SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

November 5, 2024
9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

ORAL ARGUMENT

Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you will appear at the hearing to contest the tentative

If you fail to so notify the court or opposing side, the Court will not hear argument, and the tentative ruling will be adopted.

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

APPEARANCES

The Court strongly prefers in-person appearances.

If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

COURT REPORTERS

The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	23CV419737	Creditors Adjustment Bureau, Inc. vs SURF AIR INC. et al	Parties are ordered to appear for the debtor's exam.
2	20CV368703	Kevin Sung et al vs Rock Solid Financial et al	Legacy's motion for judgment on the pleadings is GRANTED WITHOUT LEAVE TO AMEND. Scroll to line 2 for complete ruling. Court to prepare formal order.
3, 8	22CV399041	Jane Doe vs The City of Sunnyvale et al	Defendant Lockwood's joinder in Defendant City of Sunnyvale's motion to compel documents from third party Jimmie Brown is GRANTED. Jimmie Brown received notice of City's motion to compel and Lockwood's joinder and failed to respond to the motion. It also does not appear Plaintiff objects to production of her records. Accordingly, Jimmie Brown is ordered to produce documents sought by City's subpoena within 20 days of service of a formal order, which formal order Lockwood is directed to prepare and submit to the Court for review and signature within five court days following the hearing.
4	24CV436322	EXETER 1140-1150 RINGWOOD, LLC, a Delaware limited liability company vs GRU ENERGY LAB, INC., a Delaware corporation	Plaintiff's motion to compel is DENIED. Code of Civil Procedure section 2016.040 provides: "A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." The record is clear Plaintiff did not engage in a "good faith attempt at an informal resolution." Defendant agreed to produce additional documents, amend its written responses, and extend Plaintiff's deadline to move to compel long before Plaintiff's motion deadline. In fact, Defendant was literally in the process of producing additional information the day this motion was filed. The record demonstrates that cooperation and *meaningful* meet and confer could have obviated the need for this motion altogether, and it is therefore denied. Court to prepare formal order.
5	22CV408025	Home First Services of Santa Clara County vs Martir Marcus et al	Elizabeth C. Sears' motion to withdraw is GRANTED. Withdrawal shall be effective upon filing the proof of service of the final order, which final order the Court will prepare.
6-7	22CV398579	Lindy Herrera vs The Vanguard Group, Inc., et al	Matter resolved; motions off calendar.
9	22CV400295	MIN-SUN MOON et al vs HECTOR LEON et al	Plaintiffs' motion to compel Defendants' appearance at PMQ depositions and for sanctions is GRANTED. While it may be the case that the PMQ depositions have now taken place, that appears only to be because of motion practice, which appears to be a repeated issue for Defendants in this matter. Accordingly, Defendants (not counsel) are ordered to, pay $1,547.52 in sanctions to Plaintiffs within 20 days of service of the formal order, which order the Court will prepare. The parties are also ordered to appear at the hearing and (1) confirm the October 29, 2024 deposition is complete, and (2) with a proposed trial date. For efficiency and to avoid the necessity of the parties appearing at another hearing, the Court will set trial during the hearing on this motion to compel and vacate the November 12, 2024 trial setting conference.
10	22CV400762	Norman Wong vs 226 Edith Avenue Condominiums, Inc.	Defendants' summary judgment motion is DENIED. Scroll to line 10 for complete ruling. Court to prepare formal order.
11	22CV402705	KINGDOM OF SWEDEN vs J. Daryaie	Parties are ordered to appear for the examination.

12-13	23CV412073	Julie Campo et al vs Jeffrey Kim et al	Cross-complainant Business Alliance Insurance Co.'s motion for leave to serve Cross-defendant Century Development Construction, Inc. through the Secretary of State and motion to serve OK HE KIM by publication in the San Jose Mercury News are GRANTED. Moving party to prepare and submit formal orders for the Court's review within 5 court days of the hearing.
14	23CV415408	Ketevan Jakhua et al vs Nataliya Kolesnyk	Argonaut Glass & Mirror Inc.'s ("Argonaut") unopposed motion for leave to file a Cross-Complaint against Defendant and Cross-Defendant NN Design & Build is GRANTED. Argonaut is ordered to file its Cross-complaint as a separate document within 5 court days of the hearing. These orders will be reflected in the minutes.
15	23CV418079	Golden State Lumber, Inc. vs Ok Hee Kim et al	Cross-complainant Business Alliance Insurance Co.'s motion for leave to serve Cross-defendant Century Development Construction, Inc. through the Secretary of State and motion to serve OK HE KIM by publication in the San Jose Mercury News are GRANTED. Moving party to prepare and submit formal orders for the Court's review within 5 court days of the hearing.
16	24CV442770	BRENT OYLER et al vs CITY OF SAN JOSE et al	City's demurrer to causes of action 8-14, 22, and 23 is SUSTAINED WITHOUT LEAVE TO AMEND. City's demurrer to the rest of Plaintiffs' causes of action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Scroll to line 16 for complete ruling. Court to prepare formal order. As Plaintiff is self-represented, the parties are ordered to appear at the hearing.
17	24CV443376	Souad Abdelmalek vs Kirkham Berwick Wood, MD et al	Defendants' demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Scroll to line 17 for complete ruling. Court to prepare formal order.
18	24CV439018	Ashish Kothari vs Allen Buzon	Defendants Brinks Global Services USA, Inc. and Kenix Yip's motion to stay is DENIED. First, Plaintiffs are correct that a motion to stay is not a responsive pleading. Thus, Plaintiffs are currently in a position to have default entered against Brinks and Yip. Next, Brinks did not elect litigation to resolve this dispute. In fact, Brinks made clear it did NOT elect litigation to resolve this conflict when it petitioned the Court to compel this case to be arbitration, which petition the Court denied. The forum selection clause is therefore inapplicable here, and the case will remain in active litigation in this forum. Court will prepare formal order.

