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6
7 **SUPERIOR COURT OF CALIFORNIA**
8 **COUNTY OF LOS ANGELES, WEST DISTRICT**
9

10 JENNIFER FOSTER)
11 Plaintiff,)

12 -vs.-)

13)
14)
15 WESLEY BROWN aka WESLEY JACK)
16 BROWN aka WESLEY I. BROWN, an)
17 individual; REHAB INTERNATIONAL, INC., a)
18 Corporation (aka REHAB INTERNATIONAL,)
19 LLC);)
20 DAVID FRANKLIN, an individual (previously)
21 misnamed as "David Fugihara");)
22 SUNSET RECOVERY CENTER, a business)
23 organization of unknown type;)
24 CHRISTINA THOMPSON, an individual;)
25 JASON SMITH, an individual;)
26 WILLIAM FOSTER, an individual; and DOES 1)
27 through 30, inclusive)

28 Defendants.)

) **Case No.: BC123456**
) *[Complaint Filed July 2,, 2012]*
) *Assigned for all purposes to the*
) *Honorable John Smith,*
) **Related Case No.: EC123456**
) *[Complaint Filed November 5, 2011]*

) **NOTICE OF DEMURRER AND**
) **DEMURRER OF DEFENDANT JASON**
) **SMITH TO PLAINTIFF'S SECOND**
) **AMENDED COMPLAINT;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES**
) **[C.C.P. §§ 430.10(e), (f)]**

) **Filed Concurrently With:**
) **REQUEST FOR JUDICIAL NOTICE**

) **Lodged Concurrently With:**
) **[PROPOSED] ORDER**

) **DATE: June 2, 2013**
) **TIME: 8:30 a.m.**
) **DEPT: 1**

1 **TO THIS HONORABLE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF**
2 **RECORD:**

3 **PLEASE TAKE NOTICE** that on **June 2, 2013**, at **8:30 a.m.**, or as soon thereafter as the
4 matter may be heard in Department “1” of the above-entitled Court located at 123 East Main
5 Street, Los Angeles, California 91234, Defendant JASON SMITH (hereinafter referred to as
6 “defendant” or “Smith”), will demur to the Second Amended Complaint of plaintiff JENNIFER
7 FOSTER (hereinafter referred to as “plaintiff”).

8 This demurrer is brought to the Second, Third, Fifth, Sixth, Seventh and Eighth Causes of
9 Action of plaintiff’s Second Amended Complaint as each and every cause of action therein fails to
10 state facts sufficient to constitute a cause of action, pursuant to Code of Civil Procedure section
11 430.10(e). This demurrer is brought to the Fifth, Sixth, Seventh, and Eighth Causes of Action on
12 the additional ground that those causes of action are uncertain as to Smith, pursuant to Code of
13 Civil Procedure section 430.10(f).

14 This demurrer is based upon this Notice of Demurrer and Demurrer, the attached
15 Memorandum of Points and Authorities, the Request for Judicial Notice submitted herewith, the
16 pleadings on file in this action, the documents and records on file herein, and all matters that may
17 be properly brought before the Court at the time of the hearing on said motion.

18 Dated: *April 11, 2013*

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21 By: BAYLEIGH J. PETTIGREW, ESQ.
22 Attorneys for Defendant
23 JASON SMITH
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DEMURRER

DEMURRER TO THE SECOND CAUSE OF ACTION

(Fraud – Misrepresentation)

1. The Second Cause of Action for fraud (misrepresentation) does not state facts sufficient to constitute a cause of action against this answering defendant. (Code Civ. Proc., § 430.10(e).)

DEMURRER TO THE THIRD CAUSE OF ACTION

(Fraud – Concealment)

2. The Third Cause of Action for fraud (concealment) does not state facts sufficient to constitute a cause of action against this answering defendant. (Code Civ. Proc., § 430.10(e).)

DEMURRER TO THE FIFTH CAUSE OF ACTION

(Financial and Dependent Adult Abuse)

(Welfare & Institutions Code Sections 15600 *et seq.*)

3. The Fifth Cause of Action for “financial and dependent adult abuse” does not state facts sufficient to constitute a cause of action against this answering defendant. (Code Civ. Proc., § 430.10(e).)

4. The Fifth Cause of Action for “financial and dependent adult abuse” is uncertain. (Code Civ. Proc., § 430.10(f).)

DEMURRER TO THE SIXTH CAUSE OF ACTION

(Drug Dealer Liability)

5. The Sixth Cause of Action for drug dealer liability does not state facts sufficient to constitute a cause of action against this answering defendant. (Code Civ. Proc., § 430.10(e).)

