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

DATE: September 10, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR 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 plan to appear at the hearing to contest the ruling

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

FOR 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

FOR 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

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:

https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	20CV367561	ZACHARY KOWITZ et al vs MICHAEL KOWITZ et al	Michael Kowitz's motions for reconsideration of Judge Alloggiamento' s July 26, 2024 orders denying (1) his motion to stay enforcement of judgment and related relief and (2) granting plaintiff's motion for attorneys' fees are RESET for October 18, 2024 at 9 a.m. in Department 9, so that those motions can be heard by the judge who entered the subject orders.
2	21CV384203	STEVEN YU vs YU CAI et al	Off calendar.
3	23CV421142	Wells Fargo Bank, N.A. vs Benny Ooi	Wells Fargo Bank, N.A.'s motion to vacate notice of settlement and return the matter to the active docket is GRANTED. A notice of motion with this hearing date and time was served by U.S. mail on July 18, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiff also submits evidence demonstrating that Defendant never signed the settlement agreement and stopped communicating. Accordingly, the notice of settlement is vacated, the stay if lifted, and the matter is on the active docket. Moving party to prepare formal order.
4-5; 11-12	23CV422810	Isaiah Clapp et al vs City Heights at Pellier Park Homeowners Association et al	Scroll to lines 4-5, 11-12 for ruling. Court to prepare formal order.
6	23CV422882	Estate of DANIEL BUGARIN-HERNANDEZ et al vs KEVIN ALVAREZ et al	There are 8 discovery motions set in this case to be heard on different dates: September 10, 12, 17, 19, and 26. The subject of the motions are identical: Plaintiffs served discovery in November 2023, and Defendant failed to respond to that discovery for most Plaintiffs until July 2024 and for The Estate of Daniel Burgarin-Hernandez, have never responded. Plaintiffs seek sanctions and other relief. First, the parties are put on notice that the Court intends to address all of these motions on September 10 at 9 am in Department 6. Accordingly, if there are arguments not included in the papers already on file either party wants to make for any of these 8 motions, come prepared to make those arguments on September 10. Next, the parties are ordered to appear for argument and make clear what discovery, in any, remains outstanding. Finally, the Court will be issuing sanctions against Defendant personally. The Court understands and appreciates Defense counsel's explanations for why this delay took place. However, if self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys, there is no basis to excuse Defendant from that same compliance—particularly when he has an attorney explaining the process and the consequences for not complying with that process. (See *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543 (self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure); see also *County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) However, since the basic purpose of a discovery sanction is to compel disclosure of discoverable information, and may not be imposed solely to punish the offending party (*Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164; *Kwan Software Eng'g, Inc. v. Hennings* (2020) 58 Cal.App.5th 5774-75), and the motions here were simple and virtually identical to one another, the Court will reduce the amount requested and impose $1,000 in sanctions against Defendant personally and not against counsel.
7-8	24CV432739	Kelvin Chong et al vs Neuron Fuel, Inc. et al	Tao Y. Leung's motions to withdraw as counsel for Inspilearn, LLC and Neuron Fuel, Inc. are GRANTED. Court will use form of order on file. Withdrawal shall become effective upon filing of proof of service of the formal order.
9	24CV435248	Sanjuana Perez vs Sarthak Khanal et al	PV Holding Corp.'s demurrer is SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Scroll to line 9 for complete ruling. Court to prepare formal order.

10	24CV438914	Harvey Sackett vs Dolores Martinez et al	John Martinez and Delores B. Martinez's motion to stay is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on July 25, 2024. Plaintiff did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) "There is [also] no question that the privilege against self-incrimination may be asserted by civil defendants who face possible criminal prosecution based on the same facts as the civil action." (*Brown*, 180 Cal. App. 3d at 708, citing *Pacers, Inc.* v. *Superior Court* (1984) 162 Cal.App.3d 686, 688-689.) "'All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure.'" (*Id.*, quoting Code Civ. Proc., § 2016, subd. (b).) While the Court understands from the motion that there is no criminal case pending, one could still be filed between now and March 30, 2025. The Court will accordingly stay this action up to and through March 30, 2025. The November 5, 2024 initial case management conference is VACATED and RESET to April 8, 2025 at 10:00 in Department 6. Court to prepare formal order.

