TENTATIVE RULINGS: CIVIL LAW & MOTION

Friday, May 17, 2024 at **8:30 a.m.**
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. SCV-266409, Jaffee v. Lawton Construction and Restoration, Inc.

This matter comes on calendar for defendant Lawton Construction's motion to appoint a discovery referee. Lawton's request for judicial notice is GRANTED.

The Court is inclined to grant the instant motion. However, for the reasons described herein, the hearing is CONTINUED to June 21, 2024. Within two weeks of the entry of this order, Plaintiffs and defendant Lawton shall each submit up to three names of potential discovery referees. Each party may file objections to the other one's nominations within one week after that. The Court will rule on the instant motion at the June 21 hearing, and if it grants the motion, will select a referee from the parties' lists.

Lawton's counsel shall submit a written order consistent with this tentative ruling and in compliance with California Rules of Court, Rule 3.1312.

I. Background

This is a construction defect and insurance bad faith lawsuit by plaintiff homeowners Morgan and Nicole Jaffee ("Plaintiffs") against Lawton Construction and its principals Brett Lawson and Michael Massa (collectively "Lawton") and insurer CSAA ("CSAA"). The action arises from repairs performed by Lawton on Plaintiffs' home after the hardwood floors in their kitchen sustained water damage from a leaking dishwasher. The operative First Amended Complaint, filed on February 11, 2021, alleges causes of action against CSAA for bad faith and breach of contract, against Lawton for breach of implied warranty, breach of contract, and conversion, and against all defendants for negligence and fraud. CSAA filed a cross-complaint for indemnity against Plaintiffs on April 20, 2021.

A. Discovery motions

On February 28, 2022, Plaintiffs served discovery demands on Lawton consisting of form interrogatories, special interrogatories, requests for admission, and requests for production of documents. When they received no responses on July 22, 2022, Plaintiffs filed two motions: the first to compel responses to the discovery demands, and the second to deem the requests for admissions to be admitted. On August 9, the Court ordered the parties to participate in the discovery facilitator program. On November 20, the facilitator filed a report that stated, in essence, that he had been unable to resolve the conflict. Nevertheless, Lawton provided Plaintiffs with verified responses to the discovery demands on November 29. After a hearing on December 14, the Court denied the motions as moot because the responses had been served, but imposed sanctions in the amount of $2,380.

Shortly before that hearing, on December 5, 2022, CSAA served construction-related form interrogatories on Plaintiffs. After several extensions, Plaintiffs responded in early February of 2023. CSAA's counsel deemed the responses insufficient, and a lengthy meet-and-confer process ensued. CSAA moved to compel further responses on August 7, 2023. The motion was heard on December 6, 2023. The Court denied the motion as moot based on Plaintiffs' representation that they had provided amended responses to CSAA. The Court found that Plaintiffs had not misused the discovery process and imposed no sanctions. In their reply memorandum, CSAA argued that the amended responses were insufficient; the Court noted that the sufficiency of the responses was not at issue, and urged the parties to informally resolve their discovery disputes.

On May 2, 2024, Plaintiffs filed a motion to compel the depositions of CSAA's employee April Wagner and CSAA's person most knowledgeable. The motion is set for hearing on July 5, 2024 (which is one week before the currently scheduled trial date). Opposition is due on June 24, 2024. (CCP § 1005(b).)

B. Mediation

The parties initially agreed to participate in a mediation session with Frederic Hirschfield of the Arbitration and Mediation Center on December 20, 2023. However, that was postponed due to "late

submission of mediation briefs." (It is unclear whose briefs were late.) The parties agreed to reschedule the mediation for February 28, 2024. However, a dispute arose because CSAA stated that its principals could only appear at the mediation by Zoom, and Plaintiffs' counsel insisted that they appear in person. After CSAA categorically declared that its principals would not attend in person, Plaintiff's counsel stated in an email to all counsel on February 27, 2024 that "We don't anticipate a settlement with CSAA anyway, anytime, and probably highly unlikely with Lawton." CSAA and Lawton promptly responded that they would not participate in a "mediation intended not to succeed." The mediation did not take place and has not, to the Court's knowledge, been rescheduled.

II. Request for judicial notice

Lawton's request for judicial notice of the register of actions in the instant matter is GRANTED pursuant to Evidence Code § 452(d).

III. Analysis

A. Governing law

"A [discovery] referee may be appointed upon the agreement of the parties . . . ." (CCP § 638.) If the parties do not agree, "the court may, upon the written motion of any party, or of its own motion, appoint a referee" under several conditions. As relevant here, one such condition is when the court "determines that it is necessary." (CCP § 639(a)(5).) When the court appoints a referee for that reason, the court's order must describe "the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case." (CCP § 639(d)(2).)

The latter requirement means that there must actually *be* exceptional circumstances requiring the referee. Whether or not such circumstances exist is the central question in the instant motion.

B. Lawton's argument

Lawton argues that there are two such circumstances: first, "Plaintiffs' continued failure to provide Code-compliant discovery responses, which would require continuous discovery motions without the appointment of a discovery referee," and second, "Plaintiffs' insistence on proceeding with party depositions of the defendants in this action regardless of the failure to serve Code-compliant discovery responses, which would enable the parties to prepare for deposition."