6. The Sixth Cause of Action for drug dealer liability is uncertain. (Code Civ. Proc., § 430.10(f).)

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DEMURRER TO THE SEVENTH CAUSE OF ACTION

(Wrongful Death)

7. The Seventh Cause of Action for wrongful death does not state facts sufficient to constitute a cause of action against this answering defendant. (Code Civ. Proc., § 430.10(e).)

8. The Seventh Cause of Action for wrongful death is uncertain. (Code Civ. Proc., § 430.10(f).)

DEMURRER TO THE EIGHTH CAUSE OF ACTION

(Unfair Business Practices)

(Business & Professions Code Sections 17200 et seq.)

9. The Eighth Cause of Action for unfair business practices does not state facts sufficient to constitute a cause of action against this answering defendant. (Code Civ. Proc., § 430.10(e).)

10. The Eighth Cause of Action for unfair business practices is uncertain. (Code Civ. Proc., § 430.10(f).)

Dated: *March 11, 2013*

MASSERMAN & DUCEY, LLP

By:

BAYLEIGH J. PETTIGREW, ESQ.
Attorneys for Defendant
JASON SMITH

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The instant lawsuit arises out of claims by plaintiff, JENNIFER FOSTER (“plaintiff”) related to the death of plaintiff’s daughter, Anne Foster (“Anne”). Defendant, JASON SMITH (“defendant” or “Smith”) happened to own a home on Windingwood Avenue in Studio City (the “subject property”) where Anne tragically passed away on November 21, 2010 after a drug overdose. Plaintiff’s Second Amended Complaint (“SAC”) alleges no condition on the subject property, and alleges no conduct on the part of Smith, that gives rise to a duty of care owed by Smith to plaintiff or Anne. Plaintiff’s pleading is also devoid of any factual allegations, based on a reasonable interpretation of the entirety of the SAC which are accepted as true for purposes of this demurrer, that any conduct on the part of Smith was the proximate cause of the injuries alleged in the SAC.

In her third attempt to assert a cause of action against Smith, plaintiff still does not allege any statement made by Smith or any fact concealed by Smith that could give rise to causes of action for fraud based on misrepresentation and concealment (Second and Third). Smith is not alleged to have engaged in any conduct that gives rise to plaintiff’s cause of action for wrongful death (Seventh).

In two prior verified complaints, plaintiff has not alleged that Smith is a “care custodian” or owed any legal duty to Anne or plaintiff pursuant to her cause of action for financial and dependent adult abuse (Fifth).¹ Instead, plaintiff’s allegations in that regard are made solely against defendant WESLEY BROWN (“Brown”) and his business, defendant REHAB INTERNATIONAL, INC. (“RII”), who are alleged to have cared for Anne as an “interventionist”; and against defendants DAVID FRANKLIN (“Franklin”) and SUNSET RECOVERY CENTER

¹ The statute said to give rise to such duties is Welfare & Institutions Code sections 15600 *et seq.* (hereinafter, the “Dependent Adult Protection Act”).

1 (“SRC”). For the first time, plaintiff names Smith and defendant CHRISTINA THOMPSON
2 (“Thompson”) as “care custodians” by virtue of their home ownership. (SAC, ¶ 10.) This Court
3 may disregard allegations of the current pleading that are inconsistent with allegations of prior
4 pleadings and are inconsistent with the remaining allegations of the SAC, which in this case are
5 that Brown, as an “interventionist,” is the only “unlicensed care custodian” against whom plaintiff
6 is attempting to assert this cause of action. (SAC, ¶¶ 11-12.)²

7 There are no factual allegations supporting the conclusion that Smith “knowingly
8 participated in the marketing of illegal controlled substances,” as alleged in plaintiff’s new cause
9 of action for drug dealer liability. Moreover, plaintiff’s attempt to add this cause of action after
10 the sustaining of the prior demurrer to her First Amended Complaint (“FAC”) by Franklin and
11 SRC is impermissible.³ There are no allegations that can support a cause of action against Smith
12 for unfair business practices based on inconsistent allegations in the SAC that all of the defendants
13 were engaged by plaintiff as an “interventionist” rather than only Brown and RII, as alleged in the
14 FAC and throughout the remainder of the SAC.⁴ Significantly, no injunctive relief is sought
15 against Smith with respect to this cause of action, for the obvious reason that Smith engaged in no
16 unfair business practices.

17 The SAC fails to state facts sufficient to constitute a cause of action against defendant and
18 is uncertain. Code Civ. Proc., § 430.10(e), (f). Accordingly, defendant Jason Smith’s demurrer to
19 the SAC should be sustained, without leave to amend.