Calendar Lines 4-5, 11-12
Case Name: *Clapp, et al. v. City Heights at Pellier Park Homeowners Association, et al.*
Case No.: 23CV422810

Before the Court is (1) defendants' Christopher Gunnucio ("Gunnucio"), Richard Dudley ("Dudley"), David Pandori ("David"), Steven Reichner ("Reichner"), and Catherine Pandori ("Catherine") (collectively, "Board Members") demurrer to plaintiffs' Isaiah Clapp ("Isaiah") and Diana Clapp ("Diana") (collectively "Plaintiffs") first amended complaint ("FAC"), (2) Board Members' motion to strike portions contained therein, (3) defendant City Heights at Pellier Park Homeowners Association's (the "Association") demurrer to Plaintiffs' FAC, and (4) the Association's motion to strike portions contained therein.[1] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This action arises out of condominium-owners' dispute with the Association regarding repair of water pipes in the common areas. According to the verified FAC, Plaintiffs own and reside at 175 W. Saint James St, Unit 105 in San Jose (the "Property"), which they purchased around April 13, 2022. (FAC, ¶ 1.) The Property is part of the common interest development known as City Heights At Pellier Park ("City Heights"), which is governed by the Association in accordance with its governing documents. (FAC, ¶¶ 2-3.) Gunnucio is the President of the Association, Dudley is the Vice President, David is the Secretary, Reichner is the Treasurer, and Catherine is a former volunteer director of the Association and David's spouse. (FAC, ¶ 4.) Isaiah is a board member, with no title.[2] (FAC, ¶ 5.)

Plaintiffs allege the Property was damaged by water intrusions in June 2022, August 2022, November 2022, and August 2023. (FAC, ¶¶ 9-12.) The damage from the June 2022, August 2022, and August 2023 occurrences was caused by pinhole leaks in common areas, while the November 2022 incident was caused by back flow from the pipes. (*Ibid.*)

The Association hired a plumbing expert (a licensed engineer) to investigate the status of the common area pipes at City Heights. (FAC, ¶ 22.) The expert drafted a report to the Association

[1] As some individuals 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.)
[2] The Court will refer to the entire board as the "Board," and to all defendants collectively as "Defendants."

which stated the common area pipes were installed with too much wielding flux and recommended they be replaced. (*Ibid.*) Plaintiffs allege the Board did not accept the recommendation and suppressed it from disclosure to Plaintiffs and the membership. (FAC, ¶¶ 23, 53.) The Board refused to reimburse Plaintiffs for their damages. (FAC, ¶ 19.)

On September 13, 2023, Plaintiff filed their verified complaint, asserting (1) trespass, (2) nuisance, (3) waste, (4) negligence, (5) breach of fiduciary duty, (6) breach of contract, and (7) declaratory relief. On May 3, 2024, the Court issued an order sustaining the Association's demurrer with leave to amend (the "Order"). On May 17, 2024, Plaintiffs filed their FAC, asserting the same claims. On July 12, 2024, Board Members and Association filed their respective demurrer and motion to strike; Plaintiffs oppose the motions.

II. Board Members' Demurrer

A. Legal Standard

"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 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 "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.)

The Board Members demur to the third, fourth, and fifth causes of action on the ground they fail to allege sufficient facts to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

B. Analysis

1. Third Cause of Action-Waste

"Waste is conduct (including both acts of commission and of omission) on the part of the person in possession of land which is actionable at the behest of, and for the protection of the reasonable expectations of, another owner of an interest in the same land." (*Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 597-598; see also *Avalon Pacific-Santa Ana, L.P. v. H.D. Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183, 1212 (*Avalon*).) "Waste will be found only when the market value of property is permanently diminished or depreciated." (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 777.) In this context, "[p]ermanent does not inflexibly mean eternal; instead, 'permanent' means a degree of irremediableness sufficient to cause injury to a reversion interest that will not become a possessory interest until the end of the lease term." (*Avalon, supra,* 192 Cal.App.4th at p. 1212.) "In order to state a cause of action for waste, a plaintiff must plead and prove that the defendant was under a duty to preserve and protect the property involved." (*Ibid*.)

Plaintiffs allege they are board members of the Association and have an ownership interest in their own separate interest (the Property) and an ownership interest in common with the other members of the HOA over the common areas. (FAC, ¶ 35.)