Calendar Line 2
Kevin Sung et al vs Rock Solid Financial et al, Case No. 20CV368703

Before the Court is Defendants and cross-complainants Legacy Real Estate & Associates, Inc.'s and Gary Cusick, Jr.'s ("Cusick Jr.") (collectively, "Legacy") motion for judgment on the pleadings against plaintiffs Kevin Sung and Julie Ho Sung (collectively, "Plaintiffs"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Alleged Facts

This action arises from a real estate transaction. According to the Complaint, in April 2016, Paula McGee and Brian McGee (collectively, the "Sellers"), purchased real property located at 718 Millich Drive, Unit A in Campbell (the "Property"). (Complaint, ¶ 11.) In June 2016, the Sellers began a major remodel without permits, which were not compliant with building codes. (Complaint, ¶ 12.) On April 19, 2018, the Sellers listed the Property with Cusick Jr. and the listing remained operative through the date the parties entered into the purchase contract. (Complaint, ¶ 13.) On June 16, 2018, Plaintiffs viewed the Property for the first time, and they received copies of several property disclosures for review from the Sellers. (Complaint, ¶¶ 14-15.) On June 18, 2018, Plaintiff's relied on the disclosures and the representations of their agent Louis Costanzo ("Costanzo"), working under the broker's license of Rock Solid Financial dba Vero Real Estate Services ("Rock Solid Financial") and they acknowledged receipt of the disclosures and removed all buyer contingencies. (Complaint, ¶ 16.) On June 20, 2018, Plaintiffs entered into the purchase agreement with the Sellers. (Complaint, ¶ 18.)[1] Plaintiffs received all remaining property disclosures by June 23, 2018. (Complaint, ¶ 19.) On July 10, 2018, the parties agreed to extend the close of escrow, Plaintiffs performed the final walk-through inspection on July 21, 2018, and on July 26, 2018, the transaction closed escrow. (Complaint, ¶¶ 21-23.)

On July 28, 2018, Plaintiffs realized the HVAC was not working properly and on August 4, 2018, major issues with the HVAC installation were discovered upon inspection by Plaintiff's

[1] The parties entered addendums on June 23, 2018 and July 9, 2018, for purposes of making minor corrections to the initial purchase contract.

friend and which was also confirmed by an HVAC specialist from Fidelity National Home Warranty. (Complaint, ¶¶ 24-26.) On August 10, 2018, Plaintiffs contacted the Sellers about the issues and the next day, the Sellers sent two people working for Alex Gonzalez ("Gonzalez") to inspect the issues, however, Plaintiffs subsequently discovered that Gonzalez was not a licensed contractor. (Complaint, ¶ 28.) Shortly after, other issues were discovered and Plaintiffs' inquiries to the Sellers and requests for documentation were met with stonewalling. (Complaint, ¶¶ 28, 31.) Plaintiffs also discovered there were no building permits issued on the Property. (Complaint, ¶ 29.) On August 17, 2018, Plaintiffs received a quote from Cali Climate, which dissatisfied the Sellers, so they sent an inspector on August 29, 2018, who did not provide a quote due to the significant problems with the installation and instructed Plaintiffs to get a structural engineer. (Complaint, ¶¶ 30, 33.)

On July 19, 2019, the City of Campbell inspected the Property and confirmed the work on the Property was not permitted and identified multiple violations. (Complaint, ¶ 39.) On March 16, 2020, Plaintiffs retained the services of Engineering West for purposes of inspecting the Property for compliance with current building codes. (Complaint, ¶ 40.) To date, no repairs have been made to the HVAC or another other alleged defects. (Complaint, ¶ 41.)

On July 24, 2020, Plaintiffs filed the Complaint, asserting claims for (1) negligent misrepresentation, (2) intentional misrepresentation, (3) breach of contract, (4) fraud, (5) professional negligence, (6) negligence, (7) constructive fraud, (8) breach of Civil Code section 1102, et. seq., and (9) breach of the covenant of good faith and fair dealing. Plaintiffs only asserted the second, fourth, and sixth causes of action against Legacy. On October 21, 2020, Plaintiffs dismissed the second and fourth causes of action against Legacy Real Estate only.[2] On September 12, 2024, Legacy filed the instant motion, which Plaintiffs oppose.

II. Request for Judicial Notice

Legacy requests judicial notice of the following items:

(1) The Complaint, filed on July 24, 2020: Exhibit A,

[2] On August 20, 2020, the parties also stipulated to dismiss the same causes of action against Legacy Real Estate, which was used to collectively refer to Cusick Jr. and the company. (See Legacy's RJN, Exh. C.) Thus, the only remaining claim against Legacy is the negligence claim.

(2) The Request for Dismissal, filed on October 21, 2020: Exhibit B, and

(3) The Stipulation and Order entered on September 24, 2020: Exhibit C.

As the Complaint is the operative pleading, it will necessarily be considered in ruling on the merits of this motion, thus, judicial notice of it is not required. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [Sixth Appellate District denies request for judicial notice as unnecessary as the court must consider allegations in the complaint and attached exhibits in ruling on demurrer].) Evidence Code section 452, subdivision (d), permits judicial notice of court records. The request for dismissal is a court record. While the Court could not locate the stipulation in the docket, Exhibit C has an electronic stamp, which states it was reviewed on September 24, 2020, and the envelope details on the efile system indicate the court accepted the document. Therefore, Exhibits B and C are proper items for judicial notice.

Accordingly, Legacy's request for judicial notice is DENIED as to Exhibit A and GRANTED as to Exhibits B and C.

