SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 09
JUDICIAL OFFICER: JOHN P DEVINE
HEARING DATE: 03/17/2025

ALL APPEARANCES WILL BE BY ZOOM

For matters where an appearance is required, the parties should appear by Zoom unless told to appear by another method. For all other matters, if argument is requested appearances will be by Zoom.

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Law & Motion

1. 9:00 AM CASE NUMBER: C22-00793
CASE NAME: NOBLE LEARNING ACADEMY VS. WALNUT CREEK PRESBYTERIAN CHURCH
HEARING ON SUMMARY MOTION FILED BY: WALNUT CREEK PRESBYTERIAN CHURCH
FILED BY:
TENTATIVE RULING:

Defendant Walnut Creek Presbyterian Church's Motion for Summary Judgment, or for Summary Adjudication of Issues, is **denied**.

BACKGROUND

These background facts, which are largely undisputed, are taken from the statement of additional material facts. Plaintiff Noble Learning Academy (NLA) is a small non-profit private school. NLA is owned and operated by Plaintiffs Cassondra Hull (Cassondra) and Mark Hull ("Mark"). (PMF 2.) Defendant Walnut Creek Presbyterian Church (WCPC) is a California non-profit organization and church. WCPC owns a property on Lacassie Avenue in Walnut Creek that contains the church itself, as well as a gymnasium, a playground, and classrooms/mixed-use rooms (the property). From approximately 2019 to July 2021, WCPC's Director of Finance and Operations was Shauna Reed (Reed). (PMF 3.) NLA opened in Fall 2020. However, due to the COVID-19 pandemic, NLA initially offered only online instruction. In or around February of 2021, Cassondra contacted WCPC regarding the possibility of renting classroom space at the property for the 2021-2022 school year. (PMF 4.) WCPC agreed to discuss this prospect with NLA. To begin the process, Reed set up an in-person meeting at the WCPC campus with plaintiffs. During that meeting, the parties discussed which spaces

were available and how they would need to work around a group at WCPC that used the space a few times per month. After further discussions, primarily between Cassondra and Reed, Reed confirmed in an email dated March 28, 2021: "I have great news! We are a complete go." (PMF 5.) NLA's 2021-2022 school year was to begin August 31, 2021. (PMF 21.) For several months, the plaintiffs worked on preparations, including offering tours to parents of potential students, producing promotional materials with WCPC's address as the school's location, and working with WCPC to iron out certain "logistics." (PMF 24.) WCPC told plaintiffs that a Conditional Use Permit (CUP) was required for NLA to use the property. (PMF 7.) WCPC told plaintiffs that WCPC was responsible for obtaining the CUP from the City of Walnut Creek, and that it would request a consultant to assist with expediting that process. (PMF 8-9.) While Mark took measurements of the rooms to be leased per WCPC's request for use on the CUP application, plaintiffs were not involved in the CUP application, relying on WCPC for that to occur. (PMF 25.)

The parties spoke about formalizing their agreement in a written contract. Several times, from April to June 2021, Reed or her coworker Lynell Fuller (Fuller) expressed to plaintiffs that WCPC would draft the contract and send it for plaintiffs to review soon or within a "week." (PMF 38-40.) Ultimately, Reed did not send a written contract until late June 2021. (PMF 64.) While plaintiffs had asked about the contract previously, Reed indicated there was nothing to worry about with the lease, she was simply very busy with her other duties, and that the lease would be forthcoming. (PMF 40.) Relying on Reed's representations, the plaintiffs continued preparing for the upcoming school year believing that they had secured the property. (PMF 58.) WCPC collaborated with plaintiffs on their preparations, including coordinating on-site times for plaintiffs to give tours of the school and registering WCPC's location as plaintiffs' business address. (PMF 26.) However, on July 20, 2021, before plaintiffs could sign the lease that WCPC had drafted and sent to them, WCPC told plaintiffs that it was no longer going to allow NLA to lease the property. (PMF 27.) No explanation was provided, although plaintiffs later learned that WCPC had been struggling with the CUP application and had not yet submitted the application to City of Walnut Creek, even as NLA's school year approached. (PMF 11, 15-17.)

The operative complaint is the Second Amended Complaint in which plaintiffs asserted following causes of action: (1) anticipatory breach; (2) promissory estoppel; (3) intentional misrepresentation-fraud; (4) negligent misrepresentation; (5) breach of contract; (6) breach of the covenant of good faith and fair dealing. On or about April 10, 2023, the Court sustained WCPC's demurrer to the fourth cause of action for negligent misrepresentation, without leave to amend.

WCPC now moves for summary judgment or summary adjudication of issues claiming that that no enforceable contract existed between the parties, that plaintiffs' reliance on various asserted promises was unreasonable, and that no misrepresentations were made. Plaintiffs respond that material factual disputes regarding these claims preclude summary judgment or adjudication. In particular, they claim that on March 28, 2021, WCPC's Reed "confirmed" that WCPC would lease the property to NLA for its 2021-2022 school year. Plaintiffs claim this confirmation caused them to stop searching for alternative locations so they could focus on promoting the school and preparing for the school year. Plaintiffs contend that from March 28, 2021 to July 20, 2021, WCPC repeatedly assured plaintiffs that a formal lease was forthcoming, that it concealed internal concerns about the lease, and failed to submit the Conditional Use Permit application required for NLS to operate at the property. Plaintiffs claim that WCPC ultimate refusal to rent the property to NLS resulted in financial harm.