In the Order, the Court found Plaintiffs' claim failed because their conclusory allegations regarding the diminution of the City Height's value and their failure to allege Association's conduct resulted in permanent and substantial damage to the common areas were insufficient to support their claim. (Order, p.5:26-28.) In their FAC, Plaintiffs allege the following, upon information and belief:

(1) The precise path the water has taken from the pipes that already leaked, as well as the path the water will take from future pipes that will leak, is not presently known and not reasonably ascertainable (FAC, ¶ 38);

(2) Other ground floor condos have also suffered water intrusion from the leaking pipes (FAC, ¶ 29);

(3) There is no reasonable way of knowing if all of the water that has leaked has been accounted for in owners' units, because the water originates in and flows through interstitial building spaces that are not observable without destructive testing (FAC, ¶ 40);

(4) Unaccounted-for water has caused, and will continue to cause, damage to interstitial support members, concrete/rebar, insulation, electrical conduits and/or mechanical systems, and each of them, which may never be discovered and, if left unaddressed, may result in catastrophic building failure (such as what happened in Champlain Towers South in Miami, Library Gardens in Berkley, or Morris Heights in the Bronx) (FAC, ¶ 41);

(5) Unknown water damage to unknown building systems that is not readily discoverable, but is preventable through a comprehensive pipe replacement plan, has caused and will continue to cause substantial damage to common area systems and represents a permanent diminution of value ("Permanent Diminution of Value") (FAC, ¶ 42); and

(6) The Permanent Diminution of Value is exacerbated by the excess welding flux used in the previous repairs and has caused ongoing and cumulative damage to other pipes, which increased the likelihood of causing other water leaks, that could result in further damages to common areas that are not readily observable until and unless that water enters an owner's unit or the building suffers catastrophic failure. (FAC, ¶ 43.)

Plaintiffs appear to allege City Height's value is diminished because of the water damage to common areas. However, Plaintiffs fail to allege that the Board Members' conduct *resulted* in permanent and substantial damage to the common areas. (See *Avalon, supra,* 192 Cal.App.4th at p. 1215.) Instead, Plaintiffs claim value is diminished from "unknown water damage to unknown water systems"; the welding flux used for past repairs that *could result* in further damages to common areas; and "unknown water damage to unknown building systems" that *will cause* substantial damage to common area systems. (FAC, ¶ 42.) In opposition, Plaintiffs contend six years' of recurring leaks have damaged Plaintiffs' unit, but these allegations are not in the FAC. Thus, the Board Members' demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

2. Fourth Cause of Action-Negligence

"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 was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819; see also *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531 (existence and scope of a duty of care is a question of law for the court even at the pleading stage.)

Relying on *Sands v. Walnut Gardens Condominium Assn. Inc.* (2019) 35 Cal.App.5th 174 (*Sands*), Board Members argue Plaintiffs cannot state sufficient facts to state a cause of action for negligence because Board Members do not owe Plaintiffs an independent duty outside of the Covenants, Conditions, & Restrictions ("CC&Rs"). In *Sands,* homeowners sued their homeowner's association and its property manager for breach of contract and negligence after a pipe on the roof broke and caused water damage to their bedroom. (*Sands,* 35 Cal.App.5th at p. 175.) The contract required the association to keep the project in "first class condition." (*Id*. at p. 176.) The appellate court reversed the trial court's nonsuit as to the contract claim because reasonable jurors could have found the failure to maintain common areas was a breach of that promise. (*Ibid*.) However, the Court of Appeal affirmed nonsuit of the negligence. The plaintiffs conceded their evidence for negligence was the same as for the contract claim, and there was no evidence of advance warning regarding plumbing or roof issue. (*Id*. at p. 177.) On these facts, the court concluded the association had no independent duty as to the pipes and roof arising from tort law and outside of the CC&Rs:

> The association argued there was no evidence "as far as negligence [was] concerned" showing the association "was on notice of any condition that required repair." The trial court rightly decried this effort to "tortify" a creature of private ordering. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 554 [87 Cal. Rptr. 2d 886, 981 P.2d 978] ["If every negligent breach of a contract gives rise to tort damages the limitation [that 'breach of contract is tortious only when some independent duty arising from tort law is violated']

> would be meaningless, as would the statutory distinction between tort and contract remedies."].)
>
> Outside the covenants, conditions, and restrictions, the association had no independent duty as to the pipes and roof arising from tort law. The Sandses' trial counsel conceded the evidence for their negligence claim was "pretty much the same, under the same thing as a contract … ." The Sandses give us no authority for a cause of action in tort. They state: "As with the Cause of Action for Contract, the duties and obligations for which the HOA, Walnut Gardens, was responsible, are found in the [covenants, conditions, and restrictions] … ."
>
> Even had the association omitted this issue in its nonsuit motion, nothing the Sandses could have done at trial would have summoned into existence a tort claim barred by law. (See *Lawless, supra*, 24 Cal.2d at p. 94.) (*Id.* at pp.177-178

Plaintiffs fail to respond to this argument. However, Plaintiffs allege Defendants were on notice of the water leak, the Board undertook the task of investigating the issue, and the Board assumed a duty to at least try to diagnose and remedy the issue. Further, unlike in *Sands*, Plaintiffs allege Board Members had an affirmative duty to employ ordinary skill in the management of City Heights pursuant to Civil Code section 1714, which provides:

> Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

(Civ. Code, § 1714, subd. (a).)