Lawton's argument is unpersuasive. For the "continued failure to provide Code-compliant discovery responses," Lawton cites to Exhibit A to their request for judicial notice. Exhibit A is simply a copy of the Court's docket in this matter, so it is not entirely clear what Lawton is referring to. The Court notes that Lawton is the only party to this matter that has never filed a motion to compel discovery responses. (July 22, 2022, Plaintiffs' motions to compel Lawton's initial discovery responses and deem requested admissions admitted; August 7, 2023, CSAA's motion to compel further interrogatory responses from Plaintiffs.) For the "Plaintiffs' insistence in proceeding with party depositions," Lawton

cites to Exhibits E, F, G, and H of their declaration, which are four fundamentally identical notices of the deposition of defendant Brett Lawton, differing only as to the dates of the depositions. There is nothing generally objectionable about a plaintiff taking the deposition of a defendant.

Lawton filed the instant motion two days after the unsatisfactory conclusion of a protracted dispute over the scheduling of a mediation session. Lawton holds out the collapse of the mediation as an additional exceptional circumstance, but the connection between mediation and discovery is too tenuous to justify characterizing that dispute as justification for appointing a discovery referee. Unlike discovery, which is mandated by law, mediation in this case is purely voluntary.

C. Effect of the May 2, 2024 motion to compel depositions

That said, however, the Court notes that on May 2, 2024, Plaintiffs moved to compel the compel the depositions of two CSAA employees: an individual named April Wagner and CSAA's Person Most Knowledgeable. Plaintiffs' opposition memorandum in the instant motion was filed on May 6, 2024, so the comment in that memorandum that "There are currently no pending discovery motions" is inaccurate.

Plaintiffs go on to reassure the Court that the multiple "motions" (plural) to compel depositions that they propose to file "will not require significant motion work or an abundance of the Court's resources." The Court is not convinced that that is any more accurate. CSAA has not yet filed opposition to the motion to compel and will probably not do so until somewhere around the June 24 due date, so the Court can only speculate about the arguments it will contain. However, the Court believes that they may relate to its ruling following the December 6, 2023 ruling on CSAA's motion to compel further responses from Plaintiffs to its construction-related form interrogatories. The Court dismissed that motion as moot on the basis that Plaintiffs had already served amended responses before the hearing. In response to CSAA's argument that the amended responses were still insufficient, the Court noted that "the sufficiency of the amended responses is not the subject of this motion." CSAA has not moved to compel further responses to the construction interrogatories. Therefore, the Court suspects that CSAA's opposition to Plaintiffs' pending motion to compel depositions may feature an argument that the depositions are inappropriate in the absence of satisfactory responses to those interrogatories. Such an argument might well "require . . . an abundance of the Court's resources."

Again, this is all speculation, and speculative future events do not rise to the sort of "exceptional circumstance[]" contemplated by CCP § 639(d)(2). Perhaps none of the Court's concerns will prove to be well-founded. If they do, however, the complexity of the litigation over interrogatories and depositions may reach a level that constitutes such an exceptional circumstance. Because of that possibility, the Court is inclined to grant the motion and appoint a discovery referee. But because of the possibility that the parties may be able to work out their disputes informally without the Court's involvement, the Court is unwilling to do so at this time.

IV. Conclusion

The hearing on the instant motion is CONTINUED to June 21, 2024, on the same calendar at which CSAA's motion for summary judgment will be heard, and two weeks before the July 5, 2024 hearing on Plaintiffs' motion to compel depositions. Within two weeks of the entry of the order on this motion, Plaintiffs and Lawton shall submit a list of up to three discovery referees they find agreeable. (Lawton's list may optionally include Grant Woodruff, whom they have already nominated.) Each party shall file any objections to the other party's list within one week of that date. At the June 21 hearing, the Court will hear argument regarding the need for a discovery referee, and will appoint one of the referees nominated by the parties if it determines that the need to do so rises to an exceptional circumstance.

2. SCV-271174, M.S. v. McGowan

Defendant TERIANN KUHLMANN's **unopposed** motion for an order compelling the warden of Mule Creek State Prison to produce defendant DANA MCGOWAN for deposition is GRANTED. The Court will adopt the proposed order submitted with the motion.

3-4. SCV-272556, County of Sonoma v. Lutge

Plaintiff's Motion to Strike Portions of Defendant's Second Amended Answer

COUNTY's motion is GRANTED. The entirety of the Second Amended Answer is stricken, with the exception of paragraphs 1, 2, and 3. Leave to amend is DENIED. Plaintiff's counsel shall submit a written order consistent with this tentative ruling and in compliance with California Rules of Court, rule 3.1312.

I. Deficiencies in the Moving Papers

A. Foundation for exhibits

In its November 14, 2023 ruling ("Prior Ruling") on COUNTY's first demurrer and motion to strike LUTGE's First Amended Answer ("FAA"), the Court commented as follows:

> "The Court notes that Defendant has attached hundreds of pages to each of his oppositions without any declaration providing foundation for the documents submitted. There is also no accompanying request for judicial notice of anything that might purportedly be judicially noticeable within these attachments. The Court will not consider any attachment that is not accompanied by a declaration providing evidentiary foundation or a request for judicial notice where appropriate."