LEGAL STANDARD

"[F]rom commencement to conclusion, the party moving for summary judgment [or summary adjudication] bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.) A "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 v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (Id. at p. 851.) A defendant moving for summary judgment satisfies this initial burden by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (CCP § 437c, subd. (p)(2).)

Once a defendant meets its prima facie showing, the burden shifts to the plaintiff to show by reference to specific facts the existence of a triable issue as to that cause of action or affirmative defense. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 850.)

In ruling on the motion, the court must consider all the evidence, and the inferences reasonably drawn therefrom, and view them "in the light most favorable to the opposing party." "All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 538-539, citations omitted.)

ANALYSIS

(1) Contract-Based Claims (The First, Fifth and Sixth Causes of Action)

WCPC seeks to establish its entitlement to summary adjudication of NLA's contract claims by demonstrating that no enforceable contract was ever formed between the parties. Specifically, WCPC argues there is no legally enforceable contract here because (1) the parties never signed a formal lease and Mark Hull admitted in deposition that there was no binding contract until the document was signed; and (2) there was no agreement as to the amount of rent to be paid or the term of the lease. (MPA, pp. 8-11; See also, 11/20/24 Notice of Motion [NLA's first cause of action for anticipatory breach of contract, fifth cause of action for breach of contract and sixth cause of action for breach of the implied covenant fail because the parties never entered a contract].)

The law is clear that there is no contract until there has been a meeting of the minds on all material points. (See *Louis Lesser Enterprises, Ltd. v. Roeder* (1962) 209 Cal.App.2d 401, 404-405; *Apablasa v. Merritt & Co.* (1959) 176 Cal. App. 2d 719, 730; *Kessinger v. Organic Fertilizers, Inc*. (1957) 151 Cal.App.2d 741, 749-750.) Additionally, when it is clear, both from a provision that the proposed written contract would become operative only when signed by the parties, as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contract's terms would be signified by signing it, the failure to sign the agreement means no binding contract was created. (*Beck v. American Health Group Intern., Inc.* (1989) 211 Cal.App.3d 1555, 1562 and cases cited there; *Forgeron, Inc. v. Hansen* (1957) 149 Cal.App.2d 352, 360.) *On the other hand*, if the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. (*Columbia Pictures Corp. v. DeToth* (1948) 87 Cal.App.2d 620, 629.)

(a) Mark's Deposition Testimony as a Judicial Admission of No Binding Contract

WCPC cites to Mr. Hull's deposition testimony as admission regarding the lack of a binding contract. WCPC contends that Mark Hull's own understanding of whether or not there was contract binds NLA because Mark Hull was testifying as PMK regarding the lease. As noted above, although NLA may be bound by Mr. Hull's testimony regarding the facts on the topics designated by the parties, the Court does not believe it is bound by legal conclusions based on those facts. Therefore, while Mark's deposition testimony may be relevant to show that he understood the lease would only become operative when executed, the testimony is insufficient to establish that it is judicially admitted that there was no binding contract.

Additionally, the Court notes that Plaintiffs present evidence that Cassondra Hull and Shauna Reed were the parties' primary points of contract regarding lease negotiations. (AMF 1.) Cassondra testified she believed execution of the lease was a formality based on the parties' prior discussions as to terms. And later in his own deposition, Mark purported to clarify his understanding where he stated, "signing the actual agreement was a formality because [of] everything else we had discussed." (M. Hull Dep. p. 92:22-24; and see p. 93:14-16 ["The agreement was just a formality because we had already discussed everything."].)

There is evidence in the record from which a jury could find that the parties contemplated that their binding agreement would be in writing. However, the court is not currently persuaded that this issue can be resolved as a matter of law on summary judgment.

(b) Agreement as to Rent and Lease Term

WCPC next argues there is no enforceable contract because the parties never agreed on the rent to be paid, a material term. In making this claim, WCPC relies on Mark's deposition testimony at pp. 40:8-41:9 and Reed's declaration statement that "[n]o agreement was reached on any material terms of a lease such as the number of classrooms, the monthly rent, or the lease term." (Reed Decl. ¶ 17.)

When asked whether there was an agreed rent as of March 28, 2021, Mark testified "Not an *agreed* number at – at that point that I can recall." (M. Hull Depo. p. 41:1-2, emphasis added.) When Cassondra was asked in deposition whether the parties had reached agreement on the amount of rent, she responded that WCPC's Reed "gave me a range. They gave us a range; we were happy with it. The contract ended up being a little bit more, but we're like, 'That's fine.'" (C. Hull Depo., p. 60:2-6.) When later asked how the parties had agreed on the $6,000 per month figure that appeared in the written lease WCPC prepared, Cassondra stated "[t]here was lots of conversations back and forth. We talked about like a percentage on square footage. we -- and then I incorporated in here not only something like that -- I don't have my cost analysis sheet, but something like that. And then also had to incorporate the property tax they possibly would be paying. So that's how I came up with the number. And then I believe -- I believe she gave me a budget of what she wanted it to be in." WCPC's counsel then asked "[a]nd did [the rent] fit within the range?" to which Cassondra responded "Yeah." (C. Hull Depo., pp. 160:23-161:13.)