III. Legal Standard

A motion for judgment on the pleadings is the functional equivalent of a general demurrer. (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 548; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999; *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254 (*Shea*).) A defendant can move for judgment on the pleadings on the grounds that (1) the court has no jurisdiction of the subject of the cause of action alleged in the complaint and/or (2) the complaint does not state sufficient facts to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(i)-(ii).) "The grounds for the motion must appear on the face of the complaint, and in any matters subject to judicial notice. [Citation.] The court accepts as true all material factual allegations, giving them a liberal construction, but it does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts. [Citations.]" (*Shea, supra,* 110 Cal.App.4th at p. 1254; *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

Legacy moves for judgment on the pleadings as to the sixth causes of action for failure to allege sufficient facts to state a claim. (See Code Civ. Proc., § 438.)

IV. Analysis

A. Sixth Cause of Action-Negligence

To prevail on a cause of action for negligence, a plaintiff must show: (1) a legal duty owed to plaintiffs to use due care, (2) breach of that duty, (3) causation, and (4) damage to plaintiff. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 318.) Legacy argues it did not owe Plaintiffs a duty, and even it did, it did not breach that duty.

Section 2079, subdivision (a), provides ""[i]t is the duty of a real estate broker or salesperson [...] to a prospective purchaser of residential real property [...] to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal[.]" (Civ. Code, § 2079, subd. (a); *Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 763 [the statute codifies a negligence standard of care for one particular task that the law imposes on a seller's agent—the obligation to visually inspect the property and disclose the results of that inspection to the buyer] (*Michel*).)

In *Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, the Court of Appeal stated, "Section 2079 statutorily limits the duty of inspection recognized in *Easton [v. Strassburger* (1984) 152 Cal.App.3d 90, 199 (*Easton*),] to one requiring only a visual inspection." (*Id*. at p. 24.) "Accordingly, a seller's real estate agent has a statutory duty to disclose only visible defects, i.e., to disclose only what a 'reasonably competent and diligent visual inspection of the property' would reveal." (*Peak v. Underwood* (2014) 227 Cal.App.4th 428, 442.) Moreover, "the statutory scheme [of Section 2079] expressly states a selling broker has no obligation to purchasers to investigate public records or permits pertaining to title or use of the property. (*Field, supra,* 63 Cal.App.4th at p. 24.) When the seller's real estate agent or broker is also aware of facts materially affecting the value or desirability of the property, "he [or she] is under the same duty of disclosure." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735-736 (*Lingsch*).)

Plaintiffs allege the Sellers made several misrepresentations in the Transfer Disclosure Statement ("TDS") and Seller Property Questionnaire ("SPQ"), specifically, the Sellers

represented in the TDS that they were not aware of:

- Any room additions, structural modifications, or other alterations or repairs made without necessary permits (Complaint, Exh. 3, TDS, C4),
- Any room additions, structural modifications, or other alterations or repairs not in compliance with building codes (Complaint, Exh. 3, TDS, C5.), and
- Homeowners' Association which has any authority over the subject property. (Complaint, Exh. 3, C13.)[3]

Plaintiffs allege Legacy's liability arises from its failure to investigate and subsequently disclose that there were any alterations to the Property that required building permits, were not compliant with the building codes, and that required HOA approval.[4] However, the fact that repairs or alterations were made to the Property does not alone create an inference that the work was done without a permit or in violation of building codes such that Legacy knew or should have known about the defects on the Property.

Moreover, the Sellers' alleged misrepresentations relate to their *awareness* of unpermitted and non-code compliant work, not as Plaintiffs allege, that the Sellers did not make alterations that required permits or that the alterations they made were code compliant. (See Exh. 3, C4-C5; see also *Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767 (*Bakke*) ["While the 'allegations [of a complaint] must be accepted as true for purposes of demurrer,' the 'facts appearing in exhibits attached to the complaint will also be accepted as true, and if contrary to the allegations in the pleading, will be given precedence.'"]; *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83 (*SC Manufactured Homes*) ["[i]f the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits"].) As a result, Plaintiffs' Complaint fails to allege facts that would

[3] The Sellers also alleged made misrepresentations in the SPQ regarding the existence of material defects not otherwise disclosed to Plaintiffs, any alternations to the property, defects on the Property, any changes which required HOA permission, and documents pertaining to improvements on the Property. (See Complaint, Exh. 4, A10, B1, C1, I2, I3, and M1.)

[4] The TDS and SPQ are Exhibits 3 and 4 to the Complaint, respectively.

support that Legacy had a duty to inquire.

Moreover, unpermitted work, non-code compliant work, and HOA approval would not have been revealed in a visual inspection. Legacy thus did not owe a duty to Plaintiffs beyond that identified in Section 2079, and Legacy did not breach that duty by failing to make disclosures regarding the alterations on the Property. Plaintiffs therefore fail to allege sufficient facts to state a claim.

Plaintiffs request leave to amend, specifically to correct the misquoted portions of the disclosure, however, this amendment would not address the above identified deficiencies. (See *Camsi IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1542 (*Camsi IV*) ["absent an effective request for leave to amend in specified ways," it is an abuse of discretion to deny leave to amend "only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case"]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*) ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"], quoting *Cooper v. Leslie Salt Co*. (1969) 70 Cal.2d 627, 636 (*Cooper*); *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 (*Hendy*) ["the burden is on the plaintiff… to demonstrate the manner in which the complaint might be amended"].)

Legacy's motion for judgment on the pleadings as to the sixth cause of action is accordingly GRANTED WITHOUT LEAVE TO AMEND.

B. Damages

Although a motion for judgment on the pleadings is not the proper means to attack damages because they are a remedy, not a separate cause of action, Legacy's motion is because the damages are associated with the negligence cause of action and the motion for judgment on the pleadings has been granted as to that claim. (See *Kong v. City of Hawaiian Garden Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047 ["A demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy"]; see also *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 163-164.)

