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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

FRIENDS OF THE FORMERLY FRIENDLESS, Plaintiff, v. JUDY BROCK, Defendant.	Case No. BG11586730 Complaint Filed: July 21, 2011 [Assigned to Honorable Frank Roesch, Dept. 24] **DEFENDANT AND CROSS-COMPLAINANT JUDY BROCK'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** [FILED CONCURRENTLY WITH NOTICE OF LODGMENT; RESPONSE TO SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS; DECLARATION OF JUDY BROCK] [LIMITED CIVIL CASE] [R-1303425] Date: October 2, 2012 Time: 3:45 p.m. Dept. 24
Judy Brock, Cross-Complainant, v. Sally Morgan Welch Friends of the Formerly Friendless, And Does I-X, Cross-Defendants.	

Defendant and Cross-Complainant JUDY BROCK ("Defendant" or "Ms. Brock") hereby submits the following opposition to plaintiff/cross-defendant Friends of the Formerly Friendless' ("FFF") and cross-defendant Sally Morgan Welch's ("Welch") (collectively, "Cross-Defendants") motion for summary judgment or, in alternative, for summary adjudication.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Friends of the Formerly Friendless' motion for summary judgment on its breach of contract claim fails because it depends on several fallacies. The first is that Ms. Brock never testified to signing a "foster agreement," a copy of which was never produced at Ms. Brock's only deposition. Rather, three different versions of a document entitled "Waiver" were produced during discovery, the first of which contained Ms. Brock's forged signature. Second, the "Waiver" is not a fully integrated contract. Third, the parol evidence rule does not bar introduction of oral discussions because the "Waiver" is not integrated, nor does the Statute of Frauds apply. There is also a latent ambiguity in the "Waiver," which calls for reformation of the document if it is to be construed as a written agreement. Much of the Plaintiff's evidence is also inadmissible, as detailed in the concurrently filed Evidentiary Objections.

Cross-Defendants FFF and Welch also move for summary judgment on Ms. Brock's cross-claims. The cross-defendants' motion also fails for various reasons: the Statute of Frauds is inapplicable, whether cross-defendants committed fraud is a fact issue, and the effect of a party's failure to read a contract depends on the circumstances and is a question of fact.

II. FACTUAL BACKGROUND

In a series of verbal discussions at the Animal Care Center ("ACC"), Ms. Brock and cross-defendants orally agreed that Ms. Brock would foster two cats named Twinkus and Dotty until Ms. Brock could find permanent homes for them. (Defendant's Additional Undisputed Material Fact ("Def. UMF"), ¶ 124.) Orally, they also agreed that Ms. Brock would adopt two cats named Louie and Zelda, subject to a four to six-week evaluation or "foster" period. (Def. UMF, ¶ 125-

126.) Ms. Brock required this this temporary "foster" period for Louie and Zelda in order to see if Louie's ocular herpes would be contagious to any of her other pets and to generally make sure they could integrate into her household. (Def. UMF, ¶ 125-126.) However, Ms. Brock always wanted to adopt Louie or Zelda. They were always intended by both FFF and Brock to become Ms. Brock's "forever pets." (Def. UMF, ¶ 126.)

On August 23, 2010, the four cats were brought to Ms. Brock's home. Ms. Brock was presented with paperwork entitled Friends of the Formerly Friendless Waiver ("Waiver.") Ms. Brock signed this Waiver, believing that it memorialized the parties' prior oral agreement. (Def. UMF, ¶ 130.) Ms. Brock also believed that the term "foster," as applied to Louie and Zelda, referred to the four to six-week evaluation period needed to see if they would integrate. The term "foster" was not defined to mean an indefinite period, nor did Welch tell Ms. Brock that her intended definition of the term "foster" on the Waiver differed from Ms. Brock's, as applied to Louie and Zelda. (*Id.*)

After it became clear that Louie and Zelda had settled nicely into her household, Ms. Brock told Welch and also invited Welch to revisit her home to see how well the cats were doing. (Def. UMF, ¶ 9.) Welch never visited Ms. Brock's home. (*Id.*) Rather, in the late fall of 2010 when Ms. Brock went on a short trip and boarded the foster cats Twinkus and Dotty at the ACC, Welch used medical pretenses to stick them back in cages. This breached the oral agreement that Ms. Brock would foster Twinkus and Dotty until permanent adoptive homes could be found for them. In late November or early December, Welch also asked Ms. Brock to bring Louie to the ACC for a checkup. (Def. UMF, ¶ 132.) By that time, the evaluation or "foster" period for Louie and Zelda had already ended, and Ms. Brock had adopted them. (*Id.*) After speaking with various staff members at the ACC, Ms. Brock confirmed her suspicion that Welch intended to breach their oral agreement and regain ownership of Louie (and Zelda). Thus, Ms. Brock did not bring Louie or Zelda back to the ACC.