Appended to LUTGE's memorandum in opposition to the instant motion is a "List of Exhibits" describing

seven attached documents totaling 110 pages in length. The "List of Exhibits" is not a declaration. (CCP § 2015.5.) Therefore, exactly like the exhibits accompanying LUTGE's previous opposition, these exhibits are not evidence because there is no foundation for them. The Court confirms its previous ruling: it will not consider any of LUTGE's attachments because they are accompanied by neither a declaration nor a request for judicial notice. The Court urges LUTGE's counsel to consult section 9:46 of Rutter Group, *Civil Procedure Before Trial* and form 9A:4 in *Civil Procedure Before Trial – Forms*.

C. Exhibits

Paragraph 6 of the Second Amended Answer ("SAA"), the first paragraph of the "First Affirmative Defense for Equitable Estoppel" section, states that "[t]he exhibits referred to in this First Affirmative defense as Exhibits A through L were previously attached to the Verified First Amended Answer and will be referenced in this answer but not reattached here as a method toward reducing the volume of this filing." Keeping pleadings to a reasonable size is a worthy goal, but this procedure is improper. "It is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading." (*Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 384.) "Such amended pleading supplants all prior complaints." (*O'Melia v. Adkins* (1946) 73 Cal.App.2d 143, 147.)

That principle mandates that the Court strike from the SAA, at a minimum, paragraphs 10-12, 14, 17-22, 24-27, 58-60, 62-65, 81, 105, and 120, all of which contain references to exhibits attached to the now-superseded FAA.

II. Analysis

A. LUTGE's Reliance on COUNTY's Counsel's Meet-and-Confer Letter is Misplaced.

On December 8, 2023, shortly after the SAA was filed, COUNTY's counsel sent LUTGE's counsel a letter describing the deficiencies LUTGE's counsel perceived in the SAA. The letter included this passage: "Please advise if you and your client will agree to strike all the affirmative defenses (Answer, pages 3-63), and all the Exhibits attached to the Verified Second Amended Answer." In his opposition, LUTGE points out that while pages 3-63 of the SAA contain all of the affirmative defenses, paragraph 4 of the answer, which is on page 2, "incorporate[s] herein as facts supporting the denial of the above-stated list of particular paragraphs denied." Therefore, LUTGE argues, whatever else the Court does, it cannot strike the exhibits attached to the SAA in support of the affirmative defenses, because those exhibits are incorporated into the SAA on page 2, and the letter indicated that COUNTY only objected to the content of pages 3-63. LUTGE, in other words, interprets the parenthetical "(Answer, pages 3-63)" to mean "the affirmative defenses themselves, but not the exhibits supporting them." LUTGE's underlying point appears to be that the letter failed to put him on notice that COUNTY intended to move to strike all of the exhibits attached to the SAA.

This is disingenuous. The comment in the letter that "The prior defective pleading of affirmative defenses has not been corrected by the voluminous and excessive pleading in the Second Amended Answer," coupled with the fact that COUNTY had previously moved to strike virtually all of the exhibits attached to the First Amended Answer ("FAA"), should have suggested to LUTGE that COUNTY intended to request the same relief in its next motion. Moreover, the letter says that "no basis exists for including numerous irrelevant and inflammatory 'exhibits.'" LUTGE appeals to the dictionary definition of "inflammatory," perhaps by way of demonstrating that he did not understand "inflammatory exhibits" to mean "all of the exhibits," but that is also disingenuous; that comment clearly indicates COUNTY's position that the exhibits are inappropriate in any context. The only reasonable interpretation of the letter is "we would like you to remove all of your affirmative defenses and their associated exhibits from the answer, and if you don't we'll ask the court to do it."

The Court finds that COUNTY's counsel's December 8, 2023 letter provided adequate notice of COUNTY's intentions.

B. A Motion to Strike is an Appropriate Procedure for Asking the Court to Strike Irrelevant and Improper Portions of the Answer.

LUTGE argues that a motion to strike, as distinct from a demurrer, is inappropriate here for at least two reasons. First, LUTGE refers again to the December 8, 2023 letter, and states that "COUNTY did not engage in a meet and confer process regarding a motion to strike." It is true that the letter does not explicitly say that COUNTY intended to file a motion to strike – nor, for that matter, does it explicitly say that COUNTY intended to file a demurrer. It simply asked if LUTGE would be willing to remove the affirmative defenses from his answer, leaving unsaid what COUNTY intended to do if he wouldn't. But again, it was clear that COUNTY intended to do something, and that that something would involve the Court. The Court sees no reason to interpret the letter as proper notice of a demurrer but improper notice of a motion to strike. This is particularly true in light of the Court's comment in the Previous Ruling that "though the motion to strike is mooted by the sustaining of the demurrer to the entire answer, the Court will note that the Court would have been inclined to grant the motion to strike . . . ." Under these circumstances, the instant motion cannot have come as a surprise to LUTGE. Again, the Court finds that the letter provided adequate notice to LUTGE.