WCPC claims the parties never agreed to a lease term based on Cassondra's deposition testimony at 200:8-12 and Reed's declaration statement to that effect. (See UMF No. 16, citing Reed Decl., ¶ 17 and

C. Hull Depo. p. 200:8-12) At page 200:8-12 of Cassondra's deposition she is asked whether the parties agreed on rent and states "We were looking for a long-term relationship. So, no, we didn't say it was going to be X number of years." In opposition, plaintiffs cite to a different part of Cassondra's deposition where she states that WCPC agreed to lease the premises to NLA for the 21-22 school year; that is, from August 31, 2021 to May 27, 2022. (C. Hull Depo., p. 164:4-18.) The Court does not find these two excerpts from Cassondra's deposition to be inconsistent. A jury could find that the parties reached agreement as to one year, but left open the possibility of renewal.

The totality of this evidence is sufficient to create a material dispute of fact as to whether the parties agreed on the rent to be paid for the property, and the length of the lease.

(2) Second Cause of Action for Promissory Estoppel

Plaintiffs assert a promissory estoppel cause of action in which they allege that "WCPC made a promise to enter a contract with…NLA for the rental of premises; that Plaintiff NLA relied upon that promise and forbore the opportunity to search for alternate locations and took substantial action preparing to use Defendant WCPC's premises such that injustice may only be avoided by validation of the contract." (SAC ¶ 112.)

"The elements of promissory estoppel are (1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages 'measured by the extent of the obligation assumed and not performed.' [Citation.]" (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.)

WCPC requests summary adjudication as to this cause of action on the following grounds: (1) WCPC did not make a promise that was clear and unambiguous in its terms (because the parties had not yet agreed to rent and a lease term); and (2) NLA did not reasonably rely on any alleged promise because the plaintiffs always understood the agreement was conditioned on a signed lease.

"To be enforceable, a promise need only be "definite enough that a court can determine the scope of duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages." (*Garcia v. World Sav., FSB* (2010) 183 Cal. App. 4th 1031, 1045.) Here, because the plaintiffs have raised a triable issue of fact as to a WCPC's promise to rent the property for the 2021-2022 school year at $6,000 per month, and because the remaining elements depend on the preliminary determination of the validity of those promises, the Court denies the motion as to the first issue.

The Court will also deny the motion as to the second issue because plaintiffs' evidence in opposition to the motion raises a triable issue of fact regarding the reliance element of this claim. Plaintiffs present evidence that upon receiving Reed's purported confirmation on March 28, 2021, they stopped their search for alternative properties. (PMF 5, 33.) They state that NLA was a small school with few faculty members and little manpower to spare. With the school year set to begin on August 31, 2021, NLA would have had to begin recruiting students and promoting the school as soon as possible. (PMF 24.) Plaintiffs state that promotion would involve providing parents with a school address and they began showing parents the WCPC property as early as April 2021, with WCPC's permission. (PMF 54, 59.)

Plaintiffs state they would never have risked sabotaging their own preparations on an uncertain lease. (PMF 58.) Furthermore, while Reed first confirmed the lease on March 28, 2021, she continued to indicate to Cassondra for the next three months that NLA was guaranteed the property. In her deposition, Cassondra testified that Reed and "some of her crew at the church" cleaned the spaces for NLA so that NLA could start moving in. (PMF 50.)

To counter this, WCPC cites Mark's deposition testimony above, and Cassondra use of the term "preliminary" to describe a draft of a contract. Cassondra explained in deposition why she used that term: while there a few minor issues that needed to be clarified, all significant, material terms had been settled. (PMF 65.)

NLS reiterates its view that the extent to which WCPC relies on Mark's deposition is unjustified. Plaintiffs state that Cassondra testified that the NLS is seventy percent in her name. (PMF 2.) Plaintiffs state that Mark did not participate often in communications with Reed as Cassondra was the person who engaged actively in lease discussions. (PMF 1.) In her deposition, Cassondra stated numerous times that she thought a contract was in place. (PMF 52.) Mark also confirmed his understanding in deposition that the lease was in place as of March 28, 2021. (PMF 53.)

There is sufficient evidence to support the claim that plaintiffs relied on WCPC's purported promise to lease the property to NLA.

(3) Third Cause of Action for Fraud

The third cause of action is for fraud is based on "five separate concealments of material fact that were intended by Defendant WCPC, and did in fact, cause justifiable reliance and damages to Plaintiffs" set forth in paragraph 127 (a)-(e) of the SAC.

(a) The Certainty Issue

WCPC argues that the entire fraud cause of action fails because plaintiffs "admitted they knew the lease was not a certainty." (MPA at 14:12-13.) This appears to be an attempt to negate the fraud element of "justifiable reliance," although the motion does not specify. Justifiable reliance is an essential element of a claim for fraudulent misrepresentation, although the reasonableness of the reliance is ordinarily a question of fact. (*Seeger v. Odell* (1941) 18 Cal.2d 409, 414–415, 115.)