Calendar Line 10
Norman Wong vs 226 Edith Avenue Condominiums, Inc. et al, Case No. 22CV400762

Before the Court is Defendants 226 Edith Avenue Condominiums, Inc.'s ("226 Edith") and Ferrari Community Management, LLC's ("FCM") (collectively, "Defendants" or "HOA") motion for summary judgment against plaintiff Norman Wong. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Alleged Facts

This action arises from Plaintiff's slip and fall, which occurred on August 20, 2020 at 226 Edith Avenue in Los Altos. Plaintiff filed his Complaint for personal injury on July 1, 2022. On August 12, 2024, Defendants filed the instant motion, which Plaintiff opposes.

II. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., §437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, 25 Cal.4th at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra*, 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in questions. (*Aguilar, supra*, 25 Cal.4th at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) If the party

opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion)." (*Aguilar, supra,* 25 Cal.4th at pp. 854-855.) "Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Ibid.*)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

III. Analysis

Defendants assert the following facts are undisputed: Plaintiff owns and lives at 226 West Edith Avenue, Unit 19 in Los Altos (the "Property"). (Defendants' Undisputed Material Facts ("UMF"), No. 1.) As part of his ownership, Plaintiff had an assigned parking spot in the garage, and no one else was supposed to park there. (Defendants' UMF, Nos. 2-3.) On August 20, 2020, Plaintiff backed into his parking spot and as he was retrieving shopping bags from his trunk, he slipped and fell in debris located in his parking spot. (Defendants' UMF, No. 5-6.) The parking spot is an appurtenant easement common area, and each homeowner is responsible for maintenance/cleaning their own spot in the garage. (Defendants' UMF, Nos. 7, 9.)

The declaration of Covenants, Conditions and Restrictions ("CC&Rs") do not provide for the HOA to maintain the appurtenant common areas of individual homeowners; those areas are for exclusive use of the individual homeowners as set forth in the Grant Deed. (Defendants' UMF, Nos. 10-12.) Plaintiff admits the Grant Deed is applicable to the Property. (Defendants' UMF, No. 15.) Plaintiff is responsible for maintaining his assigned parking space referenced in the Grant Deed. (Defendants' UMF, No. 16.)

Plaintiff alleges the following facts are undisputed: The CC&Rs were made and recorded

in 1975. (Plaintiff's Additional Material Facts ("AMF"), No. 1.) The CC&Rs were amended on April 20, 1995 and they defined "Common Area" as the entire project except the units granted or reserved. (Plaintiff's AMF, No. 2.) The CC&Rs provide that "Common Area" included but was not limited to "Exclusive Use Common Area, all facilities and improvements located within the Common Area including recreational facilities, pool, driveways, elevators, open spaces, planted and landscaped areas…" (*Ibid*.) The CC&Rs also provide that the Board has the authority to manage, maintain, and repair the Common Area. (Plaintiff's AMF, No. 4.) The CC&Rs specified the owners shall provide landscaping inside balconies and patios appurtenant to the Unit. (Plaintiff's AMF, No. 5.)

Plaintiff purchased his condo in September 2017 and after renovations, he moved in around June 2018. (Plaintiff's AMF, No. 6.) Plaintiff has two assigned parking spots, one inside the gated garage and one outside. (Plaintiff's AMF, No. 7.) The inside spot is adjacent to the garage gate and is blocked by two brick walls. (*Ibid*.) The building electrical wires, a green button to close the garage gate, and a wooden pole are on the wall closest to the gate, and a pipe runs on the ceiling above the parking spot. (Plaintiff's AMF, No. 8.) There is a brick bumper at the head of the parking spot. (Plaintiff's AMF, No. 9.) The spot is in the corner; thus, it is in shadows and separated from spot number 18 by a solid white line. (Plaintiff's AMF, Nos. 10-11.)

On August 7, 2020, Plaintiff noticed a pile of debris swept together behind the bumper block and he used an LED lamp to take pictures. (Plaintiff's AMF, Nos. 12-13.) The same day, Plaintiff emailed HOA board member Mark Powell ("Powell"), thanking them for sweeping and cleaning the garage and stating: "[a] pile of dust/debris was inadvertently left between parking spots 18 and 19…I don't have a broom otherwise I'd clean the area up myself. Sorry. Can you please have this cleaned up?" (Plaintiff's AMF, No. 14.) Plaintiff did not receive a response. (Plaintiff's AMF, No. 15.) On August 15, he sent another email because the debris had not been cleaned up; Plaintiff again received no response. (Plaintiff's AMF, Nos. 16-17.) After he slipped and fell, Plaintiff sent another email informing Powell about the incidence and demanded, "WHEN ARE YOU GOING TO GET THIS PILE OF DEBRIS BEHIND OUR CAR CLEANED UP?!?!"

(Plaintiff's AMF, Nos. 18-19.) Powell responded and informed Plaintiff, "landscape maintenance won't be here until Monday and, as a standard procedure, the crew doesn't clean the garage on a regular basis." (Plaintiff's AMF, No. 20.) Landscapers hired by HOA clean and maintain outside parking spots. (Plaintiff's AMF, No. 21.) On August 24, 2020, Plaintiff purchased a broom and dustpan to clean up the debris. (Plaintiff's AMF, No. 22.)

"The elements of a cause of action for negligence are well established. They are '(a) a legal duty to use due care; (b) a breach of such legal duty; and (c) the breach as the proximate or legal cause of the resulting injury.'" (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 (*Ladd*).) The issue here is whether HOA or Plaintiff was responsible for maintaining parking spot 19.

Defendants argue under Civil Code section 4775, Plaintiff was responsible for maintaining the parking spot 19. Civil Code section 4775, provides:

> (a)(1) except as provided in paragraph (3), unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, and maintaining the common area.
>
> …
>
> (3) unless otherwise provided in the declaration of a common interest development, the owner of each separate interest is responsible for maintaining the exclusive use common area appurtenant to that separate interest and the association is responsible for repairing and replacing the exclusive use common area.

(Civ. Code, § 4775, subd. (a)(3).)