Secondly, LUTGE contends that a motion to strike may not be deployed against "a failure to state facts sufficient to constitute an affirmative defense," but "should only be allowed if, for example, there were obscene, vulgar, outrageous, allegations not backed up by any form of factual support, and/or made in some horrendous, outrageous manner that the Court deems completely out of line with pleading practice." LUTGE cites to *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255 for that proposition. *Clauson* addresses a motion to strike a claim for punitive damages from a complaint under a

statute containing a specific provision for damages; the reviewing court found that the punitive-damages claim did not need to be stricken at the pleading stage, but that the plaintiffs would need to elect between punitive and statutory damages if they prevailed at trial. It has nothing to do with obscene, vulgar, outrageous, or horrendous allegations.

That said, LUTGE is correct in noting that failure to state grounds sufficient to constitute an affirmative defense is grounds for a demurrer, not for a motion to strike. (See, e.g., *Warren v. Atchison, Topeka & Santa Fe Railroad* (1971) 19 Cal.App.3d 24, 41.) However, the instant motion does not argue that the facts set forth in the exhibits to the SAA are insufficient to state an affirmative defense. Rather, it argues that "[t]here are no proper affirmative defenses raised in the SAA"; that is, that the affirmative defenses themselves should not have been pleaded at all because they are not defenses to the causes of action alleged by COUNTY. Thus, the relief requested by the motion is within the Court's discretion to "[s]trike out any irrelevant, false, or improper matter inserted in any pleading." (CCP § 436(a).) Accordingly, COUNTY's challenge to the SAA by way of a motion to strike is appropriate.

C. LUTGE's Constitutional Argument is Unpersuasive.

LUTGE appears to argue that any ruling by this Court that restricts what he may plead in his answer violates his First Amendment right to petition the government for redress of grievances. In support of that argument, he cites to *Powell v. Alexander* (1st Cir. 2004) 391 F.3d 1, 16 for the proposition the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights."

The Court acknowledges that the right to petition, and indeed all the rights guaranteed by the Bill of Rights, are of paramount importance. However, the Court disagrees with LUTGE's suggestion that the rules of pleading constitute a denial of that right. If LUTGE has a grievance, he is at liberty to petition the government, by way of its judicial branch, to redress it. As noted in the contemporaneously filed ruling on COUNTY's demurrer to LUTGE's First Amended Cross-Complaint, CCP §§ 1094.5 and 1094.6 set forth the procedure for seeking judicial review of the decision of a government agency.

D. LUTGE's Amendments to His Answer Do Not Support an Exception to the General Rule That Equitable Defenses May Not be Asserted Against Governmental Bodies.

In its Previous Ruling on LUTGE's FAA, the Court noted that "the Answer contains pages of factual allegations which allege misconduct by the County; however, the factual allegations do not support the affirmative defenses of equitable estoppel and unclean hands against the County." It was, therefore, incumbent on LUTGE to amend his answer with factual allegations that do support those defenses.

LUTGE has failed to do so. He has added to the SAA 30 pages of new allegations of misconduct by the County, with supporting exhibits. The new allegations include a substantial amount of legal

argument, but none of it, and no argument in LUTGE's opposition brief, contravenes COUNTY's argument that "neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public." (*Kajima/Ray Wilson v. Los Angeles Cnty. Metro. Transp. Auth.* (2000) 23 Cal.4th 305, 316.) With respect to the estoppel and unclean-hands defenses, LUTGE's overarching point continues to be that COUNTY, in order to cover up its prior misconduct, is actively preventing him from obtaining the building permits he needs.

That might arguably be a valid basis for the application of those equitable defenses against a private entity or an individual, but it does not address the special case of equitable defenses against the government. The point of the *Kajima* rule is that *even* if a defendant would ordinarily be estopped from alleging a cause of action, the defendant may still allege it if the defendant is a government agency and preventing it from alleging it would interfere with its ability to implement an important public policy. LUTGE's arguments all go to the "defendant would ordinarily be estopped" element of that analysis.

Pettitt v. City of Fresno (1973) 34 Cal.App.3d 813, from which the Court quoted extensively in its Prior Ruling, is instructive on this point. Mr. and Mrs. Pettitt, the plaintiffs, had purchased a property that they intended to convert to a beauty salon, in reliance on the city's assurance that the property, despite being in a residential-zoned area, had an existing right of non-conforming use as a retail establishment. The Pettitts performed substantial alterations on the building under a duly issued building permit. The city later revoked the permit on the basis that it should never have been issued in the first place because of the residential zoning and prevented the Pettitts from operating the beauty salon. The Pettitts sued the city. The trial court held that because the city had assured the Pettitts that the building could be used for retail purposes, it was "estopped from denying petitioners the right to use the entire building . . . as a beauty salon, and that respondents [City] are legally precluded from revoking or modifying the rights granted under the building permit." (*Id.* at p. 818.)

The reviewing court disagreed. It acknowledged that "[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Petitt, supra*, 34 Cal.App.3d at p. 820, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497.)

However, it found that principle inapplicable because of the "vital public interest" in enforcement of zoning laws. (*Id.* at p. 822.) The court noted that "[a]ll residents of the community have a protectable property and personal interest in maintaining the character of the area," and that

> "[t]hese protectable interests further manifest themselves in the preservation of land values, in esthetic considerations and in the desire to increase safety by lowering traffic volume. To hold that the City can be estopped would not punish the City but it would assuredly injure the area residents, who in no way can be held responsible for the City's mistake."