Given these allegations, at this stage of the proceedings, the Court cannot conclude there was no duty as a matter of law. Plaintiffs allege the Board Members breached their alleged duty by authorizing the improper repairs and failing to replace the entire length of each common area pipe

found to have been affected by the pinhole leaks and that they were harmed by these breaches. (FAC, ¶¶ 52-53.) Thus, the Board Members' demurrer to the fourth cause of action is OVERRULED.[3]

3. Fifth Cause of Action-Breach of Fiduciary Duty[4]

To plead a cause of action for breach of fiduciary duty, a plaintiff must allege facts showing the existence of a fiduciary duty to that plaintiff, a breach of that duty, and resulting damage. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524 (*Pellegrini*).)

An association and its members stand in a fiduciary relationship. In "recognition of the increasingly important role played by private homeowners' associations in such public-service functions as maintenance and repair of public areas and utilities, street, and common area lighting, sanitation and the regulation and enforcement of zoning ordinances, the courts have recognized that such associations owe a fiduciary duty to their members." (*Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642 (*Cohen*).) The "directors of a nonprofit mutual benefit corporation" are "fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code." (*Coley v. Eskaton* (2020) 51 Cal.App.5th 943, 958.) Corporations Code section 7230, provides, "[a]ny duties and liabilities set forth in this article shall apply without regard to whether a director is compensated by the corporation." (Corp. Code, § 7230, subd. (a).) Corporations Code section 7231, provides, in relevant part,

> A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the *best interest of the corporation* and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

[3] In the reply, Board Members argue there is no duty where the alleged harm is economic, rather than physical. The Court declines to consider this argument as it was raised for the first time in the reply. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [points raised for the first time in reply brief will not ordinarily be considered, because this would deprive respondent of an opportunity to counter the argument]; *L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles* (2015) 239 Cal.App.4th 918, 926, fn. 7 [contention forfeited where raised for the first time in reply brief without a showing of good cause].)

[4] Plaintiffs argue the Board Members' remaining arguments are improper because the Court ruled on their previous demurrer, however, the Board Members previous demurrer was taken off calendar and thus not ruled on.

(Corporations Code, § 7231, subd. (a) [emphasis added].) Thus, without more, the Board Members' fiduciary duties, in their positions as board members, run to the Association and not to Plaintiffs.

Plaintiffs' reliance on *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513 (*Frances T.*), which addressed whether a condominium owners association and the individual members of its board could be held liable for injuries to a unit owner caused by third-party criminal conduct, is misplaced. (*Id*. at p. 495.) *Frances T.* does not hold that individual directors owe a fiduciary duty to HOA members by virtue of their seats on the board of an HOA but rather they owe a duty to exercise care based on a homeowners' function as a landlord in maintain the common areas. (*Id*. at p. 499.) A duty of care in the negligence context is different from a fiduciary duty, and "a landlord and tenant do not generally stand in a fiduciary relationship." (*Id*. at p. 513.)

Similarly, Plaintiffs reliance on *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 799 is misplaced. In *Raven's Cove*, the homeowners association sued the project developer based on defects in common area landscaping and the exterior walls of individual units. (*Id*. at p. 787.) They also sued the developer and its employees as former directors in control of the association for breach of fiduciary duty. (*Ibid*.) The court explained there was a duty of loyalty when the board of directors of an association, which is also primarily comprised of the developer and the developer's employees, considers maintenance and repair contracts, the operating budget, creation of reserve, operating accounts, and so forth:

> Thus, a developer and his agents and employees who also serve as directors of an association, like the instant one, may not make decisions for the Association that benefit their own interests at the expense of the association of its members… In most jurisdictions, the developer is a fiduciary acting on behalf of unknown persons who will purchase and become members of the association. (*Id.* at p. 799.)