In July 2011, FFF, the alter ego of Welch, filed suit to obtain possession of the cats Louie and Zelda and to recover the $10,000 in veterinary expenses that it claims to have spent on Louie

and Zelda before they had been adopted by Ms. Brock. During the litigation, Welch claimed that Ms. Brock had signed a "foster agreement" covering Louie and Zelda. At Ms. Brock's deposition, FFF's counsel produced a false copy of the "foster agreement" containing the forged signature of Ms. Brock. (Def. UMF, ¶ 127-129.) Approximately a year after FFF first filed suit, at Welch's deposition on June 29, 2012, FFF produced what Welch claimed was the original "foster agreement" that she recently found in the adoption van. (Def. UMF, ¶ 134.) But a large portion of the document was obliterated by a stain and unreadable. (*Id.*) A third version of the purported "foster agreement" was attached to FFF's Application for Writ of Possession filed on July 5, 2012, but it was different from the other two versions and portions were unreadable due to cropping. (Def. UMF, ¶ 135.)

III. LEGAL STANDARD ON MOTION FOR SUMMARY JUDGMENT

A defendant (or cross-defendant) moving for summary judgment must "show" that either:

• one or more elements of the "cause of action ... cannot be established"; or

• there is a complete defense to that cause of action. (CCP § 437c(p)(2).)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of fact. (*See Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party must set forth all material evidence on point, not just the evidence favorable to it. Omitting deposition answers that raise triable issues of fact might be treated as an attempt to mislead the court as to the state of the discovery record. (*Rio Linda Unified School Dist. v. Sup.Ct.* (*Diaz*) (1997) 52 Cal.App.4th 732, 740.) But if the moving party fails to carry its burden of production, the burden never shifts to the responding party to make any showing, and the motion must be denied. (Code Civ. Proc. § 437c, subd. (p)(1) & (2); R. Weil & I. Brown, California Practice Guide – Civil Procedure Before Trial (Rutter, 2009 Rev.) ¶ 10:261)("Weil & Brown.") When the defendant seeks summary judgment on an issue on which the plaintiff has the burden of proof, the defendant's evidence must be sufficient to persuade the fact finder that the matter is not more likely than not. (Weil & Brown at ¶ 10:240.)

In a summary judgment motion, the moving party's evidence must be strictly construed "in

order to avoid unjustly depriving plaintiff of a trial." (*Brantley v. Pisaro* (1996) 42 Cal.4th 1591, 1601; *Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1107.) In contrast, the declarations and evidence of the party opposing the motion must be liberally construed. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21; *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 373.) Any doubt as to the propriety of granting a motion for summary judgment is resolved in favor of the party opposing the motion. (*Stationers Corp. v. Dunn & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417; *Sprecher v. Adamson Companies*, *supra*, 30 Cal.3d at 372.)

It is not sufficient for a defendant (or cross-defendant) seeking summary judgment to merely assert that the plaintiff has no evidence on a particular point. (*Aguilar*, *supra*, 25 Cal.4th at 854-855.) Rather, in order to satisfy its initial burden, the party moving for summary judgment or adjudication must show both that the plaintiff has no evidence to support an essential element of the claim, and that the plaintiff (or cross-complainant) cannot obtain such evidence. (*Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 888-892.)

IV. LEGAL ARGUMENT

A. The Written "Waivers" Are Not Admissible

1. Ms. Brock's Deposition Testimony Cannot Establish That She Signed A "Foster Agreement"

To support their the motion for summary judgment, cross-defendants cite Ms. Brock's November 18, 2011 deposition testimony for the allegation that she signed a "foster agreement" covering Louie and Zelda. However, at her deposition Ms. Brock did not characterize the Waiver as a "foster agreement" or even as an "agreement." Rather, counsel for FFF, Ms. Page and Mr. Evans, repeatedly referred to the document as a "foster agreement" and eventually badgered Ms. Brock into calling it a "foster agreement." When asked by FFF's counsel if Brock filled out some type of agreement to foster Louie and Zelda, Brock replied that Welch gave her "paperwork that said foster." (NOL, Ex. D [Brock Depo.], 25:4-10.) Brock testified that she did not think the document that Welch asked her to sign was going to change their oral agreement. (NOL, Ex. D [Brock Depo.], 26:6-11.) Counsel for FFF, Mr. Evans, then marked Exhibit 4, which he believed