Here, the Grant Deed states: "Together with the following appurtenant easements…(2) the exclusive right to use for vehicle parking purposes the spaces shown on said Condominium Map as P-19." (Grant Deed, Exh. A.)[5] This language shows there was an appurtenant easement regarding the parking spot. The CC&Rs contain no provision specifically addressing responsibility for parking spots, much less a provision placing that responsibility on the HOA.

[5] The Grant Deed is Exhibit B1 to defense counsel Anthony F Pinelli's declaration.

Plaintiff argues the parking spot constituted an exclusive common area which Defendants had the responsibility to maintain. The CC&Rs define "Common Area," as "the entire project except all the Units granted or reserved." (CC&Rs, p. 2, § 1(D).) Common areas include, but are not limited to:

> Exclusive Use Common Area, all facilities and improvements located within the Common Area including recreational facilities, pool, driveways, elevators, open spaces, planted and landscaped area, roofs, foundations, stairs, walkways, manholes, cleanouts, pipes, ducts, flues, chutes, conduits, wires, heating and air-conditioning equipment for the third-floor lounge, fire sprinklers, and other utility installations to the outlets, bearing walls and columns and girders to the unfinished surfaces thereof, regardless of location, and all other improvements which may be placed upon or located in the common area. (*Ibid*.)

Under "Obligations to Repair", the CC&Rs state: "The association is responsible for managing, operating, maintaining, painting, repairing or replacing the common areas and improvements thereon *other than exclusive use common areas (as further defined in Article 9(C) below)*." (CC&Rs, p. 20, § 9(A)[emphasis added].) Article 9(C) then states:

> Exclusive Use Common Areas. Except as otherwise provided herein, each Owner shall maintain and replace the carpeting on the balcony appurtenant to his/her Unit and keep railings enclosing same free of objects that may accidentally fall on the street or patios and cause injury. (CC&Rs, p. 21, § 9(C).)

The CC&Rs also grant the Board the exclusive right and obligation to contract for goods and services, except as otherwise provided, and state:

> The Board shall have the following authority, duties, and powers to be exercised for the benefit of the Units and the Owners,
>
> (A) To manage, operate, maintain… care for and preserve the Common Area,

> and all its facilities, improvements and landscaping including any private driveways and swimming pool to the standard of maintenance prevalent in the neighborhood and to pay for such equipment, tools, supplies, and other personal property for use in such maintenance…
>
> (O) To landscape and maintain the gardens; provided, however, that all landscaping inside balconies and patios appurtenant to the Unit shall be provided by the Owner.

(CC&Rs, p. 9, § 7(A) & (O).)

Plaintiff relies on *Dover Village Association v. Jennison* (2010) 191 Cal.App.4th 123 (*Dover Village Association*), in which an HOA brought claims against a unit owner for a leaky sewer pipe beneath his unit. The court granted summary judgment in favor of a unit owner after finding that the pipe systems are considered common area which the HOA has the duty to repair and maintain. (*Id*. at p. 125.) Plaintiff's parking spot is materially different from the sewer pipes at issue in *Dover Village Association* because of the nature of its use and relation to other owners, thus *Dover Village* is of limited assistance here.

Where *Dover Village* provides some guidance is in the area of contract interpretation. "Under the rule of *expresio unius est exclusion alterius"*—say one thing and impliedly exclude the other—the most natural reading" of these various CC&Rs is that the parking spots fall under the HOA's maintenance responsibility. "Common Areas" is defined to include "Exclusive Use Common Area". There is no dispute that parking spot 19 is an exclusive use common area. The only "exclusive use common area" expressly excluded from the HOA's maintenance responsibilities are "the balcony appurtenant to [an Owner's] Unit." It would thus follow that the parking spots remain the HOA's responsibility.

Also, here, there is apparently no dispute that Plaintiff is not the party who placed the debris in parking spot 19. It appears that landscaping maintenance personnel—hired and controlled by the HOA—accumulated the debris in the course of cleaning and left it in the location where Plaintiff slipped and fell. There is thus at least a triable issue of fact regarding responsibility, where it is the HOA's vendor, not Plaintiff that placed the debris near parking

spot 19 to begin with.

Summary judgment is accordingly DENIED.

Calendar Line 16
BRENT OYLER et al vs CITY OF SAN JOSE et al, Case No. 24CV442770

Defendant City of San Jose's ("City") demurrer to the first amended complaint by plaintiffs Brent Oyler ("Brent") and California Oyler ("California") (collectively, "Plaintiffs" [6]). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Alleged Facts

According to the FAC, on January 30, 2024, Plaintiffs resided at a homeless encampment on Alviso Milpitas Road. (FAC, ¶ 4.) At approximately 2 p.m., they were subjected to harassment and discriminatory actions by employees of defendant Streets Team Enterprise ("Streets Team"), including John Doe, who threatened and used racial slurs in the presence of California, who is a minor. (*Ibid*.)

On July 9, 2024, Plaintiffs filed their Complaint and on September 14, 2024, they filed their FAC, asserting (1) violation of civil rights, (2) negligence, (3) intentional tort, (4) premises liability, (5) negligent hiring, training, supervision, and retention, (6) public nuisance, (7) intentional infliction of emotional distress, (8) child endangerment, (9) respondeat superior, (10) discrimination based on education status, (11) exemplary/punitive damages, (12) violation of Fair Housing Act, (13) obstruction of justice, (14) equitable estoppel, (15) abuse of process, (16) defamation, (17) battery, (18) gross negligence, (19) violation of Equal Protection, (20) denial of due process, (21) conspiracy against civil rights, (22) negligence infliction of emotional distress, (23) housing discrimination in violation of Fair Housing Act, and (24) racial discrimination in violation of civil rights law. On October 18, 2024, City filed the instant motion which Plaintiffs oppose.

II. Untimely Opposition

Code of Civil Procedure section 1005, subdivision (b), requires all opposing papers to be filed and served at least nine court days before the hearing. The opposition was due on October

[6] As Plaintiffs share a surname, the Court will refer to them by their first names, when necessary, for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

23, 2024, but Plaintiffs did not file and serve their opposition until October 28, 2024. Thus, the opposition is untimely.