Raven's Cove is distinguishable. There, unlike here, the individual directors who controlled the board were the developer and the developer's agents—a situation the court of appeal likened to "that of a corporate promoter to the shareholders." (*Raven's Cove*, 114 Cal.App.3d at 800.) It is clear that this fact lead to that court finding a fiduciary duty between the individual directors and the homeowners was formed and broken:

> Here, the initial directors and officers of the Association had a fiduciary relationship to the homeowner members analogous to that of a corporate promoter to the shareholders. These duties take on a greater magnitude in view of the mandatory association membership required of the homeowner. We conclude that since the Association's original directors (comprised of the owners of the Developer and the Developer's employees) admittedly failed to exercise their supervisory and managerial responsibilities to assess each unit for an adequate reserve fund and acted with a conflict of interest, they abdicated their obligation as initial directors of the Association to establish such a fund for the purposes of maintenance and repair. Thus, the individual initial directors are liable to the Association for breach of basic fiduciary duties of acting in good faith and exercising basic duties of good management. (*Id.*)

Plaintiffs offer no other basis for a fiduciary duty from the Board Members to Plaintiffs. Thus, Board Members' demurrer to the fifth cause of action is SUSTAINED without leave to amend.

III. Board Members' Motion to Strike

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"While under Code of Civil Procedure section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281, internal citations omitted.)

The Board Members move to strike portions of the FAC regarding punitive damages (¶ 94; p. 13, ¶ 2) and irrelevant allegations (¶ 41).

B. Analysis

1. Improper Allegation

The Board Members seek to strike the portion of paragraph 41 as follows: "(such as what happened in Champlain Towers South in Miami, Library Gardens in Berkley, or Morris Heights in the Bronx.)." That allegation is contained within the third cause of action for waste and the Board Members' demurrer has been sustained to that claim. Thus, the Board Members' motion to strike the portion of paragraph 41 is MOOT.

2. Punitive Damages

A motion to strike a claim for punitive damages is properly granted when the complaint fails to set forth the elements stated in the general punitive damage statute. (Civ. Code, § 3294; *Turman v.*

Turning Point of Cent. Cal., Inc. (2010) 191 Cal.App.4th 53, 63-64.) These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. (Civ. Code, § 3294, subd. (a).) "Malice" is defined as conduct which is "intended by the defendant or cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others." (Civ. Code., § 3294, subd. (c)(1).) "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in a conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) "Fraud" means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).)

A demand for punitive damages for the commission of any tort requires more than mere allegations of the "wrongfully and intentionally," "oppression, fraud, and malice" sort of language found in Civil Code section 3294. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7.)

Plaintiffs contend they sufficiently allege punitive damages based on fraud and oppression. However, the Court finds Plaintiffs fail to allege facts that rise to the level of oppression or fraud. Plaintiffs do not allege facts to support an inference, for example, that Board Members engaged in willful conduct with the intent of depriving Plaintiffs of property or legal rights or otherwise causing injury. As the FAC alleges, Isaish was also a board member, thus it follows that he was aware of all the alleged willful conduct. Therefore, to the extent Plaintiffs based their claim for punitive damages on Board Members' conduct towards other Association members, Plaintiffs fail to allege facts regarding the Board Members' intent there as well. Thus, the Board Members' motion to strike the allegations involving punitive damages and the accompanying prayer for relief from the FAC is GRANTED with 20 days leave to amend.

IV. The Association's Demurrer

The Association demurs to the third and sixth causes of action on the ground they fail to state sufficient facts to constitute a claim (Code Civ. Proc., § 430.10, subd. (e)) and to the sixth cause of action on the ground that it is uncertain (Code Civ. Proc., § 430.10, subd. (e)).

A. Third Cause of Action-Waste

The Association offers the same arguments as Board Members regarding this cause of action and the Court has addressed those arguments above. Thus, the Association's demurrer to the third cause of action is SUSTAINED with 20 days leave to amend.

B. Sixth Cause of Action-Breach of Covenant

Courts have construed CC&Rs as a contract between the Association and its condominium owners. (*Frances T., supra*, 42 Cal.3d at p. 512 [CC&Rs as contract between homeowner and homeowners association with respect to installation of common area lighting]; *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1054 [CC&Rs as contract between neighboring property owners prohibiting the use of a residential property for business activities]; *Franklin v. Marie Antoinette Condominium Owners Assn.* (1993) 19 Cal.App.4th 824, 828, 833-834 [CC&Rs as a contract between homeowner and homeowners association with respect to homeowners association's obligation to maintain and repair common area plumbing].)