to be a true and correct copy or original of the document signed by Ms. Brock in Welch's presence on August 23, 2010. However, Ms. Brock testified that it was not the document she signed, as the document she signed had "all kinds of handwriting on it." (NOL, Ex. D [Brock Depo.], 54:17-25.) Ms. Brock also testified that the second page of Exhibit 4 did not contain her signature, but that it had been forged by Welch. (NOL, Ex. D [Brock Depo.], 55:14-24; 63:9-22.) After Exhibit 4 was introduced, counsel for FFF continued to ask Ms. Brock questions about the document she signed, even though the document that Ms. Brock actually signed was not in front of her or ever produced during her deposition. Ms. Brock's counsel, Ms. Bain, objected that the "contract" before them was not the one that Brock signed. (NOL, Ex. D [Brock Depo.], 63:9-10.) FFF's counsel continually referred to the August 23, 2010 document as a "foster agreement" or "foster care agreement." For example, Mr. Evans asked Brock: "When did you sign the foster agreement?" Brock answered, August 22 or 23, 2010. However, after being questioned about the "foster agreement," Brock testified several times that she was not sure what the word "agreement" or "contract" means. (NOL, Ex. D [Brock Depo.], 65:14, 20-21, 25; 66:3-4, 11-12.) Counsel for FFF repeatedly asked Ms. Brock for legal reasoning and legal conclusions with respect to a document they called a "foster agreement," which was never produced at Ms. Brock's deposition. The following exchange is typical:

> "Q. So you signed an agreement in August 2010; is that correct?
>
> A. I signed that document that you don't have before you today that you have a part of today, which they call -- whatever is document that says foster -- what does it say on top? Foster -- Friends of the Formerly Friendless waiver, which refers not at all to the rest of our agreements, neither to the letter that came after or the verbal agreements that preceded it. This is the part that I signed. So it is a part, a component of the overall understanding I had with FFF.
>
> Q. So my question is: Did you sign a foster agreement with FFF in August 2010?
>
> A. I signed a waiver, whatever that is. It doesn't say foster agreement on here.

(NOL, Ex. D [Brock Depo.], 67:6-20; 68:2-3.) Eventually, counsel for FFF badgered Ms. Brock

into calling the document a "foster agreement." For example:

> Mr. Evans: Q. Early in the depo Ms. Page asked you if you signed a foster agreement with Friends of the Formerly Friendless, and you said yes. Do you want to amend that answer now?
>
> A: I mean, I don't think it matters. Now I see their form and it says waiver, whatever it is. I don't think it really matters. As I told you then, the written agreement that I signed is part of the overall understanding. I'll call it foster if you want."

(NOL, Ex. D [Brock Depo.], 68:4-12.) Notably, the reporter did not read back any testimony in which Ms. Brock had earlier testified to signing a "foster agreement" with FFF. Rather, when asked by FFF's other counsel, Ms. Page, if Brock filled out some type of agreement to foster Louie and Zelda, Brock replied that Welch gave her "paperwork that said foster." (NOL, Ex. D [Brock Depo.], 25:4-10.) Ms. Page later states, "Okay. So earlier we said that you did sign a foster agreement with Friends of the Formerly Friendless…" (NOL, Ex. D [Brock Depo.], 31:11-13.)

However, at that point in Ms. Brock's deposition, Ms. Brock had not herself testified that the document she signed was a "foster agreement," nor had a true and correct copy of the document been produced for her review. Later, Ms. Page asked Brock how long "had you known Sally before entering into the agreement that you entered into with her regarding Louie and Zelda?" Brock replied, "Which agreement are you talking about?" Ms. Page answers, "The foster care agreement that you signed." (NOL, Ex. D [Brock Depo.], 42:20-24.) Thus, throughout Ms. Brock's deposition, it was FFF's counsel that kept referring to and characterizing the August 23, 2010 document as a "foster agreement." At no time during her deposition was the original or a true and correct copy of the August 23, 2010 document that Ms. Brock signed produced. Rather, FFF's counsel produced an altered and forged version of the document which omitted the handwritten notes. Thus, Ms. Brock's deposition testimony cannot support the undisputed facts listed in the Separate Statement with respect to her execution of a "foster agreement."

2. Multiple, Altered Versions of the "Waiver" Render Any Version

Inadmissible

Plaintiff FFF and Cross-Defendants FFF and Welch claim that they are entitled to summary judgment on several claims and cross-claims because of an alleged document that they refer to as a "written foster agreement," but which in actuality is a waiver ("Waiver"). However, there are at least three known versions of the Waiver. The fact that there are three versions renders any version of the Waiver inadmissible. In their Motion, cross-defendants submit only the third version of the Waiver, attached as Exhibit B to the Declaration of Corey Evans, and not the first or second version. Even if the court were to rule that this version of Waiver was admissible and a contract of some type, defects in all three documents call into question their scope and enforceability.