(*Id.* at p. 823.) In other words, although the government had behaved badly to the Pettitts as the result of its own mistake, and despite the fact that the Pettitts had expended considerable money and effort in reliance on the government's mistaken assurances, the general public's interests in the government taking the action that it did outweighed the Pettitts' interest in running a retail establishment in a residential district.

The laws requiring abatement of conditions like those detailed in the complaint in the instant matter are at least as vital to the public interest as zoning laws. Therefore, *Pettitt* is the controlling authority here. The Court finds that the government's interest in abating such conditions is sufficiently aligned with the general public's "protectable property and personal interest" to outweigh LUTGE's interest in asserting an equitable defense.

E. LUTGE Fails to Show That Tort Defenses are Available Here.

LUTGE correctly points out that COUNTY's argument regarding the unavailability of the assumption of risk and failure to mitigate defenses in the instant matter is devoid of citation to authority. However, the Court's rejection of those defenses in its Prior Ruling was not. The Court ruled as follows:

> "Assumption of the risk is an affirmative defense to negligence, as it is an exception to the rule of duty. (See *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1197.) There is no legal authority for asserting it as an affirmative defense to the causes of action raised by the County. LUTGE has not attempted to provide any argument whatsoever regarding the legal sufficiency of this defense. Failure to mitigate also applies in tort actions and provides that the COUNTY cannot be compensated for damages he could have avoided. (See *Green v. Smith* (1968) 261 Cal.App.2d 392, 396.) Again, there is no legal authority for asserting this as a defense to the causes of action alleged by the County and the LUTGE has not attempted to provide any."

Lackner explains that the doctrine of assumption of risk is an exception to the general rule that a property owner has a duty to all visitors "to use due care to eliminate dangerous conditions on his or her property." (*Lackner, supra,* 135 Cal.App.4th at p. 1197.) Duty is one of the main prongs of a cause of action for negligence, but it is irrelevant here because COUNTY does not allege that LUTGE was negligent.

Green explains that the doctrine of mitigation of damages "applies in tort, willful as well as negligent," and provides that "[a] plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green, supra,* 261 Cal.App.2d at p. 396.) The doctrine

does not apply here because this is not a tort case, and more particularly because COUNTY is not seeking damages. "Damages" means "compensation for a loss or injury suffered." (Black's Law Dict. (4th ed. 1968) p. 466, col. 2.)

LUTGE points out that several paragraphs of the complaint, as well as the prayer for relief, request costs, fees, and civil penalties pursuant to the Sonoma County Code. But COUNTY does not allege that it has suffered a loss or injury; it alleges that LUTGE has violated the Sonoma County Code and must therefore pay the penalties prescribed by the Code for that violation. Therefore, the COUNTY does not seek damages, and therefore had no duty to mitigate them.

III. Conclusion

LUTGE's first and second affirmative defenses are stricken on the basis that they are equitable defenses that may not be maintained against a government entity. LUTGE's third and fourth affirmative defenses are stricken on the basis that they apply only to tort causes of action, and that COUNTY has not alleged such a cause of action. LUTGE's fifth affirmative defense, the due process claim under the California Constitution, is stricken pursuant to LUTGE's stipulation.

Leave to amend is DENIED. The situation here is not that LUTGE's affirmative defenses are improperly pleaded. The situation is one that cannot be cured by amendment: that the defenses are simply inapplicable to this case. Plaintiff's counsel shall submit a written order consistent with this tentative ruling and in compliance with California Rules of Court, rule 3.1312.

Plaintiff/Cross-Defendant's Demurrer to First Amended Cross-Complaint

Cross-defendant's request for judicial notice is GRANTED. The demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Cross-defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with California Rules of Court, rule 3.1312.

I. Deficiencies in the Moving Papers

C. Foundation for exhibits

In its November 14, 2023 ruling on COUNTY's demurrer to LUTGE's original cross-complaint ("Prior Ruling"), the Court commented as follows:

> "The Court notes that [LUTGE] has attached several pages of attachments to his oppositions without any declaration providing foundation for the documents submitted. There is also no accompanying request for judicial notice of anything that might be judicially noticeable within them. The Court will not consider any attachment that is not accompanied by a declaration providing evidentiary foundation or a request for judicial notice where appropriate."

Appended to LUTGE's memorandum in opposition to the instant demurrer is a "List of Exhibits" describing three attached documents totaling 51 pages in length. The "List of Exhibits" is not a

declaration. (CCP § 2015.5.) Therefore, exactly like the exhibits accompanying LUTGE's previous opposition, these exhibits are not evidence because there is no foundation for them. The Court confirms its previous ruling: it will not consider any of LUTGE's attachments because they are accompanied by neither a declaration nor a request for judicial notice. The Court urges LUTGE's counsel to consult section 9:46 of Rutter Group, *Civil Procedure Before Trial* and form 9A:4 in *Civil Procedure Before Trial – Forms*.