Here, there is a triable issue of fact as to whether plaintiffs reasonably believed the lease was a certainty. Plaintiffs' evidence in opposition to the motion supports that they relied on WCPC's representations and believed the parties had a deal (even while there is other, contradictory evidence in the record). To wit, on March 18, 2021, Cassondra sought confirmation of the lease agreement before telling students' families of the school's new location:

> Most importantly, are we 100% officially ok'd to rent space from you for the 2021-22 school year? My families are beyond eager to know where we will be conducting our classes. May I officially state that we are "on"?
>
> Secondly, I just want to give you a heads up that we may, in fact, need the

classrooms all 5 days per week. I hope that's ok.

(PMF 34.)

Then, Reed wrote to Cassondra in response: "We are a go and I was ready to say 100% for sure that it will work knowing we had a place for our MOPS ministry two days a month. . . . I need to go back to thinking if there are other rooms for them. . . . This is going to work and I think I already have a solution." (*Id*.) Then, on March 28, 2021, after Reed spoke to the head of the organization that used some of the classrooms, Reed wrote: "I have great news! We
are a complete go." (PMF 35.) On the same day, Cassondra responded: "YOU ARE THE DREAMIEST! Thank you for working so hard to make this work for us! We appreciate it more than you know! I'm sending out the wonderful news today!" (*Id*.)

On March 28, 2021, when Reed indicated that the lease was "a complete go" plaintiffs stopped their search for a different campus location and began the process of student recruitment and preparing for the upcoming school year. (PMF 5, 24, 33, 35) Plaintiffs provide evidence that for several months afterword, WCPC, through Reed, acted as though the lease had been agreed upon. WCPC allowed Plaintiffs to show parents the campus on video calls. (PMF 56.) Regarding this, Cassondra testified, "…I assumed we already had this commitment and guarantee. Earlier emails you can read from me saying, 'I'm not sharing unless I know this is a for-sure go[,]'" and "so I wouldn't – I wouldn't share with families without 100 percent feeling that this was our space to share." (PMF 22.) Even towards the end of June 2021, Cassondra Hull was showing the WCPC campus to student families with WCPC's permission. (PMF 23.) Cassondra remained in communication with Reed, who appeared to affirm WCPC's commitment to a lease by promising that WLA would send the formalized lease shortly. (PMF 13.) In reliance, plaintiffs continued to focus their efforts on preparing for the school year rather than looking for a different location. (PMF 24.) On July 20, 2021 when WCPC informed Cassondra Hull that it would not lease the property to NLS after all, plaintiffs claim they were out of options, as they had stopped looking at other properties after Reed's so-called "confirmation" email on March 28, 2021. (PMF 33.) Cassondra Hull stated in deposition: "We had six weeks to find a new location. It's very hard to find property. And at the end of March, we stopped looking. We had no plan B on property. And also knowing we weren't going to be able to utilize the next six weeks to continue to spread the word about our school. Without a location – our families were ready to have their kids in person for the most part. And without a location, we would have to close the school." (*Id*.)

Based on the foregoing, a jury could conclude that plaintiffs would not have relied on a lease that they did not believe was binding.

(b) The CUP

As noted, at SAC paragraph 127 plaintiffs allege "five separate concealments of material fact that were intended by Defendant WCPC, and did in fact, cause justifiable reliance and damages to Plaintiffs." The third alleged concealment relates to a Conditional Use Permit (CUP). As its second basis for summary adjudication of the fraud claim, WCPC's argues that its representations to plaintiffs regarding the CUP were made without fraudulent intent. WCPC further argues that plaintiffs cannot establish fraudulent intent because, Cassondra Hull "admitted" in deposition that she did not think WCPC intended to defraud the plaintiffs. (MPA at 16:10-11.)

Plaintiffs argue that WCPC's characterization of its supporting evidence is misleading, and the Court tends to agree. In her deposition, Cassondra testified in regard to Reed's failure to complete the CUP: "I don't know the motivation behind the CUP not being addressed or worked on…I don't picture anybody being sinister and like, "Oh, we're going to show her. We're not going to get that CUP.'" (See MPA at 16:16-22, UMF No. 21, C. Hull Dep. 194:23-195:10.) It is unclear why Cassondra should have personal knowledge of these matters but her lack of knowledge of WCPC's intent is not an admission.