Three distinct versions of the Waiver have been produced in this lawsuit.[1] The first, was produced by FFF as an exhibit at Ms. Brock's November 18, 2011 deposition. (NOL, Ex. A). The only handwriting on the document is the word "Foster" on the upper left corner of the first page and the note that "Other services" specifically "foster visit" will be provided. (*Id.*) On the second page, the document is signed by Welch. A second signature starting with the letter "J" appears below it. (*Id.*) The date on the Waiver was also altered, from an original hand-written date of "2/20/10" to "8/23/10." (*Id.*) During her deposition, upon being questioned about this document, Ms. Brock testified that the second signature was not hers. Ms. Brock testified that Welch had apparently forged Ms. Brock's signature to a "clean copy" of the Waiver. (UMF 127.) The court may conclude for itself that the signature does not belong to Ms. Brock, under Evidence Code section 1417. The Waiver also does not mention the number of cats it pertains to, or their names, nor does it define what "foster visit" means. (NOL, Ex. A).

On June 29, 2012, at the PMK deposition of FFF, a second, completely different version of the Waiver was produced. Welch testified that this second version was the original Waiver. (NOL, Ex. B; Ex. F [June 29 Welch Depo.], 20:19-20:24, 21:10-22:23). This version of the Waiver is

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[1] Ms. Brock does not concede that any of these Waivers are admissible.

covered with handwritten notes, which Welch testified that she wrote. (NOL, Ex. B; Ex. F [June 29 Welch Depo.], 20:19-20:24, 21:10-27:24.) Welch "believe[d]" she added the handwritten notes in Ms. Brock's presence, (*id.* at 27:5-27:24) but did not testify when these notes were added. Much of the handwriting on the black-and-white copy of this version is illegible due to what Welch claimed to be an oil stain. (NOL, Ex. B; Ex. F [June 29 Welch Depo.] 28:3-13; 29:12-14.)

Finally, on July 5, 2012, when FFF filed its Application for Writ of Possession, it attached a third version of the Waiver as Exhibit 1 to the Declaration of Sally Morgan Welch. (NOL, Ex. C.) This version of the Waiver is also covered in handwritten notes, although some of them are cropped out so that the full text of the document is not visible (*id.*), and it is not the original. (NOL, Ex. F, [June 29 Welch Depo.], 20:19-20:24, 21:10-22:23). Because of the cropping to the document, the damage to the purported original, and the existence of a third version of the Waiver that does not mention the names of any specific cats (NOL, Exs. A-C), FFF has failed to establish the admissibility, authenticity, or enforceability of any of the three versions of the Waiver. (*See* Cal. Evid. Code §§ 403(a), 1400-1402.) Furthermore, "[t]he intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act." (Cal. Civ. Code § 1700.)

B. The Third Version of the "Waiver" Is Not An Integrated Agreement

As FFF and Welch assert, "whether a writing is integrated, the court must consider the writing itself, including whether the written agreement appears to be complete on its face; whether the alleged parol understanding on the subject matter at issue might naturally be made as a separate agreement; and the circumstances at the time of the writing." (Motion, p. 14.) "Whether a contract is integrated is a question of law when the evidence of integration is not in dispute." (*Id.*)

Here, the evidence of integration is hotly disputed and summary judgment cannot be granted. Since cross-defendants only submit the third version of the Waiver for consideration (Ex. B to Evans Declaration), the version which was attached to FFF's Application for Writ of Possession, only that version will be discussed here.

The Third Waiver is not even the version that Welch testified as being the "original." Rather, Welch testified that the second version produced on June 29, 2012, which contained an oil stain obliterating most of the hand-written notes on the second page, was the original. (NOL, Ex. B; Ex. F [June 29 Welch Depo.], 20:19-20:24, 21:10-22:23.) The Third Waiver is also incomplete on its face because when compared with the purported "original," it is clear that some of the handwriting is cropped out. (NOL, Ex. B and C.)