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23 ² *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 (“any
24 inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may
disregard the inconsistent allegations”).

25 ³ *People v. Clausen* (1967) 248 Cal.App.2d 770, 785-786.

26 ⁴ Compare SAC, ¶ 11 with SAC, ¶ 58; compare FAC, ¶¶ 32-33 with SAC, ¶¶ 35-36 (changing
27 allegations from Brown and RII, only, to all defendants as “interventionists”). Plaintiff cannot
have it both ways. Either Brown and RII were or were not retained as an “interventionist,” as
alleged against only those defendants in the First Cause of Action.

1 II.

2 **ALLEGATIONS OF PLAINTIFF'S SECOND AMENDED COMPLAINT**

3 The SAC was filed on February 8, 2013 and alleges eight (8) causes of action, six (6) of
4 which are set forth against Smith: Fraud (Misrepresentation), Fraud (Concealment), Financial and
5 Dependent Adult Abuse, Drug Dealer Liability, Wrongful Death, and Unfair Business Practices.
6 The defendants include Brown, an “interventionist,” Brown’s business RII, Franklin and SRC,
7 defendant CHRISTINA THOMPSON (“Thompson”), and Smith. The SAC contains a new
8 allegation that defendants Brown, RII, Thompson, and Smith each “acted as a co-joint venturer”
9 with the other co-defendants without any further explanation or facts. (SAC, ¶¶ 2, 5-7.) For the
10 first time, plaintiff inserts the names of Smith and Thompson, two property owners, as “care
11 custodians” along with the alleged “interventionist,” Brown and RII. (SAC, ¶ 10.)

12 The gravamen of the SAC is that plaintiff and Anne sought assistance for Anne’s drug
13 dependency from Brown and RII, and paid money to those defendants to assist Anne. Plaintiff
14 alleges Brown and RII were in business as an “interventionist” and undertook to provide
15 psychological and medical services to persons suffering from drug and alcohol dependency, such
16 as Anne. (SAC, ¶¶ 11-12.)

17 As to Smith, plaintiff alleges he and Christina Thompson owned houses or “venues” where
18 Brown’s clients, including Anne, stayed. (SAC, ¶ 13.)⁵ Plaintiff alleges that unlicensed
19 caregivers or “sober companions” were made available to “drug dependent persons in need.” (*Id.*)
20 Plaintiff alleges that Smith knew that the “co-defendants, including Brown, were interventionists”;
21 knew that Anne was entrusted to the care of those co-defendants; knew that Anne “and other such
22 persons were at other times supervised by untrained and unqualified care givers”; knew that Anne
23 and others were provided with marijuana, heroin and other drugs; and knew that co-defendants
24 were using “their homes, apartments or guest houses” where Brown’s and RII’s clients would be
25 housed during treatment. (SAC, ¶ 14.)

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27 ⁵ This allegation, like numerous allegations in the verified SAC, is made upon information and
28 belief.

1 Plaintiff alleges that Smith “agreed to assist” Brown in “his illegal and wrongful activity”
2 by offering his house as a “venue” for Brown’s clients “in return for substantial payments.”
3 (SAC, ¶ 15.) However, *no payments are alleged from Brown to Smith in the SAC*. Plaintiff
4 vaguely alleges that “Smith had in the past also received money from Brown to provide living
5 accommodations to Brown’s clientele, and in anticipation of additional revenues from such
6 arrangements with Brown, in 2008 Smith purchased or leased a second residence on
7 Windingwood Drive in Studio City and made it available to Brown’s clients also for a substantial
8 share of Brown’s profit.” (*Id.*) Without alleging dates, amounts, facts regarding alleged
9 payments, or any bearing a payment would have on plaintiff’s injuries, plaintiff alleges that sums
10 were paid to Brown “and then to Thompson and Smith” and were “typically paid on behalf of the
11 dependent persons by family, or by the subjects themselves.” (SAC, ¶ 16.)

12 Plaintiff alleges that Brown and RII “placed Anne at Smith’s home where one James
13 Davidson had then been living for approximately 2-3 months.” (SAC, ¶ 20.) It is alleged Anne
14 lived at the subject property from July 16, 2010 to November 21, 2010, when she died there of a
15 drug overdose. (SAC, ¶¶ 20-21.) It is alleged that immediately before her death plaintiff planned
16 to move Anne to the Betty Ford Clinic when Brown or Davidson – not Smith – allowed Anne to
17 leave the property and after her return to be up until early in the morning. (SAC, ¶ 21.) *Plaintiff*
18 *alleges inconsistently* that defendant Brown “came to the Smith property with heroin” or that
19 Anne obtained heroin on her own outside the residence. (SAC, ¶ 21.) *Plaintiff alleges*
20 *inconsistently* that Brown, Smith or Davidson injected Anne or that Anne injected herself with
21 heroin. (SAC, ¶ 21.)