Plaintiffs are self-represented, which is sometimes referred to as appearing in propria persona. "[W]hen a litigant is appearing in propria persona, he is entitled to the same, but no grater, consideration that other litigants and attorneys. Further, the in propria persona litigant is held to the same restrictive rules of procedures as an attorney." (*Burnete v. La Cases Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267 (*Burnete*); *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."].)

The Court has discretion to consider late filed papers. (*Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168.) And, where a party provides a substantive response to a late filing, the party waives all defects in service. (*Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 10.) There appears to be no prejudice to City, so the Court will consider the merits.

However, Plaintiffs are admonished to comply with court rules and procedures with respect to future filings, as the Court may decline to consider future papers that are not filed and served on time. (See *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765 ["[A] trial court has broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission."].) Thus, the Court will address the merits of the motion.[7]

III. Legal Standard for a Demurrer

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to

[7] Plaintiffs filed surreply. There is no statutory authority permitting a surreply papers. (See e.g., Code Civ. Proc., § 1005, subd. (b) [addressing filing and service of moving, opposing, and reply papers].) While the Court nevertheless has discretion to consider Plaintiffs' surreply (see *Guimei v. General Electric Co.* (2009) 172 Cal.App.4th 689, 703-704), there is no meaningful reason to consider them here.

constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendants demur to each cause of action on the ground it fails to allege sufficient facts to state a claim. (See Code Civ. Proc., § 430.10, subd. (e).)

IV. Analysis

C. Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Ibid*.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer

for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

City argues it cannot ascertain who each claim is directed to and what conduct gives rise to the claim. However, Plaintiffs identify who the claims are asserted against and why they should be held liable. Whether Plaintiffs' allegations are sufficient to state a claim against City is separate from the purported uncertainty of the allegations. While the allegations could be more specific, the FAC is not so uncertain that City cannot reasonably respond to it. (See *Khoury, supra,* 14 Cal.App.4th at p. 616.) Thus, City's demurrer on the basis of uncertainty is OVERRULED.

D. Vicarious Liability

"An employer is vicariously liable for the torts of its employees committed within the scope of the employment." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296 (*Lisa M*).) An employer's vicarious liability may extend to an employee's willful, malicious, and criminal torts, as well as negligence, even if the employer did not authorize the crimes or torts. (See *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209 (*Mary M.*); *Perry v. County of Fresno* (2013) 215 Cal.App.4th 94, 101.)

"An employer will not be held vicariously liable for an employee's malicious conduct or tortious conduct if the employee substantially deviates from the employment duties for personal purposes. Thus, if the employee inflicts an injury out of personal malice, not engendered by the employment, or acts out of personal malice unconnected with the employment, or if the misconduct is not an outgrowth of the employment, the employee is not acting within the scope of employment. If an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior. In such cases, the losses do not foreseeably result from the conduct of the employer's enterprise and so are not fairly attributable to the employer as a cost of doing business." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 812-813 (*Delfino*) [internal citations and quotations omitted].)

Plaintiffs allege Streets Team is a non-profit. (See p. 3:13.) Although Plaintiffs allege employees of Street Team are employees or agents of City, there are no facts alleged to support this legal conclusion. While the court accepts all material facts as properly pleaded, it does not accept conclusions of fact or law. (See *Blank, supra,* 39 Cal. 3d at p. 318.) Plaintiffs fail to allege any facts to support its conclusory assertions of an employer/employee or agency relationship between City and Streets Team.

Therefore, the FAC does not state sufficient facts to support Plaintiffs' claims against City based only on an employer/employee relationship between Defendants and City's vicarious liability on that basis. Thus, City's demurrer to the second, third, fifth, seventh, sixteenth, seventeenth, and twenty-second causes of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

E. First, Nineteenth, Twentieth, and Twenty-First Causes of Action

Plaintiffs allege Defendants violated their civil rights, denied them equal protection, denied them due process, and conspired against civil rights under 42 U.S.C § 1983.

Title 42 U.S.C. § 1983 creates a right of action against any person who, "under color of statute, ordinance, regulation, custom, or usage, of any state or territory of the District of Columbia," deprives another "of any rights, privileges, or immunities secured by the Constitution and laws." (42 U.S.C. § 1983.) To state a cause of action under section 1983, the plaintiff must plead that (1) the defendant is acting under color of state law and (2) deprived plaintiff of rights secured by the Constitution or federal statutes. (*Park v. Thompson* (9th Cir. 2017) 851 F.3d 910, 918.) State action is required to impose liability. (See e.g., *Heineke v. Santa Clara University* (9th Cir. 2020) 965 F.3d 1009, 1013, fn. 3 [state action required for Section 1983 liability].)

Public entities are only subject to suit under Section 1983 where the entity itself causes a constitutional violation, not merely where an employee causes the violation. (*Monell v. New York City Dept. of Social Service* (1978) 436 U.S. 658, 695-695 (*Monell*).) In other words, respondeat superior and vicarious liability are insufficient to support the claim against a public entity. (*Ibid*.) "In order to establish liability for governmental entities under *Monell*, a plaintiff

must prove (1) that [the plaintiff] possessed a constitutional right of which [s]he was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and (4) that the policy is the moving force behind the constitutional violation." (*Doughtery v. City of Covina* (2011) 654 F.3d 892, 900 [internal citations omitted].)