The evidence also raises a triable issue of fact whether Cassondra was led to believe the CUP was needed and WCPC would be able to secure it without issue. (PMF 7-8, 21, 41.) Plaintiffs point to evidence that WCPC told Cassondra that someone at WCPC was working on the CUP application and even that the process could be expedited with the help of someone affiliated with WCPC. (PMF 9.) Reed testified in deposition that she never told NLA there were any issues with the CUP application, and Cassondra testified that she never heard of any issues or delays. (*Id.*) Other communications show that Reed provided assurances. (PMF 21, 41.) For example, on June 14, 2021, when Cassondra expressed worry about any conflicts or issues with NLA's lease, Reed responded via text to assure her: "We can likely change this when we get the conditional use permit…I actually made some progress on our contract today. We hired a consultant for the conditional use permit and I will have requests for that as well. My goal this week is only these contracts and conditional use permit application items around meetings." (PMF 41.) Cassondra responded that she "1000%" trusted Reed, "and if you [Reed] say we are good – then that's enough for me." (*Id*.) However, as it turned out, Reed did not submit an application for the CUP. (PMF 11.) As the school year approached, Reed, who was leaving her position at WCPC, had evidently come to see the CUP application as a burden. (PMF 16.) In a July 20, 2021 email chain between WCPC members Claudia Suh, Lisa Chrisman, Karen Davidson, and Julie Sept, Karen Davidson noted that "[t]hese two school rentals were Shauna's baby…She has hand-carried it on her own, pushing everyone to make it happen – until she realized that the City use permit process was a long, hard slog." (PMF 42.) Other emails show that Reed had abandoned the project for other WCPC employees to resolve and they chose to abandon it. (PMF 15-17, 42-43.)

Plaintiffs contend that a duty to disclose arises when parties are entering into contractual relations, and Reed violated this duty by failing to disclose that WCPC had not finalized the CUP application by July 20, 2021, let alone submitted the CUP application to the City of Walnut Creek. In its motion, WCPC does not dispute the assertion of a duty.

Summary adjudication of the fraud cause of action is denied because WCPC does not establish as a matter of law that plaintiffs knew the lease was not a certainty and was conditioned on a signed writing. WCPC also does not meet its burden to show that the fraud cause of action fails based on an purported admission by Cassondra that Reed did not harbor any ill will when she failed to disclose matters regarding the CUP. WCPC's notice of motion list as an additional ground for summary adjudication that plaintiffs "admit they did not reasonably rely on any alleged misrepresentations or concealments by WCPC." Plaintiffs' evidence in opposition to the motion raises a triable issue of fact regarding the reliance element of their claim.

EVIDENTIARY MATTERS

Plaintiffs' objections to evidence are ruled on as follows:

Objections to the Deposition of Cassondra Hull**:** Objection Nos. 1-4 are **overruled.**

Objections to the Deposition of Mark Hull**:** Objection No. 1 (40:8-41:9) is **overruled**. Plaintiffs' objection to the quoted material is "legal conclusion" but the objection is asserted as to several lines of deposition testimony. It is not clear what the objectionable material is.

Objection No. 2 (Mark Depo., p. 69:18-70:1) and No. 3 (Mark Depo., p. 70:20-71:5) are **sustained** to the extent that this testimony may be offered to establish a judicial admission. Mark states his belief that NLA was not legally bound to a lease it did not sign. WCPC seeks to use the deposition testimony as a judicial admission that there is no enforceable contract. Although NLA would be bound by Mark's testimony regarding the facts on the topics designated by the parties, it would not be bound by his legal conclusions based on the facts.

Objections to the Declaration of Shauna Reed**:** Objection Nos. 2 and 6 are **sustained** as to statements of unidentified WCPC personnel and those of Carol Martin. Hearsay. Objection Nos. 1, 3-5, 7-15 are **overruled**.

Plaintiffs' request to strike WCPC's reply brief is **denied**.

DISPOSITION

Based on the foregoing, WCPC'S motion for summary judgment or summary adjudication of issues is **denied.**

2. 9:00 AM CASE NUMBER: C22-01880
CASE NAME: HERNANDEZ VS. SATHRI
***HEARING ON MOTION IN RE: TO STRIKE PORTIONS OF PLAINTIFF GABRIEL HERNANDEZS FIRST AMENDED COMPLAINT**
FILED BY: AVIS RENT A CAR SYSTEM, LLC
****TENTATIVE RULING:****

Defendant Avis Rent A Car System, LLC's motion to strike is **granted as to punitive damages without leave to amend.**

Avis seeks to strike allegations related to punitive damages. In order to obtain punitive damages against an employer, the plaintiff must show that "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code §3294(b).)

Although the Court finds that Plaintiff has included facts showing that Avis was Sathri's employer, Plaintiff has not provided any facts showing that Avis knew of Sathri's unfitness or that someone sufficiently high up in Avis authorized or ratified Sathri's actions as to Plaintiff. Therefore, the motion to strike punitive damages is granted. This is the second time this issue has been raised and no new facts have been alleged to show how Avis, a business entity, can be liable for punitive damages based upon the actions of Sathri. Plaintiff also fails to provide additional facts that he can allege in his opposition to this motion. Therefore, leave to amend is denied.

3. 9:00 AM CASE NUMBER: C22-01880
CASE NAME: HERNANDEZ VS. SATHRI
HEARING ON DEMURRER TO: FIRST AMENDED COMPLAINT FROM: AVIS RENT A CAR SYSTEM LLC
FILED BY: AVIS RENT A CAR SYSTEM, LLC
TENTATIVE RULING:

Defendant Avis Rent A Car System, LLC's demurrer is **sustained without leave to amend as to cause of action three, four and five; with leave to amend as to causes of action one, two; and overruled as to six and seven.** Plaintiff may file and serve an amended complaint by April 1, 2025.