D. Exhibits

1. Exhibits A through L

Paragraph 5 of the First Amended Cross-Complaint ("FACC") states that LUTGE "has simultaneously filed and served an Answer concurrently with this cross complaint. The series of statements and allegations made in the answer and the series of exhibits A through L thereto are incorporated into this cross-complaint and for sake of brevity will not be restated here." A page headed "List of Exhibits" following the signature page of the FACC states, without verification, that Exhibits A through L "were all attached to the previous version of the First Amended answer, and are not being attached hereto." It is unclear whether LUTGE means that Exhibits A through L are attached to the original answer (that is, "the previous version of the First Amended answer") or the Second Amended Answer, that being the one filed contemporaneously with the FACC. It does not matter, though, because neither would be an effective way of attaching exhibits to a pleading. The original answer no longer exists because it was superseded by the First Amended Answer, which in turn was superseded by the Second Amended Answer, and "[i]t is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading." (*Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 384.) "Such amended pleading supplants all prior complaints." (*O'Melia v. Adkins* (1946) 73 Cal.App.2d 143, 147.) Exhibits A through L are not, in fact, attached to the Second Amended Answer; that pleading purports to incorporate them by reference to the First Amended Answer, which is improper for the same reason. The Court will not consider Exhibits A through L.

2. Exhibit M

The "List of Exhibits" page states that Exhibit M "was attached to the previous version of the Cross-Complaint, and [is] not being attached hereto." Just as with the various versions of the answer, the previous version of the Cross-Complaint is superseded by the current version, and it is therefore improper to incorporate any part of it by reference. The Court will not consider Exhibit M.

3. Exhibits N through Y

The "List of Exhibits" page states that Exhibits N through Y "were attached to the Second Amended Answer, and are not being attached hereto." The Court struck all of those exhibits in its ruling, filed contemporaneously with this one, on COUNTY's motion to strike the Second Amended Answer.

However, because that ruling was not yet in effect when LUTGE filed the FACC, the Court will consider Exhibits N through Y.

II. COUNTY's Request for Judicial Notice

COUNTY's request for judicial notice of the transcript of the Sonoma County Assessment Board hearing on August 4, 2023 (Exhibit 10) and the grant deed for the subject property are GRANTED.

III. Standard on Demurrer

A demurrer tests whether the complaint sufficiently states a valid cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) Complaints are read as a whole, in context and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*Rakestraw v. California Physicians ' Service* (2000) 81 Ca1.App.4th 39, 43; see also *South Shore Land Co. v. Petersen* (1964) 226 Ca1.App.2d 725, 732.) Matters which may be judicially noticed are also considered. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

Analysis

E. First cause of action for declaratory relief

In its Prior Ruling, the Court observed that "Based on the factual allegations of the Cross-Complaint, it is clear that the essence of this cause of action is to seek the Court's review of the administrative hearing and ultimate decision in this matter. However, Cross-Complainant is barred from doing so. Judicial review of any decision of a local agency may be had only by the procedures pr[e]scribed in CCP §§ 1094.5 and 1094.6." The Court cited authority for the proposition that "an action for declaratory relief is not appropriate to review an administrative decision." (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249.) The Court granted Plaintiff's demurrer to the first cause of action on that basis, but "g[a]ve cross-complainant an opportunity to amend as there have been no prior opportunities for amendment."

There has now been such an opportunity. Despite the 17 pages of allegations LUTGE has added to his first cause of action for declaratory relief (FACC ¶¶ 74 et seq.), the Court remains unpersuaded that that cause of action is anything other than an invitation to rule on the correctness and propriety of an administrative action by the Sonoma County agency that issues building permits. The new allegations begin with several pages of direct quotations from the complaint in Plaintiff's underlying lawsuit. LUTGE then alleges that the "series of allegations and statements made in his Answer to the complaint . . . show that there is still in existence an actual controversy between the parties over their respective rights and duties *arising from the administrative law order* . . . ." (FACC ¶ 84, emphasis supplied.) The ensuing several paragraphs discuss LUTGE's stated desire to resolve this case, his proposals for doing so,

and his "overall intentions . . . to legalize [the property]." The FACC then discusses the conflict between LUTGE and COUNTY over whether the 2023 or 2022 version of the building codes should apply, and the impasse resulting from that disagreement. (FACC ¶¶ 90-94.) This is a perfect example of the sort of agency action that this Court can review only pursuant to the procedures set forth in CCP §§ 1094.5 and 1094.6.

The FACC then devotes several pages to discussing COUNTY's culpability for installing a drainage system that connects the septic tanks on the subject property to the Petaluma River, resulting in several negative events including an e. coli outbreak and the death of a child in Novato. Regarding those allegations, the Court notes that in an Assessment Appeals Board hearing on August 4, 2023, LUTGE stated that he "[didn't] know the history" of the installation of the drainage system, which casts grave doubt on his repeated allegations that COUNTY installed it. (Bruggiser dec, Exh. 10, p. 22.)