The Third Waiver is not integrated because three different clauses permit oral alteration of the contract—two of which seem to also permit oral terms to be included in the contract at the time of signing:

1) The second clause reads: "I will abide by all Friends of the Formerly Friendless[] guidelines and requirements ***discussed with me*** regarding care, treatment, handling, adoption procedures and requirements and if applicable, housing of Friends of the Formerly Friendless foster animal(s)." (emphasis added.)
2) The third clause reads: "I understand that any and all animal(s) fostered in my home or personal site will be housed separately from my own pet(s) ***unless otherwise agreed upon with an authorized F.F.F. representative.***" (emphasis added.)
3) On the second page, the last sentence before the signature block reads: "Any and all ***changes to this agreement*** must be by ***mutual agreement between myself and an authorized FFF representative.***" (emphasis added.)

According to these three sentences, the parties intended to allow for oral modification. Not only that, but the first two clauses on this list of three are unclear as to timing—it is possible they refer to things that either have been or will be discussed, or have been or will be agreed upon. Because these two clauses use the past tense, the Waiver seems to be the very opposite of an integrated agreement—it is specifically incorporating unstated verbal terms that predate the document. "An integrated agreement is a writing that constitutes the final expression of one or more terms of an agreement. Whether a writing is an "integration" is a question of law to be decided by the trial court. (*Ibid.*)" (*Duncan v. McCaffrey Group, Inc.* (2011) 200 Cal. App. 4th

346, 363 (citations omitted).) The terms cannot be final if they are either unstated or if they can be added based on an oral agreement between the parties.

Moreover, if any one of the three Waivers are contracts, and were materially altered post-signing, FFF and Welch are not entitled to demand return of the cats under any version of the waiver because "[t]he intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act." (Cal. Civ. Code § 1700.) FFF and Welch has failed to prove that there are no triable issues as to whether the Third Waiver, or any of other versions of the Waiver for that matter, are admissible, integrated contracts.

C. The Parties Did Not Extinguish The Oral Contract By Modifying It

1. The Oral Contract Was Not Extinguished

Cross-defendants contend that after the parties entered into an oral contract, they modified it with the written Waiver. In support of this argument, Cross-defendants cite a single case – *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 223. In *Carlson*, plaintiff attorneys sued their former clients to enforce payment of legal fees in a probate case. (*Id.* at 219.) The *Carlson* court did not address or hold that any oral contract was "extinguished." Rather, the court stated that "[a] contract can, of course, be subsequently modified with the assent of the parties thereto … provided the same elements essential to the validity of the original contract are present." (*Id.* at 223.) Nor, in *Carlson*, did the jury find that a writing had "extinguished" an original oral agreement. Rather, the Court of Appeal summarized the jury's findings as follows: there was an original oral contract to pay plaintiffs 1/6th of the entire gross estate. That agreement was subsequently modified at defendants' request to 10% of 40% of the gross estate, which was evidenced in a letter. However, the Court stated that the letter "was not an entire contract, nor was it the contract of the parties." (*Id.* at 223-24.) Thus, the *Carlson* case does not support the proposition urged by cross-defendants – that the Waiver or any other writing extinguished an oral agreement between the parties.

Carlson further does not apply here because the same elements essential to the validity of the original oral contract were not present in the Waiver. The oral contract included the following terms:

> (1) Ms. Brock would adopt Louie and Zelda on the condition that after they came to live in her home she determined that Louie's ocular herpes was not contagious to her other cats and that both cats could otherwise get along with her other cats;
>
> (2) FFF and Ms. Brock would work together to Dotty and Twinkus, the two cats that Ms. Brock agreed to foster, adopted out by bringing Dotty and Twinkus to adoption events designated by FFF.
>
> (3) FFF agreed to pay a stipend to Ms. Brock for fostering Twinkus and Dotty until permanent adoptive homes for them and during the temporary evaluation period to see if Louie and Zelda could integrate into her home – which was a period of about four to six weeks.

An essential element to the validity of the oral contract was consideration. In exchange for acquiring two new "forever" or adopted pets, Ms. Brock agreed to adopt Louie and Zelda and give them good homes and to foster Twinkus and Dotty until finding them permanent homes, thereby fulfilling one of FFF's professed goals of finding permanent homes for homeless cats. FFF's consideration to Ms. Brock was its promise to adopt Louie and Zelda to her and to pay her a monthly stipend for fostering Twinkus and Dotty and for the brief evaluation or "foster" period when Ms. Brock was determining whether Louie and Zelda could integrate into her household.