22 Plaintiff alleges Smith and the other defendants had a duty of care to intervene in Anne’s
23 life in a positive way and to provide services by competent, trained caregivers. (SAC, ¶ 22.)
24 Plaintiff alleges that “each defendant had a further fiduciary duty to act only in Anne’s interest.”
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1 (SAC, ¶ 37.) Plaintiff alleges that defendants breached said duties and plaintiff was damaged in
2 an amount of \$222,000 for sums she paid to defendant Brown, only. (SAC, ¶¶ 23-24.)⁶

3 **III.**

4 **LEGAL STANDARDS APPLICABLE TO DEMURRER**

5 A complaint must contain a statement of the facts constituting the cause of action, in
6 ordinary and concise language. Code Civ. Proc., §425.10(a). A demurrer will lie where a
7 complaint “does not state facts sufficient to constitute a cause of action.” Code Civ. Proc., §
8 430.10(e). A general demurrer “searches the complaint” for a failure to state a cause of action as a
9 matter of law. *Stanton Road Assoc. v. Pacific Employees Ins. Co.* (1995) 36 Cal.App.4th 333,
10 340. On demurrer, courts do “not assume the truth of contentions, deductions, or conclusions of
11 fact or law.” *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *see also*
12 *Moore v. Conliffe* (1994) 7 Cal.4th 634, 638; *Adelman v. Associated International Ins. Co.* (2001)
13 90 Cal.App.4th 352, 359. When a court reviews the sufficiency of a complaint against a general
14 demurrer, the court will “give the complaint a reasonable interpretation, reading it as a whole and
15 its parts in their context.” *Kurtz, Richards, Wilson & Co., Inc. v. Insurance Communicators*
16 *Marketing Corp.* (1993) 12 Cal.App.4th 1249, 1256 (quoting *Blank v. Kirwan* (1985) 39 Cal.3d
17 311, 318 [citations omitted]). The Court must determine “whether there is a reasonable possibility
18 that the defect [in the pleading] can be cured by amendment. ... The burden of proving such
19 reasonable possibility is squarely on the plaintiff.” *Blank, supra*, 39 Cal.3d at p. 318 (citations
20 omitted).

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27 ⁶ The amounts transferred by plaintiff to Brown are set forth specifically in Paragraph 31 of the
SAC. Again, no amounts are alleged to have been paid by plaintiff to Smith. (SAC, ¶ 31.A-N.)

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IV.

THE SECOND AMENDED COMPLAINT FAILS TO ESTABLISH ANY KIND OF JOINT VENTURE LIABILITY BETWEEN ANY OF THE OTHER NAMED DEFENDANTS AND DEFENDANT SMITH

After two prior complaints, plaintiff for the first time alleges upon information and belief that Smith acted in the capacity of a “co-joint venture with his co-defendants” and “”became directly involved in conduct which caused injury to Anne” “as described hereinafter.” (SAC, ¶ 6.) The elements of a joint venture are (1) joint control over the venture by the members; (2) the sharing of the profits of the undertaking; and (3) the ownership interest of each participant in the enterprise. *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370; *Kaljjan v. Menezes* (1995) 36 Cal.App.4th 573, 586.

However, as set forth in this demurrer to the causes of action alleged against Smith, the SAC offers no allegations that Smith and any of the other named defendants had any kind of joint participation in the management and control of each of their respective businesses or, in the case of Smith and Thompson, in their capacity as property owners. There are no allegations that Smith or any other defendant had “joint control” over Brown’s business. The SAC is devoid of allegations that Smith shared profits from any payments alleged to have been made by plaintiff to Brown and RII, or had any ownership interest whatsoever in Brown/RII’s business as an interventionist. Accordingly, the SAC on its face fails to allege any facts that support a joint venture between Smith and the other co-defendants.

V.