The FACC then proposes several other reasons why the cause of action for declaratory relief is permissible. In paragraph 114, it suggests that it is justified by the First Amendment guarantee of the right to petition the government for redress of grievances. The Court recognizes that there is such a constitutional right, but agrees with COUNTY that it "does not fashion a declaratory relief action where one does not otherwise exist." If LUTGE wishes to petition the government for redress of his grievances against COUNTY's administrative agencies, CCP §§ 1094.5 and 1094.6 set forth the procedure for doing so. In paragraph 116, the FACC notes that allowing LUTGE to proceed with his declaratory relief action would serve the interest of judicial economy because it "does not add any further burdens onto the parties or onto the court." While that may or may not be true, the fact remains that the California Supreme Court has held that "an action for declaratory relief is not appropriate to review an administrative decision." (*State of California, supra,* 12 Cal.3d at p. 249.) "Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction," irrespective of whether doing so is inefficient. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Finally, paragraph 117 posits that a declaratory relief judgment is necessary because "justice demands a full declaration by the Court of what the County of Sonoma has done in this case," accompanied by a reference to COUNTY's "effort to cover up its installation of a rainwater system interconnected with the septic system [that] did in fact cause the death of at least one female juvenile in Novato, 49 e. coli sicknesses, a spike in e. coli, and further deaths or sicknesses in Sonoma County that have not yet been discovered . . . ." The Court agrees that if there is any truth to these allegations – a point upon which the Court takes no position – then the interests of justice would be served by their being made public. However, LUTGE has provided no authority for the proposition that making them public is a proper function of this Court. It would be better suited to an investigative journalist.

Because the Court finds that the first cause of action for declaratory relief is barred by the principles described above, it need not and does not reach COUNTY's remaining contentions regarding that cause of action.

F. Second cause of action for inverse condemnation

The FACC reframes the second cause of action as a "nuisance tort inverse condemnation claim for damages pursuant to Article I, section 19(a) of the California Constitution." (FACC ¶ 121; see also ¶ 142 ["This is the first time Mr. Lutge has raised a nuisance tort-based claim for inverse condemnation"].) The referenced section of the Constitution provides that "Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." The gravamen of the cause of action is that by "installing the rainwater drainage pipe that the County decided and constructed itself, off the record, off the radar, with no public easement noted, and/or no official documentation . . . which interconnected through a pipe system interconnection with the three septic tanks that service buildings A B and C at the subject property . . . ," COUNTY effectively took or damaged LUTGE's property. (FACC ¶ 122.)

1. <u>Although LUTGE Provides No Evidence That COUNTY Installed the Drainage Pipe, the Allegations are Sufficient to Survive Demurrer.</u>

To begin with, the idea that COUNTY installed the drainage line is entirely speculative. Again, LUTGE conceded at his Assessment Appeals Board hearing that he "[didn't] know the history" of the installation of the drainage system. (Bruggiser dec, Exh. 10, p. 22.) Nor does LUTGE allege that the drainage system itself is the nuisance; rather, he posits that it became a nuisance when it was connected to the septic tanks on the subject property, and he states in the FACC that he does not know when that happened. (FACC ¶ 124.) The notion that COUNTY was responsible for that connection is even more speculative than the notion that COUNTY installed the drainage line in the first place. LUTGE does not even suggest the COUNTY installed the septic tanks, and it is likely that whoever did install them connected them to the existing rainwater drainage system in order to avoid the expense of installing a leach field. That supposition is borne out by LUTGE's statement at the hearing that "with all my digging, there's just never been a leach field." (Bruggiser dec, Exh. 10, p. 22.)

Moreover, "damages are an essential element of a tort cause of action." (*Star Pacific Investments v. Oro Ranch* (1981) 121 Cal.App.3d 447, 457.) LUTGE's only allegation of damages is, in essence, that the value of his property was diminished by COUNTY's wrongful installation interconnection of the drainage line and the septic tanks. This will likely be difficult for him to prove because, as COUNTY notes, its "Assessment Appeals Board already agreed to lower the assessed value of Lutge's property in the amount of the estimated replacement costs based on his contention that he did not know about the existence of the pipe when he purchased the property from Wells Fargo Bank."

All of that being said, the question at the demurrer stage is not whether the allegations in the complaint can be proved at trial; it is whether the causes of action are supported by adequate allegations. Here, the Court finds that the second cause of action meets that standard.

2. The Cause of Action is Time-barred.

As LUTGE recognizes, the limitations period applicable to this cause of action is three years. (FACC ¶ 127, citing CCP § 338(j).) He alleges that he learned of the issues underlying his nuisance-tort claim from a "Soils Engineer report: April 27, 2020." Emergency Rule 9, related to the COVID-19 pandemic, tolled all civil statutes of limitations from April 6, 2020 to October 1, 2020. Thus, LUTGE's deadline to file the second cause of action was October 1, 2023.

a. Relation back

LUTGE filed his original cross-complaint on April 7, 2023. He filed the FACC at issue here on November 29, 2023. Thus, the cause of action is not time-barred if it relates back to the original cross-complaint. "An amended complaint relates back to an earlier complaint if it is based on the same general set of facts, even if the plaintiff alleges a different legal theory or new cause of action. [Citations.] However, the doctrine will not apply if the 'the plaintiff seeks by amendment to recover upon a set of facts entirely unrelated to those pleaded in the original complaint.'" (*Pointe San Diego Residential Community v. Procopio, Cory, Hargreaves & Savitch* (2011) 195 Cal.App.4th 265, 277.) The central question, then, is whether the second cause of action is based on "the same general set of facts" as the cause of action it amends. The FACC explicitly states that "This is the first time Mr. Lutge has raised a nuisance tort-based claim for inverse condemnation." (FACC ¶ 142.) That is undoubtedly true.