The same essential element of consideration was entirely lacking in the Waiver, as the Waiver does not contain one single promise or one single benefit that flows from FFF to any possible foster parent. Instead, it is a laundry list of disclaimed liability and obligations that the "applicant" must undertake. Consideration is defined as: "any benefit" that flows to the promisor or "any prejudice" that the promisee takes upon him- or herself, as long as that benefit or prejudice is not something that the party will already obtain or suffer from under the law. (Civ. Code, § 1605.) Should the court read into the Waiver an implicit promise to provide a person who

volunteered to foster animals with the companionship of that animal,[2] it still would be insufficient because any such implicit promise is illusory. By the very terms of the Third Waiver, FFF is permitted to require that animals be "immediately" "relinquish[ed]", and that any "determination of suitability of foster care placement . . . is the sole right and responsibility of Friends of the Formerly Friendless." (*Id.*) As the Supreme Court of California ruled:

> When the parties attempt, as here, to make a contract where promises are exchanged as the consideration, the promises must be mutual in obligation. In other words, for the contract to bind either party, both must have assumed some legal obligations. Without this mutuality of obligation, the agreement lacks consideration and no enforceable contract has been created. (*Shortell v. Evans-Ferguson Corp.*, 98 Cal.App. 650, 660-662, 277 P. 519; 1 Corbin, Contracts (1950), s 152, pp. 496-502.) Or, if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration. *See J. C. Millett Co. v. Park & Tilford Distillers Corp.*, D.C.N.D.Cal., 123 F.Supp. 484, 493. Whether these problems are couched in terms of mutuality of obligation or the illusory nature of a promise, the underlying issue is the same consideration. *Ibid.*

(*See Mattei v. Hopper* (1958) 51 Cal. 2d 119, 122.) As the same elements essential to the validity of the original oral contract are not present in the Third Waiver, the Third Waiver does not modify or extinguish the oral contract as a matter of law, and summary judgment cannot be granted on this ground.

D. FFF's Complaint Is Insufficient to Support Summary Judgment on Its Fifth Cause of Action for Fraud Against Ms. Brock

Pleadings serve as the "outer measure of materiality" in a summary judgment motion, and the **motion may not be granted or denied on issues not raised by the pleadings. (***Government Employees Ins. Co. v. Sup.Ct.* (*Sims*) (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 73 —"the pleadings determine the scope of relevant issues on a summary judgment motion.")

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[2] FFF does not seem to guarantee that it will place an animal with an applicant, or permit an applicant any contact with animals, in exchange for signing the Waiver. Instead, the Waiver is drafted such that it describes what applicant is contracting to ***provide.*** (Waiver, Clause 1.)

Plaintiff FFF's motion for summary judgment on its fraud cause of action is predicated on facts and theories that are not even pled in its operative complaint. In its Motion, FFF characterizes its fifth cause of action for fraud as one in which Ms. Brock made up a false story about having lost the cat Louie, when in fact she hid Louie at a friend's house. (Motion, p. 9.) This caused Welch to go looking for Louie and to spend money printing and posting flyers around Ms. Brock's neighborhood. (Motion, p. 10.) Yet Plaintiff FFF's operative complaint against Brock alleges a wholly different theory and set of facts in support of its fraud claim:

> 46. Defendant Brock misrepresented to FFF that she would be willing to return the cats to FFF if, and immediately when, FFF requested return of the cats.
> 47. Defendant Brock had no intention of returning the cats and used this misrepresentation to gain custody of the cats.
> 48. Defendant Brock intended to maintain custody of the cats even if FFF requested that she return the cats.
> 49. FFF relied on the misrepresentation and gave Defendant Brock custody of the cats.
> 50. By reason of Defendant Brock's fraud, FFF is entitled to equitable relief in the form of an order directing Defendant Brock to return the cats immediately to FFF.
> 51. As a result of defendant's fraud, FFF is entitled to equitable relief in the form of an order directing Defendant Brock to return the cats immediately to FFF.

(NOL, Ex. I.) FFF's fifth cause of action for fraud actually alleges that Ms. Brock lied to FFF in order to *gain custody* of all four cats. (*Id.*) Nowhere in its Complaint or the fifth cause of action does FFF allege that Ms. Brock lied about the whereabouts of any cat after they were delivered to her. (*Id.*) Nor does FFF's complaint allege that Ms. Brock hid any cats to keep them from FFF. (*Id.*) Thus, FFF's complaint is insufficient to support its motion for summary judgment. Moreover, none of the actual allegations supporting FFF's fraud cause of action are identified as undisputed material facts in FFF's Separate Statement in support of its MSJ/MSA. Accordingly, summary judgment must be denied on FFF's fifth cause of action for fraud against Ms. Brock.

E. The Statute of Frauds Does Not Apply To Ms. Brock's Oral Agreement To Adopt Louie And Zelda

Cross-defendants contend that any alleged oral contract violates the statute of frauds at Civil Code § 1624, subd. (a)(1). That section states:

> The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:
> (1) An agreement that by its terms is not to be performed within a year from the making thereof.