On September 6, 2022, Plaintiff Gabriel Hernandez sued Bay Area Car Rental LLC (as employer) and John Sathri (as CEO of Bay Area). Plaintiff sued for (1) assault, (2) battery, (3) wrongful termination in violation of public policy (Bay Area only), (4) Bane Civil Rights, (5) whistleblower retaliation (Bay Area only), (6) intentional infliction of emotional distress and (7) Defamation. Avis was added as a Doe defendant and filed a demurrer to the complaint, which the Court sustained. Plaintiff has filed an amended complaint and Avis filed another demurrer. Avis demurs to each claim in the FAC under Code of Civil Procedure section 430.10(e) for the failure to allege facts to constitute a claim against Avis.

In the FAC, Plaintiff alleges the following as to Avis: Plaintiff alleges that he was employed by both Avis and Bay Area Car Rentals. (FAC ¶13.) Avis' name and logo are used throughout the San Ramon location and the San Ramon location (where Plaintiff worked) is advertised on Avis' website. (FAC ¶14.) "Store hours, directions, advertising for the location, and the Terms & Conditions for renters are all included by Avis on their website page for the San Ramon location. Visitors may also make a reservation for the San Ramon location via the Avis website." (FAC ¶15.) Avis directed Sathri on all aspects of how the car rental business would be run. (FAC ¶16.) Avis provided all the rental vehicles, assigned agents IDs and pins to employees so they could access Avis' computer system through which rental payments were made and Avis handled all revenues generated by Bay Area Car Rentals. (FAC ¶16, 18, 21.) If there were any additional procedures, Sathri would have to go through Avis and acquire approval first before implementing them. (FAC ¶16.) All rental vehicles at the San Ramon location were registered to and owned by Avis. (FAC ¶17.) When the San Ramon location ran out of vehicles, employees at San Ramon would make a report to Avis about how many cars are rented out and how many additional cars are needed. (FAC ¶17.) Avis provided the procedure on how to complete this report. (FAC ¶17.) Avis had final hiring approval over all employees at Bay Area Car

Rental. (FAC ¶19.) During the onboarding process, Plaintiff was given an agent ID and pun, which are akin to a username and password, by Avis Territory Performance Manager. (FAC ¶19.) Once hired, Plaintiff was trained by an Avis employee who acted as a manager at Bay Area Car Rentals. (FAC ¶20.) Avis provided policies and procedures when renting vehicles and an Avis employee would come to the San Ramon location about once a month to ensure things were running smoothly and that the policies were being followed. (FAC ¶22.) Avis provided policies for many aspects of the rental car business. (FAC ¶¶25-27.) Avis also provided policies for handling employees, including policies for hiring, onboarding, and disciplinary actions for any alleged non-compliance with Avis mandated policies. (FAC ¶28.)

Avis argues that the allegations in the FAC as to Avis contradict those in the original complaint, specifically paragraphs 11 and 21.) In the original complaint, Plaintiff alleged that his employer was Bay Area Car Rental LLC and that Avis is a corporation affiliated with Bay Area Car Rental LLC. (Comp. ¶¶11 and 21.) The Court finds that the new allegations as to Avis included in the FAC do not contradict the allegations in the original complaint in a way that raises a concern of a sham pleading.

Avis as an Employer

The main issue here is whether Avis is an employer of Plaintiff and Sathri such that Avis is liable for the claims against it. When looking at the employment relationship here, there are two questions: is Avis Plaintiff's employer for the employment related claims and is Avis is an employer or principal of Sathri such that it is potentially liable under respondeat superior for the intentional tort claims. The respondeat superior question is addressed in the next section.

Avis argues that it is not an employer in this case and asks the Court to use the employer standard in *Martinez v. Combs* (2010) 49 Cal.4th 35. *Martinez* provided the test for an employer in the context of wage and hour claims. *Martinez* does not apply here as there are no wage and hour claims. The other cases cited by Avis are distinguishable for the same reason because they are also wage and hour cases. (*Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419; *Henderson v. Equilon Enterprises, LLC* (2019) 40 Cal.App.5th 1111; *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289.)

When determining if Avis is an employee of Plaintiff for the employment claims, " 'There is no magic formula for determining whether an organization is a joint employer. Rather, the court must analyze "myriad facts surrounding the employment relationship in question." [Citation.] No one factor is decisive.[Citations.]' " (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 124-125.)

"Factors to be taken into account in assessing the relationship of the parties include payment of salary or other employment benefits and Social Security taxes, the ownership of the equipment necessary to performance of the job, the location where the work is performed, the obligation of the defendant to train the employee, the authority of the defendant to hire, transfer, promote, discipline or discharge the employee, the authority to establish work schedules and assignments, the defendant's discretion to determine the amount of compensation earned by the employee, the skill required of the work performed and the extent to which it is done under the direction of a supervisor, whether the work is part of the defendant's regular business operations, the skill required in the

particular occupation, the duration of the relationship of the parties, and the duration of the plaintiff's employment. [Citations.] …. 'Of these factors, the extent of the defendant's right to control the means and manner of the workers' performance is the most important.' [Citations]" (*Id*. at 125-125.)