PLAINTIFF’S SECOND AND THIRD CAUSES OF ACTION FOR FRAUD MUST FAIL BECAUSE NO STATEMENTS OR FACT CONCEALED FROM PLAINTIFF ARE ALLEGED AGAINST SMITH

“The tort of deceit or fraud requires “(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e.,

1 to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *Engalla v. Permanente*
2 *Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 (internal quotation marks and citations omitted);
3 *see also Molko v. Holy Spirit Ass’n* (1988) 46 Cal.3d 1092, 1108. “Deceit” must be the suggestion
4 as a fact of that which is not true, the assertion of a fact of that which is not true by one who has
5 no reasonable ground for believing it to be true, the suppression of a fact by one who is bound to
6 disclose it, or the making of a promise without any intention of performing it. Civ. Code, §§
7 1710(1), (2), (3), (4).

8 There are no allegations in the SAC that Smith made any suggestion or assertion to
9 plaintiff or Anne in the first instance, much less having done so without a reasonable ground for
10 believing it to be true. There are no allegations that Smith suppressed or concealed any facts from
11 plaintiff or Anne, nor are there any allegations that Smith was bound to disclose any fact even if
12 the concealment had been properly alleged. Although it includes Smith, this cause of action
13 contains no allegations that Smith made any statements to plaintiff or Anne. Only “Brown,
14 Commerce Resources, Inc., and Does 1-15” are alleged to have “orally represented” any matters to
15 plaintiff or Anne. (SAC, ¶ 26.) None of the alleged misrepresentations, said to have been made at
16 or around the time of the dates payments of money were made by plaintiff or Anne to Brown, are
17 alleged to have been made by Smith. (SAC, ¶¶ 31.A-N.) In addition, no representations were
18 alleged to have been made by Smith during the July 16 to November 21, 2010 time period during
19 which Anne allegedly lived at the subject property. (SAC, ¶¶ 19, 31.L, 31.M, 31.N.) Similarly,
20 there are no allegations of concealment against Smith. Rather, it is alleged that Brown and RII
21 provided the fraudulent services that endangered Anne. (SAC, ¶ 35.)

22 Plaintiff has failed to allege that Smith made any misrepresentation to her or Anne, in the
23 form of a “false representation, concealment, or nondisclosure.” *Engalla v. Permanente Medical*
24 *Group, Inc.* (1997) 15 Cal.4th 951, 974. As plaintiff cannot even establish the first prong of a
25 cause of action for fraud based on misrepresentation or concealment, the demurrer to the Second
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1 and Third Causes of Action must be sustained, without leave to amend. Code Civ. Proc., §
2 430.10(e).

3 VI.

4 **PLAINTIFF'S FIFTH CAUSE OF ACTION FOR VIOLATION OF THE DEPENDENT**
5 **ADULT PROTECTION ACT ALLEGES NO CONDUCT BY SMITH THAT**
6 **QUALIFIES HIM AS A "CARE CUSTODIAN" OR THAT CONSTITUTES**
7 **PHYSICAL OR FINANCIAL ABUSE**

8 In her third version of the complaint and in the absence of having made any such allegation
9 previously, plaintiff now transforms Smith, the owner of the house in which Anne passed away
10 from a heroin overdose, into a "caregiver" by adding his name to Paragraph 10 of the SAC for
11 purposes of the Dependent Adult Protection Act, Welfare & Institutions Code sections 15600 *et*
12 *seq.* This lone allegation is internally inconsistent with the successive allegations of Paragraphs
13 11 and 12 of the SAC, directed only to Brown and his business as an unlicensed interventionist.
14 The entirety of the SAC, read in context, demonstrates that Smith never took any money from
15 plaintiff, Anne or Brown and, as such, could not have engaged in "financial abuse"; and never
16 took any part in Anne's care and, as such, could not have engaged in "physical abuse."

17 For a plaintiff to support a claim for dependent adult abuse, she must make a showing of
18 egregious and extreme abuse, no mere "inadvertence, incompetence, unskillfulness, or a failure to
19 take precautions" but a "conscious course of action[.]" *Benun v. Superior Court* (2004) 123
20 Cal.App.4th 113, 123. In her SAC plaintiff conclusively alleges, without any supporting facts,
21 that Smith and the other defendants "had care and custody of Anne, *and or* [sic] had responsibility
22 for the care and custody of Anne." (SAC, ¶ 46.) Without providing dates, places or specific
23 conduct, plaintiff scurrilously alleges that Smith and the other defendants "engaged in the physical
24 abuse of Anne," "sexually assaulted" her, and provided her with powerful psychotropic drugs.
25 (SAC, ¶ 49.)⁷ These generic allegations are the entire basis upon which Smith is said to have
26 committed "neglect" under Welfare & Institutions Code § 15610.57. (SAC, ¶ 48.) It is alleged

27 ⁷ Elsewhere, plaintiff alleges that another individual (not named as a defendant), a Keith Salmon,
28 "offered to obtain drugs for Anne in return for sex." (SAC, ¶ 19.)