Cross-defendants argue that because the SACC does not allege the term of the oral agreement, it must be for an indefinite period of time and therefore violates the statute of frauds. Cross-defendants have mischaracterized the statute of frauds and Civil Code § 1624, subd. (a)(1). "It is well settled that the oral contracts invalidated by the statute [of frauds] because [they are] not to be performed within a year include only those which *cannot* be performed within that period." (*Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 281 (citing 3 Williston on Contracts (3d ed.) § 495, pp. 575-576, citing *Hollywood Motion Picture Equip. Co. v. Furer* (1940) 16 Cal.2d 184; *see also Steward v. Mercy Hospital* (1987) 188 Cal.App.3d 1290, 1296 (held that since employment contract is capable of being performed within one year, it falls outside the statute of frauds and is not barred); *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 877 (reasoning that plaintiff's alleged oral lease agreement arguably would not fall within the statute of frauds because it could be performed within one year.) Furthermore, with respect to Ms. Brock's reformation of contract claim, the rule that equity courts will reform contracts both executed and executory, irrespective of the statute of frauds, is well established. (*Merkle v. Merkle* (1927) 85 Cal. App. 87.)

Here, the oral agreement between Ms. Brock and FFF/Welch did not specify any term because no one could predict how long the cats Louie and Zelda might live or stay with Ms. Brock. In *Gaskins v. Security-First Nat. Bank of Los Angeles* (1939) 30 Cal.App.2d 409, 418-419, the Court opined that even if the contract was an oral one to care for the minor children of the incompetent during their minority, such a contract might be fully performed in one year from the date of its execution should all the minor children have died within the first year. Similarly here, the oral agreement *could have* been performed within one year because the cats Louie and Zelda

could have died within the first year of the making of the oral agreement. Thus, the oral agreement for Ms. Brock to adopt Louie and Zelda falls outside the statute of frauds and need not be in writing to be valid.

F. A Triable Issue of Fact Exists As To Whether Any Written Agreement Between Brock and FFF/Welch Should Be Reformed

1. Ms. Brock Alleges Adequate Grounds For Reformation of Contract

Cross-defendants have not established that any document entitled "Waiver" signed by Ms. Brock is an admissible contract. But even if the Court found that Brock and FFF executed an enforceable, written contract, a triable issue exists as to whether the written contract should be reformed to reflect the parties' true agreement. FFF and Welch contend that Ms. Brock seeks reformation of contract based solely on fraud in the inducement, and that the only type of fraud that will support a claim for contract reformation is fraud in the execution. (Motion, p. 18.) The only cited case by cross-defendants for this proposition is *Lane v. Davis* (1959) 172 Cal.App.2d 302, 307. However, the *Lane v. Davis* court does not address what actually constitutes fraud in the execution versus fraud in the inducement. Next, cross-defendants argue that Ms. Brock alleged only fraud in the inducement, rather than fraud in the execution, but fail to cite any case law or statute for this argument.

In fact, Ms. Brock alleged in her SACC that "[w]ithout knowledge of the true facts and in reliance on Cross-Defendant's false representations, Cross-Complainant was deceived and misled into signing a writing that differed materially from the prior oral understanding of the parties." (NOL, Ex. J [SACC].) Cross-defendants have not proven that only fraud in the execution is alleged, or that only fraud in the inducement will support reforming a contract.

2. In the Alternative, The Third Waiver Did Not Contradict The Oral Agreement, and Reformation Is Required to Clarify The Terms of The Waiver

Ms. Brock and Cross-Defendants' oral agreement provided that there would be an evaluation or "foster" period for Louie and Zelda. (Def. UMF 125-126.) This was a condition required by Ms. Brock, as Louie had ocular herpes and she wanted to makes sure that it would not

be contagious to her other cats. (*Id.*) When Ms. Brock saw paperwork presented to her regarding "foster services" for all four cats, Twinkus, Dotty, Louie and Zelda, she believed that the "fostering" of Louie and Zelda was limited to the 4-6 week evaluation period she needed to determine if they could integrate into her household. (Def. UMF 130.)

On this view, the Third Waiver does not contradict, modify, or extinguish the oral agreement. Rather, the Third Waiver merely omits the term in the parties' oral agreement that the fostering of Louie and Zelda was limited to a four to six week evaluation period that Ms. Brock herself required as a condition of adopting them. The term "foster" in the Waiver, as applied to Louie and Zelda, presents a latent ambiguity. "The proper interpretation of a contract is disputable if the contract is susceptible of more than one reasonable interpretation, that is, if the contract is ambiguous. An ambiguity may appear on the face of a contract, or extrinsic evidence may reveal a latent ambiguity. (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1126.)