Avis did not meet its initial burden of convincing the Court that Plaintiff has not alleged enough facts to show Avis was an employer because Avis used the wrong legal standard and focused on only a few factors which are important in wage and hour claims. In addition, the FAC includes sufficient facts to show that Avis had control of Plaintiff's means and manner of work such that Avis could be considered Plaintiff's and Sathri's employer. Therefore, for pleading purposes, Plaintiff has alleged that Avis was an employer of both Plaintiff and Sathri.

Causes of Action one, two, six and seven (intentional torts by Sathri)

For the intentional tort claims (assault, battery, IIED, defamation), Avis argues that the facts alleged are insufficient to make Avis vicariously liable for Sathri's torts.

" 'Under the doctrine of respondeat superior, an employer is vicariously liable for his employee's torts committed within the scope of the employment.' [Citation.]" (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1056.) "In making this decision, the trier of fact considers whether the conduct benefited the employer, whether it was authorized or directed by the employer, the reasonable expectations of the employer, the amount of freedom the employee has to perform the duties of the job, the type of work the employee was hired to do, the nature of the conduct involved, and the time and place of the accident, among other things. [Citations.]" (*Id.* at 1058.) In the franchise context, a franchisor "becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees." (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 497-498.)

At the pleading stage, the Court finds that Plaintiff has alleged sufficient facts for Avis to be vicariously liable for torts committed by Sathri. Plaintiff alleged that Avis had the ultimate decision about hiring new employees, had many policies that must be followed, sent Avis' staff to the business to ensure policies were followed, Avis provided policies on hiring, onboarding, and disciplinary actions and Avis provided the employee badges and IDs. These allegations are sufficient at the pleading stage to state a tort claim against Avis based on vicarious liability. Here, however, the torts alleged are intentional torts which requires additional analysis.

Intentional torts committed by employees are usually not within the scope of employment. There must be a "a causal nexus to the employee's work." (*Lisa M. v. Henry Mayo Newhall Mem'l Hosp.* (1995) 12 Cal. 4th 291, 297.) Few courts have found such a nexus. For example, in *Mary M. v City of Los Angeles* (1991) 54 Cal.3d 202, the court found that an on-duty police officer's rape of a motorist was within the scope of employment. But since then, very few cases have found an employer vicariously liable for intentional torts. (See, e.g. *Doe 1 v City of Murrieta* (2002) 102 CA4th 899 (refusing to hold city vicariously liable for sexual torts of police officer against minors); *John Y. v*

Chaparral Treatment Ctr., Inc. (2002) 101 Cal.App.4th 565 (no vicarious liability for residential facility for sexual molestation of patient by counselor).)

Plaintiff argues that Sathri's conduct against Plaintiff was at least in part motivated by Sathri's feelings about how Plaintiff was doing his work and based on Sathri's belief that Plaintiff was knowingly allowing cars to be rented past their return dates.

The court is not convinced that the alleged assault and battery by Sathri was within the scope of his employment. Therefore, the demurrer as to causes of action one and two is sustained with leave to amend. The Court will give Plaintiff one more opportunity to allege facts that show a connection between Sathri's assault and battery and his employment.

As to the IIED and defamation claims, the acts alleged there include conduct within the scope of employment. In the IIED claim, Plaintiff alleges that Sathri engaged in discrimination, harassment and retaliation. (FAC ¶60.) In the defamation claim, Sathri made statements specific to Plaintiff's conduct at work, which have a nexus with Sathri's employment. (FAC ¶69.)

The demurrer as to the IIED and defamation claims (causes of action six and seven) is overruled.

Bane Act (cause of action four)

"The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law. [Citation.]" (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 883.) The legal right in a Bane Act claim are "egregious interferences with constitutional rights, not just any tort." (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395.)

The facts alleged do not show a violation under the Bane Act. It is unclear what egregious interferences with constitutional rights is alleged to have occurred here. Further, the facts alleged do not show that Sathri's alleged assault and battery were done to keep Plaintiff from exercising his rights. These arguments were raised in the first demurrer. No additional facts have been alleged and Plaintiff does not address this argument in his opposition. Finally, the Court cannot think of how Plaintiff could amend his complaint to state a claim here. Therefore the demurrer to cause of action four for the Bane Act is sustained without leave to amend.

Employment related claims (causes of action three and five)

As to cause of action three for wrongful termination in violation of public policy, Avis argues that the wrongful termination in violation of public policy claim fails to allege a sufficient public policy. "The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff

harm. [Citation.]" (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154.) " '[A] policy may support a wrongful discharge claim only if it satisfies four requirements. The policy must be (1) delineated in either constitutional or statutory provisions; (2) "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) "substantial" and "fundamental."' [Citation.]" (*Sistare-Meyer v. Young Men's Christian Ass'n* (1997) 58 Cal.App.4th 10, 14.)