1 that Smith knew or should have known of monies paid by plaintiff to Brown. (SAC, ¶ 50.) In
2 alleging “neglect”, plaintiff vaguely associates Smith with an alleged \$27,000 fraudulent credit
3 card transaction, allegedly carried out by Brown, Franklin, and Sunset. (SAC, ¶ 48.) This claim
4 conflicts with earlier allegations detailing this scheme that make no mention of Smith’s
5 involvement. (SAC, ¶ 31.J.)⁸

6 In sum, there are no specific facts alleged against Smith in the SAC to support any claim
7 that Smith himself or in league with anyone else committed “neglect” against Anne, financially
8 abused her, or physically or sexually abused her. (SAC, ¶ 49.) The addition of Smith’s name as a
9 “care giver,” the only difference between Paragraph 10 of the FAC and Paragraph 10 of the SAC,
10 is utterly insufficient to state facts sufficient to constitute a cause of action against Smith for
11 violation of the Dependent Adult Protection Act, and is uncertain as to Smith. Code Civ. Proc., §§
12 430.10(e), (f).

13 Moreover, the allegations of the SAC are internally inconsistent and inexplicably at odds
14 with the allegations of the first two complaints. As the court explained in *Vallejo Development*
15 *Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946, “any inconsistencies with prior
16 pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent
17 allegations ... and “a court is ‘not bound to accept as true allegations contrary to factual allegations
18 in former pleading in the same case.’” *Id.* at 946 (quoting *Potter v. Arizona So. Coach Lines, Inc.*
19 (1988) 202 Cal.App.3d 126, 133 fn. 2); *see also Owens v. Kings Supermarket* (1988) 198
20 Cal.App.3d 379, 383-384 (court “may disregard the inconsistent allegations and read into the
21 amended complaint the allegations of the superseded complaint.”); *see also Hills Transp. Co. v.*
22 *Southwest Forest Inds., Inc.* (1968) 266 Cal.App.2d 702, 713 (court held that “[a] pleader may not
23 attempt to breathe life into a complaint by omitting relevant facts which made his previous

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25 ⁸ *See Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 328 (decrying the
26 practice of pleading inconsistent allegations in a complaint, Supreme Court affirms trial court’s
27 order sustaining demurrer, without leave to amend); *Careau & Co. v. Security Pacific Business*
28 *Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390 (inconsistent specific allegations as basis for
demurrer to complaint).

1 complaint defective”). This Court may take judicial notice of plaintiff’s prior pleadings filed in
2 court and, if the matter is inconsistent with the current pleading, may disregard the allegations of
3 the SAC in their entirety.⁹

4 Belatedly dropping in Smith’s name as a “care giver” in the absence of specific allegations
5 of conduct that qualify him as such under the Act is flatly insufficient to support this cause of
6 action. This most recent attempt to “amend” her allegations reveals that plaintiff cannot allege
7 further facts to support this claim against Smith. The Court should sustain Smith’s demurrer to the
8 Fifth Cause of Action, without leave to amend.

9 **VII.**

10 **THE ADDED SIXTH CAUSE OF ACTION FOR DRUG DEALER LIABILITY, WHICH**
11 **WAS NOT PRESENT IN THE FIRST AMENDED COMPLAINT,**
12 **IS IMPROPER AND MUST FAIL**

13 **A. Plaintiff May Not Amend The Complaint To Add A New Cause of Action After A**
14 **Demurrer Has Been Sustained**

15 When a court sustains a demurrer and grants plaintiff leave to amend, this permission is
16 limited to “the cause of action which he pleaded in the pleading to which the demurrer has been
17 sustained.” *People v. Clausen*, (1967) 248 Cal.App.2d 770, 785-786. There is an exception if the
18 new cause of action “ directly responds to the court's reason for sustaining the earlier demurrer.”
19 *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015. The demurrer filed by Sunset and
20 Franklin was sustained with 10 days leave to amend as to the Third, Fifth, Sixth, and Seventh
21 Causes of Action, only, of the FAC. The new cause of action for drug dealer liability is not
22 curative of any prior pleading defect noted by the Court. Thus, plaintiff may amend his first
23 amended complaint with respect to those four causes of action, but adding an unrelated cause of
24 action is beyond the scope of permissible amendments. For this reason, the demurrer as to the
25 Sixth Cause of Action for Drug Dealer Liability, which was not included in the FAC, should be
26 sustained without leave to amend.