When Ms. Brock saw the term "foster" on the Waiver, she reasonably understood it to be consistent with the parties' oral agreement that she would adopt Louie and Zelda, contingent on an evaluation or "foster" period to see if they would integrate into her household. (Def. UMF 130.) This latent ambiguity in the Waiver can logically be resolved by reforming the Waiver to conform with the Parties' previous oral agreement that Ms. Brock would adopt Louie and Zelda, subject only to a brief "foster" period to evaluate whether they could settle into her household.

3. Equity Does Not Compel Granting Summary Judgment Against Ms. Brock On Her Reformation of Contract Claim

Cross-defendants argue that Ms. Brock's negligence in reading the Waiver before signing it compels summary judgment against her on the reformation of contract claim since reformation is an equitable remedy. (Motion, p. 19.) Ms. Brock did not fully read the Waiver presented to her by Welch because she believed that it simply memorialized their previous oral agreement and she had no reason to think that the document would contain different terms. (NOL, Ex. D [Brock Depo.] 26:1-4, 6-11).

In support of this argument, cross-defendants cite *Taff v. Atlas Assurance Co.* (1943) 58 Cal.App.2d 696. However, *Taff* is inapposite. In *Taff*, an insurance company defeated an insured's claim for reformation of an insurance policy because the insured did not read the contract and there were no allegation that the insurance company knew or should have known that the insured would not examine the policy or affirmatively prevented the examination. (*Id.*) However, the Court of Appeal of *Taff* was not considering an appeal from a grant of summary judgment, but a judgment after trial. The court stated that "[i]f the trial court should determine that the excuse offered by the insured is not a satisfactory explanation of his failure to read the policy, he is not relieved from the consequences of his neglect…." (*Id.* at 703.) Accordingly, whether Ms. Brock's failure to fully read any Waiver negates her reformation claim is a question of fact that depends on the circumstances of her meetings with Welch. (*See*, *e.g.*, *Tomas v. Vaughn* (1944) 63 Cal.App.2d 188; *Sparks v. Richardson* (1956) 141 Cal.App.2d 286 (the effect of failure to read a contract depends on the circumstances and is a question of fact.)

Factually, the cases are also distinguishable. In *Taff*, the insured had been issued *five* identical and successive policies before filing an action for reformation, claiming that he never read any of the policies. (*Taff*, *supra*, at 703.) *Taff* was also abrogated by subsequent case law. The abrogation was recognized in *Yasuda Fire & Marine Ins. Co., Ltd. v. Heights Enterprises*, 1997 WL 1047919, 1998 Guam 5 (Guam Terr. Dec 11, 1997). Thus, the effect of Ms. Brock's failure to fully read any Waiver before signing it depends on the circumstances and the credibility of the parties, and is not appropriate for summary judgment or adjudication.

G. Plaintiff Cannot Obtain Specific Performance For The Transfer Of The Cats Louie and Zelda

In general, the breach of an agreement to transfer personal property will not justify specific performance, except in the case of unique chattel such as heirlooms or shares of stock not obtainable on the open market. (Witkin, Summary of California Law, 10th Ed., Vol. 13, Personal Property, § 30, Page 322; see also 45 Cal.Jur.2d Specific Performance, Sec. 50.) This rule is simply a corollary to the general rule discussed in Witkin, Summary of California Law, 10th Ed.,

Vol. 13, Personal Property, § 24, Page 312 that specific performance will be granted only when the legal remedy, such as an action for damages, is inadequate. For example, in *Gilfallan v. Gilfallan* (1914) 168 C. 23, plaintiff was held entitled to specific performance of an agreement under which defendant agreed to sell 50,000 shares of stock. The defendant's only property was 40 acres of oil land and shares of stock whose sole value was dependent on the discovery of oil.

In contrast, FFF and Welch have failed to establish proof of the facts of inadequacy of a legal remedy, such as the unique nature of the property or its lack of a determinable market value. Although FFF and Welch suggest that the cats Louie and Zelda have "peculiar value" based on over $10,000 in veterinary care allegedly spent on them (Motion, p. 8.), they do not contend or show that it is impossible or extremely difficult to determine a market value for two formerly homeless cats, one of which is semi-feral and one of which has ocular herpes. Rather, monetary damages equal to the fair market value of Louie and Zelda are adequate damages precluding the granting of specific performance on summary judgment.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Plaintiff and Cross-Defendants' Motion for Summary Judgment or, in the alternative, for summary adjudication.

DATED: September 17, 2012

By: _____
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