Plaintiff fails to allege any acts by City, rather they allege City is vicariously liable for acts by its employees or agents. (See p. 4:17-18, 23:6, 24:9-10, 25:10-11.) As the Court stated above, Plaintiffs conclusory allegations do not support their assertion of an employer/employee or agency relationship between City and Streets Team. Even if they did establish such a relationship, vicarious liability cannot support this claim against City. (See *Monell, supra,* 436 U.S. at pp. 695-695.) Furthermore, the FAC is devoid of any factual allegations of *conduct by City* that supports a constitutional violation under 42 U.S.C. § 1983. And Plaintiffs fail to identify any policy from City which can form the basis of the claims. (*Doughtery, supra,* 654 F.3d at p. 900.) Accordingly, City's demurrer to the first, nineteenth, twentieth, and twenty-first causes of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

F. Fourth Cause of Action-Premises Liability

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach of a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "Premises liability is a form of negligence … and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619.)

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition was created by a reasonably foreseeable risk of the kind of injury which occurred, and that either:

(a) A negligent or wrongful omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

(Gov. Code, § 835.)

Plaintiffs allege City owns the property and it allowed a dangerous condition to persist on the property. However, Plaintiffs fail to allege City had actual or constructive notice of the alleged dangerous condition. (See Gov. Code, § 835, subd. (b).) Moreover, as the Court stated above, Plaintiffs fail to allege any facts to support their legal conclusion that the employees of Streets Team were City's employees. Even if they did, they fail to allege *any facts* that the individuals were acting within the scope of their supposed employment. (See Gov. Code, § 835, subd. (b).) Thus, City's demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

G. Sixth Cause of Action-Public Nuisance

Civil Code section 3479 defines a "nuisance" as: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property …." A nuisance may be categorized as public, private, or both. (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341.) A public nuisance is defined as "one which affects *at the same time an entire community or neighborhood, or any considerable number of persons*, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480, emphasis added.) "As the California Supreme Court has explained, 'public nuisances are offenses against, or interferences with, the exercise of rights common to the public.'" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542.) "The interference must be both substantial and unreasonable." (*Id.* See also CACI No. 2020.) "A public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable

interference with a public right." (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 79.) Causation is also an element of a public nuisance claim (but not an element of a nuisance per se claim). (*Id*. at p. 101.)

Plaintiffs fail to allege any facts regarding a nuisance that affected an "entire community or neighborhood, or any considerable number of persons." (See Civ. Code, §3480.) And Plaintiffs fail to allege any acts by City or facts in support of their conclusion that Streets Team was City's employee. Thus, City's demurrer to the sixth cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

H. Eighth Cause of Action-Child Endangerment

The FAC does not assert this claim against City. Even if it did, the claim is brought under Penal Code section 273. There is no authority to support the viability of a child endangerment claim in civil court. Thus, City's demurrer to the eighth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

I. Ninth Cause of Action-Respondeat Superior

Under the doctrine of respondeat superior, an employer is liable for the torts of its employees committed within the scope of their employment. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967.) Nevertheless, respondeat superior is a doctrine, not an independent cause of action among California state courts. (See *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296 (*Lisa M*.) [Under the doctrine of respondeat superior, "an employer is vicariously liable for the torts of its employees committed within the scope of the employment."]; see also *Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2021) 12 Cal.5th 493, 502-503["For nearly 150 years, the long-standing history of respondeat superior—a form of vicarious liability—has been reflected in both California statutory and common law, pursuant to which, by default, "an employer may be held vicariously liable for torts committed by an employee within the scope of employment"].) Respondeat superior is a theory of liability rather than a cause of action, thus, City's demurrer to the ninth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

J. Tenth Cause of Action-Discrimination Based on Education Status

The Federal Fair Housing Act ("FHA") states that it is unlawful "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of *race, color, religion, sex, familial status, or national origin*." (42 U.S.C. § 3604(b) [emphasis added].)

Education status is not a protected category under the FHA. Thus, City's demurrer to the tenth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

K. Eleventh Cause of Action-Exemplary/Punitive Damages

Plaintiffs cannot state a claim for punitive damages because they are remedies, not independent causes of action. (See *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 391.) Thus, City's demurrer to the eleventh cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

L. Twelfth Cause of Action-Violation of Fair Housing Act

Plaintiffs allege Defendants violated federal and state housing laws by discriminating against them based on their housing status. They specifically allege City is directly responsible for ensuring compliance with fair housing laws. However, Plaintiffs fail to allege any facts regarding City's act or how it failed to ensure compliance with the laws. As a result, Plaintiffs fail to allege sufficient facts to state this claim. (See *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*) [statutory causes of action must be alleged with particularity].) Moreover, housing status is not a protected category under the FHA. (See 42 U.S.C. § 3604.) Thus, City's demurrer to the twelfth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

M. Thirteenth Cause of Action-Obstruction of Justice

Plaintiffs assert this claim under Penal Code section 182; however, this statute applies to conspiracy. Even if Plaintiffs had cited to an appropriate statute (i.e., Penal Code sections 132-136), there is no civil cause of action for obstruction of justice. Thus, City's demurrer to the thirteenth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

N. Fourteenth Cause of Action-Equitable Estoppel

"California does not recognize an independent cause of action for equitable estoppel." (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 782 (*Moncada*).) Equitable estoppel "is defensive in nature only, and operates to prevent one party from taking an unfair advantage of another." (*San Diego Mun. Credit Union v. Smith* (1986) 176 Cal.App.3d 919, 922-923 [internal quotations omitted].)

Because an independent cause of action for equitable estoppel is not recognized in California, Plaintiff cannot state this claim. Thus, City's demurrer to the fourteenth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

O. Fifteenth Cause of Action-Abuse of Process

"To establish a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a willful act in a wrongful manner." (*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 792.)