"To state a cause of action for breach of contract, a party must plead the existence of a contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach and resulting damage. [Citation.] If the action is based on alleged breach of written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 308 [citation omitted].) Alternatively, a plaintiff may plead the legal effect of the contract rather than its precise language. (See *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489.) "In order to plead a contract by its legal effect, plaintiff must 'allege the substance of its relevant terms. This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions.' [Citations.]" (*Ibid*.)

The Association again argues Plaintiffs' claim is barred by the business judgment rule and the related policy of judicial deference towards decisions made by the directors of a homeowners' association and is uncertain. Plaintiffs argue the business judgment rule does not apply because the subject decision must be permissible under the relevant statutes, covenants, and restrictions.

"The common law business judgment rule has two components-one which immunizes [corporate] directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith and in what the directors believe is the organization's best interest. A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors." (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 257 (*Lamden*); Corp. Code, §§ 7231-7231.5.) A similar rule applies to ordinary maintenance decisions entrusted to the discretion of a community association's board of directors. (See generally *Lamden, supra,* 21 Cal.4th 249.) "The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1045 (*Boyle*).) A court will not substitute its judgment for the board of director's judgment if the latter's good faith decisions can be attributed to any rational business purpose. (*Ibid*.)

An exception to the business judgment rule's presumption exists in circumstances which inherently raise an inference of conflict of interest; the rule does not shield actions taken without reasonable investigation, with improper motives, or as a result of a conflict of interest. However, a plaintiff must allege sufficient facts to establish these exceptions. (See *Lauckhart v. El Macero Homeowners Assn.* (2023) 92 Cal.App.5th 889 (*Lauckhart*).) In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. [Citation.] Interference with the discretion of directors is not warranted in doubtful cases." (*Lauckhart, supra,* 92 Cal.App.5th at p. 907.) "[T]he failure to sufficiently plead facts to rebut the business judgment rule or establish its exceptions may be raised on demurrer, as whether sufficient facts have been so pleaded is a question of law." (*Boyle, supra,* 178 Cal.App.4th at pp. 1045-1046.)

Based on the same rationale, the California Supreme Court in *Lamden, supra,* adopted a rule of judicial deference to community association board decision-making that applies when owners in common interest developments seek to litigate decisions entrusted to the discretion of their

associations' board of directors. (*Lamden, supra,* 21 Cal.4th at p. 253.) "Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statute, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development common area, courts should defer to the board's authority and presumed expertise." (*Ibid*.) The Supreme Court explained that judicial deference to the associations' economic decisions and business judgment is appropriate in view of "the competence possessed by owners and directors of common interest developments to make the detailed and peculiar economic decisions necessary in the maintenance of those developments." (*Id*. at pp. 270-271.) Some courts have narrowly construed the *Lamden* rule. In *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 940 (*Affan*), the court narrowly applied the rule to decisions concerning ordinary maintenance. (*Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103, 122.) However, most courts have broadly applied the *Lamden* rule beyond decisions concerning ordinary maintenance to include decisions regarding violations of the CC&Rs, maintenance/control/management of the common areas, adoption of rules and imposition of fees. (See *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 875; *Harvey v. The Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809, 820; *Watts v. Oak Shores Community Assn.* (2015) 235 Cal.App.4th 466, 473.)

Plaintiffs rely on the following portion of *Lamden, supra,* to contend that the business judgment rule does not apply here because the Association allegedly violated the CC&Rs,

> As will appear, we conclude as follows: where a duly constituted community association, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion *within the scope of its authority under relevant statutes, covenants and restrictions* to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise.

(*Lamden, supra,* 21 Cal.4th at p. 253 [emphasis added].)

The Court is not persuaded. The business judgment rule does not apply when the subject decision is outside the scope of the community associations' *authority under the CC&Rs*, not when it purportedly violates the CC&Rs. Plaintiffs do not allege the Association acted outside the scope of its authority under the CC&Rs, but rather that the actions they took violated portions of the CC&Rs.

Plaintiffs do allege improper motives, bad faith, and the lack of reasonable investigation, however, those allegations are asserted specifically against the Board Members and in the context of the breach of fiduciary duty claim. (See FAC, ¶¶ 63-65.) Like the Complaint, Plaintiffs' FAC does not allege *the Association's* unreasonable failure to investigate, improper motives, conflict of interest, bad faith, or fraud. As a result, Plaintiffs fail to sufficiently allege any exceptions to the application of the business judgment rule and consequently, fail to rebut its presumption. Thus, the Association's demurrer to the sixth cause of action is SUSTAINED without leave to amend.