26 _____
27 ⁹ Defendant’s request for judicial notice of plaintiff’s complaint and FAC is filed concurrently
28 herewith.

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B. Smith Did Not Knowingly Market Illegal Controlled Substances For Purposes Of The Sixth Cause Of Action For Drug Dealer Liability

Plaintiff fails to state any facts that would allege Smith’s liability under the Drug Dealer Liability Act, Health and Safety Code sections 11700 *et seq.* “The purpose of the Act is to enable persons injured as a consequence of the use of an ‘illegal controlled substance’ to recover damages from persons who participated in their marketing and to shift the cost of damages ‘to those who illegally profit from that market.’ *Whittemore v. Owens Healthcare-Retail Pharmacy, Inc.* (2010) 185 Cal.App.4th 1194, 1200 (citing §§ 11701, 11702.).

Plaintiff singularly alleges that “[b]y virtue of the foregoing, defendants and each of them have knowingly participated in the marketing of illegal controlled substances” and that this resulted in damages to Anne. (SAC, ¶¶ 52-53). Yet, there is no factual basis to support the allegations that Smith “knowingly” engaged in any of the prohibited conduct under this statute as required by Section 11704(a). Similarly, there are no facts to support an allegation that Smith was involved in “marketing” as defined under this statute. ¹⁰ Further, this cause of action is inconsistent with other allegations in the SAC, where it is alleged that Brown, his “sober companions,” and other clients furnished Anne with drugs. (SAC, ¶¶ 18-19) Smith is not an individual for whom liability was intended under this statute. Smith is not alleged to have had any involvement with the possession or sale of illegal controlled substances for profit. The facts alleged are insufficient to constitute a cause of action and are uncertain as to Smith.

VIII.

PLAINTIFF’S SEVENTH CAUSE OF ACTION FOR WRONGFUL DEATH AGAINST SMITH MUST FAIL BECAUSE IT IS NOT ALLEGED WITH SUFFICIENT SPECIFICITY AND IS UNCERTAIN

“A wrongful death cause of action is a statutory claim providing compensation for

¹⁰ Section 11703(a) defines “marketing of illegal controlled substances” as “the possession for sale, sale, or distribution of a specified illegal controlled substance, and shall include all aspects of making such a controlled substance available, including, but not limited to, its manufacture.”

1 specified heirs of the decedent for the loss they suffered as a result of the decedent's death.”
2 *Adams v. Superior Court* (2011) 196 Cal.App.4th 71, 76 (citing Code Civ. Proc., §§ 377.60-
3 377.62). “The elements of the cause of action for wrongful death are the tort (negligence or other
4 wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by
5 the heirs.” *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263 (emphasis by
6 court). Recovery in a wrongful death case necessarily requires a legal duty owed by a defendant
7 to a plaintiff. As the court stated in *Nally v. Grace Community Church of the Valley* (1988) 47
8 Cal.3d 278, in which the Supreme Court held that a non-therapist counselor was not liable to
9 parents whose son committed suicide, “[a] tort, whether intentional or negligent, involves a
10 violation of a *legal duty*, imposed by statute, contract or otherwise, owed by the defendant to the
11 person injured. Without such a duty, any injury is ‘damnum absque injuria’ – injury without
12 wrong.”¹¹ In *Nally*, the court also held there was no duty because there was no “special
13 relationship” between the young man who committed suicide and the nontherapist counselor.
14 *Nally, supra*, 47 Cal.3d at pp. 293-294.

15 The wrongful death cause of action in this case is based upon the singular allegation that
16 “[b]y virtue of the foregoing and as a clear and proximate result of the foregoing, Anne died,
17 depriving Jennifer AND William Foster of her love, care, comfort, and society.” (SAC, ¶ 56.)
18 Not only do these allegations not state facts sufficient to constitute a cause of action, they are
19 fatally uncertain as to Smith. Code Civ. Proc., §§ 430.10(e), (f).

20 Smith is left to speculate as to the meaning of “the foregoing” that would give rise to any
21 duty to plaintiff or Anne. As to Smith, the allegations of the SAC are that Smith had knowledge
22 of certain matters, without specifying any basis for Smith’s knowledge. (*E.g.*, SAC, ¶ 14 [no facts
23 alleged concerning knowledge of Brown’s business]; ¶ 21 [no facts alleged concerning knowledge

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25 ¹¹ *Id.* at 292; *see also Padilla v. Rodas* (2008) 160 Cal.App.4th 742, *rev. denied* (Second District
26 holds homeowner owes no duty of care to child who drowned in pool on property); *Quigley v.*
27 *First Church of Christ, Scientist* (1998) 65 Cal.App.4th 1027 (Fourth District affirms trial court
order sustaining demurrers to complaint by church or its members for failure to treat diabetes of
12-year-old boy).

