations but also suppresses some material facts.'" (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336 [citation omitted]; *Bigler-Engler v. Breg, Inc*. (2017) 7 Cal.App.5th 276, 310–311].)

Where, as here, a fiduciary relationship does not exist between the parties, only the latter three circumstances may apply. These three circumstances, however, "presuppose[ ] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise." (*Bigler-Engler v. Breg, Inc., supra,* 7 Cal.App.5th at 311 at pp. 336–337.) "A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as ' "seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement." ' " (*Shin v. Kong* (2000) 80 Cal.App.4th 498, 509, 95 Cal.Rptr.2d 304.)

A duty to disclose may arise as a result of a transaction between the parties. However, the transaction "must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." (*Bigler-Engler* at 312 [manufacturing defendant sold medical devices to the

doctor defendant several years before the plaintiff rented one of the manufacture's devices from the doctor's office; manufacturing defendant had no contact with the plaintiff, did not know plaintiff was a potential user of their products or used the device, and did not derive any direct monetary benefit from the plaintiff's rental of the device].)

As the court has determined that Lerner had no duty for purposes of negligence and breach of fiduciary duty, the court similarly finds there was no duty here. Moreover, there is no allegation that the facts were actively concealed from plaintiff (e.g., the consequences of not having a promissory note, or the legal effect of co-tenancies are not particularly within the knowledge of the defendants).

The demurrer to this cause of action is sustained.

Sanctions

Plaintiff argues she is entitled to reasonably incurred attorneys' fees and costs pursuant to Code of Civil Procedure section 128.5. Pursuant to Code of Civil Procedure section 128.5, "[a] trial court may order a party, the party's attorney, or both to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc. § 128.5, subd. (a).) "'Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading." (Code Civ. Proc., § 128.5, subd. (b)(1).) "'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party." (Code Civ. Proc., § 128.5, subd. (b)(2).) Here, plaintiff argues the demurrer was without merit. Clearly, the court does not agree. There is no basis for an award of sanctions pursuant to Code of Civil Procedure section 128.5.

In any event, for motions and pleadings (and oppositions to motions and responses to pleadings) that can be "appropriately corrected" by withdrawing or correcting them, the complaining party must follow a safe harbor procedure, giving the opposing party a 21-day opportunity to withdraw the offending document before filing a motion for sanctions. (Code Civ. Proc. § 128.5, subd. (f)(1)(B); *Nutrition Distribution, LLC v. Southern Sarms, Inc.* (2018) 20 Cal.App.5th 117, 129-130; *Transcon Fin'l, Inc. v. Reid & Hellyer, APC* (2022) 81 Cal.App.5th 547, 550; *Zarate v. McDaniel* (2023) 97 Cal.App.5th 484, 490-491.

Leave to Amend

It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Bounds v. Sup.Ct. (KMA Group)* (2014) 229 Cal.App.4th 468, 484—court should grant leave to amend if in all probability plaintiff will cure defect; *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.* (2022) 83 Cal.App.5th 1062, 1073.) It is generally plaintiff's obligation to demonstrate a reasonable possibility that the pleading defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [the burden of proving such reasonable possibility is squarely on plaintiff].)

Here, plaintiff has not requested a further opportunity to amend the pleading. In an abundance of caution, however, the court will allow her one more opportunity to do just that, including as to the first cause of action for breach of contract cause of action. The court urges plaintiff to consider carefully how and whether the complaint can be amended to state any liability under the theories presented. The court does not authorize by this order the addition of any new causes of action.

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.)