It appears Plaintiffs allege City manipulated administrative processes to obstruct justice. However, Plaintiffs fail to allege what administrative processes City allegedly manipulated. Moreover, Plaintiffs fail to allege any ulterior motive or willful act by City. Thus, City's demurrer to the fifteenth cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

P. Eighteenth Cause of Action-Gross Negligence

"Gross negligent is a subspecies of negligence; it is not a separate tort." (*Joshi v. Fitness Internat., LLC* (2022) 80 Cal.App.5th 814, 825; *Epochal Enterprises, Inc. v. LF Encinitas Properties, LLC* (2024) 99 Cal.App.5th 44, 55 ["California does not recognize a distinct common law cause of action for gross negligence apart from negligence."] (*Epochal Enterprises*).) Gross negligence is different from ordinary negligence in degree, not in kind. (*Anderson v. Fitness Internal LLC* (2016) 4 Cal.App.5th 867, 881 (*Anderson*).) "Because gross negligence is simply a degree of negligence, the elements of a claim for gross negligence [are] the same as one for ordinary negligence." (*Epochal Enterprises, supra,* 99 Cal.App.5th at p. 56.)

"[T]o support a theory of gross negligence, a plaintiff must allege facts showing either a 'want of even scant care' or 'an *extreme* departure from the ordinary standard of conduct.'" (*Anderson, supra,* 4 Cal.App.5th at p. 881.) Circumstances in which courts have found gross negligence include "conduct that substantially or unreasonably increased the inherent risk of an activity or actively conceals a known risk," or "conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard." (*Ibid*.)

Plaintiffs offer no argument or authority to support the assertion of a standalone cause of action for gross negligence in addition to a cause of action for negligence. Moreover, Plaintiffs fail to allege any facts regarding City's allegedly grossly negligent acts. (See *Anderson, supra,* 4 Cal.App.5th at p. 881.) Therefore, Plaintiffs fail to allege sufficient facts to state this claim. Thus, City's demurrer to the eighteenth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

Q. Twenty-Third Cause of Action-Housing Discrimination in Violation of Fair Housing Act

Plaintiffs assert this claim against City for "its policies and actions that discriminate against vulnerable populations." However, Plaintiffs fail to identify any policies or actions by City. Moreover, Plaintiffs allege discrimination based on their housing status, but housing status is not a protected category under Section 3604. Thus, City's demurrer to the twenty-third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

R. Twenty-Fourth Cause of Action-Racial Discrimination in Violation of Civil Rights

42 U.S.C. § 2000d, provides, "[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (42 U.S.C. § 2000d.) 42 U.S.C. §1981, provides, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as it enjoyed by white citizens,

and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every other kind and to no other." (42 U.S.C. §1981, subd. (a).)

Plaintiffs assert this claim against City "for policies or practices that resulted in racial discrimination." However, Plaintiffs fail to allege any facts in support of their claim. Moreover, they fail to allege any facts to support discrimination in relation to receiving Federal assistance or *any acts by City* to discriminate against them on the basis of race. Thus, City's demurrer to the twenty-fourth cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

Calendar Line 17
Souad Abdelmalek v. Stanford health Care dba Stanford Hospital, et.al., Case No. 24CV443376

Before the Court is Defendants', Stanford Health Care dba Stanford Hospital, Kirkham Berwick Wood, Curt George Di Cristina, Garret Kenn Morris, demurrer to the Plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Alleged Facts

According to the complaint, on August 2, 2023, Plaintiff was admitted to Stanford Hospital for a spinal cord decompression procedure. The procedure was performed by Defendant Wood and assisted by Defendant Di Cristina. After the procedure, Plaintiff was unable to move her bowels and was given laxatives and enemas. Plaintiff also complained of pain and coldness in her right leg, but the medical providers claimed her complaints were normal and sought to discharge her. On August 9, 2023, it was discovered that Plaintiff was suffering from a post-operative hematoma, and she had to undergo multiple additional procedures.

Plaintiff initiated this action on July 18, 2024, alleging "Health Care provider Negligence Leading to Injury or Death, per California Civil Code S. 3333.1."

II. Legal Standard

"The party against whom complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure] section 430.30, to the pleading on any one or more of the following grounds: (e) The pleading does not state facts sufficient to constitute cause of action, (f) The pleading is uncertain." (Code Civ. Proc., 430.10, subds. (e) (f).) A demurrer may be utilized by "[t]he party against whom complaint has been filed" to object to the legal sufficiency of the pleading as whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the

possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A*. (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendant demurrers to the entirety of the complaint on the grounds that it fails to (1) comply with Cal. Rules of Court, Rule 2.112 and (2) state sufficient facts to constitute a cause of action.

III. Analysis

Plaintiff does not properly respond to Defendant's demurrer. California Rules of Court, Rule 3.1113(a) requires a memorandum that "contain[s] a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (California Rules of Court, Rule 3.1113(b).) Rule 3.1113 rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the opposing party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide. (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934, [trial court was justified in denying post-trial motions for failure to provide adequate memorandum].) However, the Court will address the merits for party and judicial efficiency, as the Defendants' points regarding the complaint are well taken.

Defendants contend the complaint confusingly refers to fifteen counts of negligence under the caption of "Health Care Provider Negligence" and under the heading of "First Cause of Action Professional Negligence", without identifying the healthcare provider defendants or the charging allegations. Citing *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.* (1993) 5 Cal.4th 854, fn.1, Defendants note that "counts" are merely ways of stating the same cause of action differently. In opposition, Plaintiff argues the complaint contains one cause of action for

professional negligence against the named defendants and each defendant's various liabilities have been grouped into counts under their name.

While it is true that liberal understanding or interpretation of the complaint's allegation makes it immaterial what labels Plaintiff has used to identify their claims, "[e]rroneous or confusing labels attached by the inept pleader are to be ignored if the complaint pleads facts which would entitle the plaintiff to relief." (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.) It remains essential that a complaint set forth the actionable facts with sufficient precision. (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 636.)

Plaintiff's complaint here makes vague allegations about her condition in conclusory fashion and fails to allege sufficient facts regarding (1) the applicable professional standard of care for each defendant, (2) how each defendant's actions breached the standard of care, or (3) how each defendant's breach causally connected to any harm Plaintiff suffered.

Accordingly, Defendants' demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.