1 of events leading to Anne’s death].) Bare allegations concerning Smith’s knowledge or receipt of
2 payments from Brown, without specification of dates, amounts, or recipients of payments other
3 than those alleged to have been made by plaintiff to Brown, are not sufficient to create a duty
4 owed by Smith to plaintiff or Anne. (SAC, ¶ 14.A.)

5 In addition, the critical allegations against Smith are made “upon information and belief.”
6 (E.g., SAC, ¶¶ 13-14.) As one appellate court recently held in sustaining a demurrer,

7 A “[p]laintiff may allege on information and belief any matters that are not within
8 his personal knowledge, *if he has information leading him to believe that the*
9 *allegations are true*” ... and thus a pleading made on information and belief is
10 insufficient if it “merely assert[s] the facts so alleged **without alleging such**
information that ‘lead[s] [the plaintiff] to believe that the allegations are
true.’”

11 *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-1159 (quoting *Doe*
12 *v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, 551 fn. 5) (italic emphasis by *Gomes* court,
13 bold emphasis added).

14 In the instant case, plaintiff does not state facts sufficient to constitute a cause of action
15 against Smith for wrongful death, because there are no allegations concerning the “information”
16 that leads plaintiff to believe such allegations are true. *Doe v. City of Los Angeles* (2007) 42
17 Cal.4th 531, 551 fn. 5. Moreover, the allegations of “the foregoing” conduct, without any
18 specificity, render the SAC on this cause of action against Smith uncertain. Smith’s demurrer to
19 the Seventh Cause of Action should therefore be sustained, without leave to amend.

20 IX.

21 **PLAINTIFF’S EIGHTH CAUSE OF ACTION FOR UNFAIR BUSINESS PRACTICES** 22 **FAILS TO STATE SUFFICIENT FACTS AS TO, IS UNCERTAIN, AND DOES NOT** 23 **SEEK INJUNCTIVE RELIEF AGAINST SMITH**

24 In her Eighth Cause of Action for unfair business practices pursuant to Business &
25 Professions Code sections 17200 *et seq.*, plaintiff lists the names of all of the defendants and
26 morphs defendant *Brown’s own business* as “an interventionist” (SAC, ¶ 11) into “*their [all of the*
27

1 *defendants’] business* as ‘interventionists’ for persons seeking assistance with drug dependency
2 problems including, but not limited to Anne.” (SAC, ¶ 58.) Evidently in hopes the Court will not
3 recognize this fundamental inconsistency, plaintiff also alleges that the defendants, including
4 Smith, “assist[ed] in *their business* as an interventionist.” (SAC, ¶ 58.) These allegations, which
5 are utterly inconsistent with the remaining allegations of the SAC, cannot give rise to a cause of
6 action for unfair business practices.

7 In *Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, the Second District Court of
8 Appeal affirmed the trial court’s order sustaining a demurrer to a Section 17200 cause of action,
9 reasoning as follows:

10 The ‘unfairness’ prong of the unfair competition law is “intentionally
11 broad” However, the scope of the law “is not unlimited. Courts may not simply
12 impose their own notions of the day as to what is fair or unfair.... If the Legislature
13 has permitted certain conduct or considered a situation and concluded no action
should lie, courts may not override that determination. ...”

14 *Id.* at 1157-1158 (internal citations omitted).

15 The only basis for a violation of Business & Professions Code section 17200 against Smith
16 in the SAC is the alleged violation of the Dependent Adult Protection Act or the Drug Dealer
17 Liability Act, statutes that are not sufficiently alleged to apply to Smith in the first instance. Thus,
18 the Eighth Cause of Action fails to state facts sufficient to constitute a cause of action against
19 Smith.

20 Moreover, plaintiff had a further opportunity to allege this cause of action after her FAC.
21 As was the case in the FAC, *there is no injunctive relief requested by plaintiff against Smith in the*
22 *SAC* under Business & Professions Code section 17203. (SAC, ¶ 59.) There is no conduct of
23 Smith that plaintiff requests be enjoined. The demurrer to the Eighth Cause of Action should be
24 sustained, without leave to amend.

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CONCLUSION

For all of the foregoing reasons, defendant Jason Smith respectfully requests that the Court sustain his demurrer to plaintiff's Second, Third, Fifth, Sixth, Seventh, and Eighth Causes of Action in her Second Amended Complaint, *without leave to amend*.

Dated: *March 11, 2013*

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