V. The Association's Motion to Strike

The Association moves to strike allegations regarding punitive damages, attorneys' fees, and an improper allegation at paragraph 41.

A. Improper Allegations

The Association seeks to strike the same portion of paragraph 41 as the Board Members. For reasons stated above, the Association's motion to strike as to paragraph 41 is MOOT.

B. Punitive Damages

The Association proffers the same arguments as the Board Members regarding Plaintiffs' punitive damages demand. For reasons stated above, Plaintiffs fail to state sufficient facts to support their request. Thus, the Association's motion to strike the allegations involving punitive damages and the accompanying prayer for relief from the FAC is GRANTED with 20 days leave to amend.

C. Attorneys' Fees

Plaintiffs seek attorneys' fees based on their negligence claim, asserted against all Defendants, and their breach of covenant claim, asserted only against the Association. (See FAC, ¶¶ 54, 73.) The Association moves to strike Plaintiffs' request for attorneys' fees on the ground that they fail to allege any provision of the governing documents which would entitle Plaintiffs to attorneys' fees. (MPA, p.

10:1-3.) It further argues Plaintiffs fail to cite any requirement in Civil Code section 4955 that was violated by Association or the Board Members.

Plaintiffs seek attorneys' fees under Civil Code section 4955 for their negligence claims and pursuant to section 14.19 of the CC&Rs and Civil Code section 5975 for their breach of covenant claim. The Court sustained the Associations' demurrer to Plaintiffs' breach of covenant claim, thus the motion to strike allegations regarding attorneys' fees pursuant to section 14.19 of the CC&Rs and Civil Code section 5975 is MOOT.

Civil Code section 4955, provides: "[a] member who prevails in a civil action to enforce the member's rights pursuant to this title shall be entitled to reasonable attorney's fees and court costs…" (Civ. Code, § 4955, subd. (b).) But Plaintiffs do not assert any claims for violations of Civil Code section 4600 or section 4955. Thus, there is no basis for Plaintiffs request for attorneys' fees, and the Association's motion to strike the request in paragraph 54, lines 21-22 and paragraph 3 of the prayer for relief is GRANTED with 20 days leave to amend.

Calendar Line 9
Case Name: *Sanjuana Candelaria Perez v. PV Holding Corp., et. al.*
Case No.: 24CV435248

Before the Court is Defendant PV Holding Corp.'s ("PV") demurrer to Plaintiff's Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a personal injury action. According to the Complaint, on July 11, 2022 Defendant Sarthak Khanal operated a vehicle that collided with Plaintiff's. Plaintiff alleges Defendants had an agency relationship with each other, and they carelessly owned, drove, operated, entrusted, and maintained the subject vehicle. (Complaint, ¶¶ MV-1, MV-2, NG-1.) As a result, Plaintiff filed his Complaint on April 12, 2024, alleging motor vehicle and general negligence.

II. Legal Standard

"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 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.)

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id*.)

PV contends the Complaint fails to state a viable claim because (1) Plaintiff's allegations are uncertain, conclusory, and fail to state material facts supporting his allegations; and (2) under federal law, a rental car company and its affiliates cannot be held vicariously liable for the negligent acts of its customers pursuant to 49 United States Code § 30106, known as the Graves Amendment.

III. PV's Request for Judicial Notice

PV requests judicial notice of the following documents:

- Ex. A – The Operative Complaint
- Ex. B – A true and correct copy of 49 U.S.C. 30106
- Ex. C - A true and correct copy of *Garcia v. Vanguard Car Rental USA, Inc*. 540 F 3d 1242 (11th Cir. 2008)
- Ex. D - A true and correct copy of *Cates v. Hertz Corp*., 2009 WL 2447792 at 4, (5th Cir. 2009)
- Ex. E - A true and correct copy of *Graham v. Dunkley*, 2008 NY 50 AD3d 55
- Ex. F - A true and correct copy of *Rodriguez v. Testa*, 296 993 A 2d 955, 967 (Conn. 1, 22)
- Ex. G - A true and correct copy of *Meyer v. Nwokedi and Enterprise Rent a Car Company of Montana/Wyoming*, 777 NW 23 218 (Minn. 2010)
- Ex H – True and correct copies of webpages from "Buzzfile", "D&B Business Directory", and CrunchBase", identifying and confirming Avis as being engaged in the business of renting or leasing automobiles to the public.