Despite the fact that the second cause of action in the FACC replaces a cause of action in the original cross-complaint with the same heading, "Second Cause of Action for Inverse Condemnation Under Article I, Section 19 of the California Constitution," there is no question that the tort theory Plaintiff now alleges is different from the straightforward inverse-condemnation theory he alleged in his original cross-complaint. The gravamen of the latter cause of action was that "the County's conduct and behavior described in the First Cause of Action is in fact a substantial factor in causing a huge diminution in value to Lutge's use of" the subject property. (Cross-Complaint ¶ 78.)

While the first cause of action did mention the interconnection between the drainage line and the septic system, it was primarily concerned with COUNTY's failure to issue building permits. The second cause of action in the original cross-complaint alleged no additional facts beyond those associated with its first cause of action, but depended on the allegation that "The facts stated above with respect to the First Cause of Action for declaratory relief . . . show a basis for Cross-Complainant Lutge's entitlement to damages or compensation for inverse condemnation . . . ." (Cross-Complaint ¶ 77.)

In marked contrast, the second cause of action in the FACC seeks "damages arising from the County's nuisance tort in installing the rainwater drainage pipe that the County decided and constructed itself, . . . which interconnected through a pipe system interconnection with the three septic tanks" on the subject property. (FACC ¶ 122.) That is a very different legal theory than the one in the original cross-complaint.

Plaintiff follows that statement with some 33 paragraphs of factual allegations. (FACC ¶¶ 124-156.) None of the facts alleged in that section of the FACC were alleged in the original cross-complaint. The Court, therefore, disagrees with LUTGE's contention that the second cause of action in the FACC "arises from the same basic nexus of operative facts as set forth in the initial version of the cross-complaint." (FACC ¶ 147.) Rather, the Court finds that it "seeks . . . to recover upon a set of facts entirely unrelated to those pleaded in the original [cross-]complaint." (*Pointe San Diego, supra,* 195 Cal.App.4th at p. 277.) Accordingly, the Court holds that the relation-back doctrine does not excuse the filing of the second cause of action outside the applicable limitations period.

b. Continuous wrongdoing doctrine

In the alternative, LUTGE suggests that the statute of limitations is tolled by the "continuous tort/continuous wrongdoing doctrine." (FACC ¶ 135.) This is based on his assertion that COUNTY "is taking bizarre steps to block any attempt by Mr. Lutge to actually bring about a repair and elimination of the rainwater drainage septic interconnection installed by the County of Sonoma." (*Ibid.*)

That principle might conceivably have applied to the inverse condemnation claim in the original cross-complaint, since the nature of the inverse condemnation alleged there was COUNTY's ongoing failure to issue building permits. But here, the alleged tort consists of COUNTY's alleged conduct in installing the drainage/septic system in the first place. That is not an allegation of a continuing tort; it is an allegation of a tort that occurred once, at some distinct but unknown time in the past (FACC ¶ 124), which Plaintiff discovered on April 27, 2020. Therefore, the "continuous wrongdoing doctrine" also does not excuse the late filing of the second cause of action.

c. Judicial estoppel

LUTGE argues that COUNTY is judicially estopped from asserting that the second cause of action is time-barred because of a comment made by an attorney with the County Counsel's office at the November 8, 2023 hearing on the demurrer to the original cross-complaint. When asked by the Court to comment "on the question of leave to amend on the cross-complaint," the attorney responded, among other things, that "it's kind of premature to bring this forward at this point." (Opposition, Exh. C, p. 29.) This immediately followed counsel's comment that "the really key issue with this new argument that Mr. Franck and Mr. Lutge are trying to fashion, it still goes back to the permit, right?" (*Id.* at p. 28.) In other words, counsel's point was that amending the cross-complaint in a manner that "goes back to the permit"

would have been premature, but as noted above, the new cause of action very much does *not* relate to the permit or the permitting process; it relates to the County's alleged malfeasance in connecting the drainage system to the septic tanks. Thus, counsel did not say that the actual cause of action alleged by Plaintiff in the FACC was premature.

Even if she had, that was nothing more than a comment at a court hearing by a lawyer for an adverse party. In no way did COUNTY prevent Plaintiff from filing the FACC after the Court granted leave to do so. Plaintiff duly filed it on November 29, 2023, three weeks after the hearing at which counsel made the "premature" comment. The Court has no reason to suspect that that comment had any effect on Plaintiff whatsoever. Accordingly, there is no basis for a finding of estoppel.

IV. Conclusion

It is obvious that LUTGE feels strongly about this issue, and his comments that he "started all this work with the death of his own daughter, who was raped here at this subject site in early 2020" and that his "intent and desire [is] to create a crime memorial for his daughter" make it easy to understand why. (FACC ¶¶ 63, 90.) But however much sympathy the Court may have for him, it must still follow the law. Under the law, LUTGE's cross-complaint cannot be maintained.

The demurrer is SUSTAINED. Leave to amend is denied. Cross-defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with California Rules of Court, rule 3.1312.