PV's request for judicial notice as to Exhibits A through G is GRANTED Pursuant to Evidence Code sections 452, subsections (a), (b) and (d). However, the Court is noticing Exhibits C through G solely for the fact of their judicial determinations, and not the truth of any fact underlying any statement made in arguing the issues, which fact findings are not binding on this Court.

The Court DENIES PV's request to judicially notice Exhibit H for the purpose of establishing that it is in the business of renting and/or leasing vehicles and its affiliated entities. Evidence code sections 451 and 452 do not support judicial notice for Exhibit H, which appears to be a printout from the internet. The Court can only take judicial notice of objectively reliable information, such as securities filings or other government related documents to understand the corporate structure and work of PV.

IV. Analysis

A. Uncertain & Conclusory Allegations

The elements for a negligent cause of action are: (1) a legal duty owed to the plaintiff to use due care; (2) breach of duty; (3) causation; and (4) damage to the plaintiff. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292, 318.) There is a general duty to operate a motor vehicle without negligence to prevent injuries to other people or property. (*See Bewley v. Riggs* (1968) 262 Cal. App. 2d 188, 194.) Accordingly, the elements for motor vehicle negligence and negligence are the same. A negligence cause of action may be generally pleaded; it is sufficient to allege that defendant negligently performed or omitted an act, and that defendant's negligent act or omission caused damage to plaintiff. (See *Pultz v. Holgerson* (1986) 184 Cal. App. 3d 1110, 1117.)

Here, the Complaint is a form prepared by the Judicial Council of California. Consequently, Plaintiff contends the Complaint's sufficiency is presumed since he checked all the necessary boxes. The Court disagrees. The Complaint alleges Defendant Khanal was operating the vehicle, but it does not state how he and PV were negligent. Plaintiff makes a generic conclusory allegation of negligence. (*Id*. ¶¶ MV-1, MV-2, GN-1.)

The Complaint also sets forth conclusory and uncertain allegations that (1) "Defendants and each of them negligently, carelessly, and unlawfully owned, drove, operated, entrusted, and maintained their vehicle causing it to collide with Plaintiff's vehicle…" and (2) Defendants are agents

and employees of each other. (Complaint ¶¶ MV-2, GN-1) These boilerplate allegations are insufficient to put PV on notice of the factual basis of Plaintiff's claims against it. The Complaint does not set forth any facts to show the moving Defendant was a principal giving rise to agent liability. (See *Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 85.) And Plaintiff's negligent operation or control theories of liability are not viably alleged against PV since, as a corporate entity, PV is unable to operate a vehicle.

B. 49 United States Code § 30106 - The Graves Amendment

The Graves Amendment provides:

> (a) In general - An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if-
>
> (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

(49 U.S.C. § 30106.)

The Graves Amendment also contains the following "savings clause":

> (b) Financial responsibility laws. Nothing in this section supersedes the law of any State or political subdivision thereof -
>
> (1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or
>
> (2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.

While other jurisdictions have already adopted this federal law and concluded that it preempts their own state vicarious liability statutes for vehicle lessors or renters, no published California appellate court decision has addressed whether the Graves Amendment preempts California tort law under Vehicle Code sections 17150 and 17151. (See Judicially Noticed Exhibits C through G.) Traditionally, California courts have applied California Vehicle Code sections 17150 and 17151 in to allow plaintiffs' recovery from lessors based on vicarious liability. Vehicle Code section17150 provides: "Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle ... by any person using or operating the same with the permission, express or implied, of the owner." However, under section 17151, where the basis for liability is permissive use, and the relationship between the owner and the driver is not that of principal and agent or master and servant, the owner's liability is limited by statute to $15,000 per person, not to exceed $30,000 per accident.

Here, Plaintiff does not allege PV is engaged in the business of renting or leasing motor vehicles, or that the damages at issue arose out of the operation of the vehicle during a period of its rental or lease. The Complaint also fails to allege whether Plaintiff seeks to hold PV directly liable for its own actions or vicariously liable for Defendant Khanal's actions. Considering the bare allegations of the Complaint and the Court's denial to judicially notice PV's Exhibit H, the Court cannot ascertain the parties' relationship, nor can it determine whether the Graves Amendment applies to PV for on this demurrer. The Court notes, however, that it appears probable that the moving Defendant is in fact a rental car company such that the Graves Amendment applies, and that the issue will become whether any of the exceptions to the Amendment can be established here.

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