Here the complaint alleges that "Employer discharged Plaintiff in violation of important and well-established public policies, set forth in various statutes and Constitutional provisions including but not limited to Bane Civil Rights Act (Civil Code §§ 52.1), Assault (Section 240 PC), Battery (Section 240 PC), Defamation (Civ. Code § 44), Theft (Section 484 PC), Conspiracy (Section 182 PC) Civil Code §§ 51.7, 52, 52.1 (employment discrimination; 1102.5 (whistleblower) and workplace safety laws including Cal-OSHA." (FAC ¶63.) These allegations appear identical to the allegations in the original complaint. (Comp. ¶45.)

Previously, the Court held that Plaintiff had not alleged a connection to Plaintiff's termination and a violation of one of these policies. Avis raised this argument in their first demurrer and again in this one. Plaintiff did not address this argument in his opposition. Further, Plaintiff has not alleged additional facts to support this claim. Therefore, the demurrer is sustained without leave to amend on this ground.

As to cause of action five for whistleblower retaliation under Labor Code 1102.5 and 1105.6, Avis argues that Plaintiff has not alleged facts showing a violation. Labor Code "Section 1102.6 requires whistleblower plaintiffs to show that retaliation was a 'contributing factor' in their termination, demotion, or other adverse action. This means plaintiffs may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 713-714.) Under section 1102.5, an employee is protected from retaliation for disclosing illegal activity to a governmental agency or someone with authority over the employee who has the power to investigate, discover, or correct the violation. (Labor Code § 1102.5(a).)

Here Plaintiff alleges various statutes, but does not allege any facts showing that Plaintiff told a governmental agency or someone with authority of an alleged violation and thereafter his employment was terminated or Plaintiff was otherwise retaliated against. This is the second time Avis has raised this issue and Plaintiff did not amend his complaint or provide argument in his opposition. Therefore, the demurrer to cause of action five is also sustained without leave to amend on this ground.

Leave to Amend

In his opposition, Plaintiff requests leave to amend if the demurrer is sustained. Plaintiff does not provide additional facts that he could amend. If Plaintiff has additional facts that he can allege then he may timely contest the tentative ruling (with notice to opposing parties) and appear at the

hearing prepared to provide those additional facts and how they would change the Court's ruling on causes of action three, four and five.

4. 9:00 AM CASE NUMBER: C23-02871
CASE NAME: PETER ONOPKO VS. MORRIS CAREY
***HEARING ON MOTION FOR DISCOVERY TO COMPEL FURTHER DISCOVERY RESPONSES AND PRODUCTION OF DOCUMENTS**
FILED BY: CAREY, MORRIS
****TENTATIVE RULING:****

Appearance required.

5. 9:00 AM CASE NUMBER: C24-00022
CASE NAME: BINGHUI LIU VS. COLLECT ACCESS, LLC
***HEARING ON MOTION IN RE: FOR ATTORNEY FEES AND COSTS**
FILED BY: LIU, BINGHUI
****TENTATIVE RULING:****

Appearance required.

6. 9:00 AM CASE NUMBER: C24-00088
CASE NAME: DANIEL CURRID VS. BELA BRUNSHTEYN
***HEARING ON MOTION IN RE: CONTINUED HEARING ON MOTION TO COMPEL MIKHAIL BRUNSHTEYN TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET ONE, AND REQUEST FOR PRODUCTION OF DOCUMENTS, SET ONE. FILED BY DANIEL CURRID. JOINT BRIEF TO BE FILED NO LATER THAN 03/07/25**
FILED BY:
****TENTATIVE RULING:****

Appearance required.

7. 9:00 AM CASE NUMBER: C24-01214
CASE NAME: JAMANI HUMBLE VS. JOSEPH VASQUEZ
HEARING ON DEMURRER TO:
FILED BY:
TENTATIVE RULING:

The Demurrer by Defendant Joseph Vasquez to the Complaint of Plaintiffs Jeffery Humble, individually, and as Guardian ad Litem for Jamani Humble, a minor, is **sustained with leave to amend**. Defendant shall prepare the order and serve and file notice of its entry. Plaintiffs shall have 30 days from notice of entry of the order in which to amend their complaint.

Background

Plaintiff Jeffry Humble, individually and as guardian ad litem for Jamani Humble (Jamani), a minor, brings this action against defendants City of Hercules, Chief of Police Joseph Vasquez (Vasquez), Hercules police officers Christopher Hallford (Hallford) and Marco Vallejo (Vallejo), and Contra Costa County, for wrongful death, personal injury and survivorship damages arising out of a tragic motor vehicle accident on March 23, 2023 in which a vehicle attempting to evade police collided with a vehicle driven by Jamani's mother, Ryniqueka Dowell (Ryniqueka), injuring Jamani and resulting in the deaths of Ryniqueka and Jamari Humble, who was Jamani's twin brother.

Plaintiff alleges that on March 23, 2023, "on-duty officers with the Contra Costa Sheriff's Office notified [Hercules Police Department (HPD)] of a vehicle which was believed to have been stolen entering the City of Hercules." (FAC ¶ 1 p. 2:5-6., ¶ 14.) "HPD officers Christopher Hallford [] and Marco Vallejo [] decided to instigate a high-speed pursuit of the vehicle into densely populated residential areas and through multiple intersections and stop lights when the suspect's vehicle collided with another vehicle carrying Decedent Ryniqueka Dowell and her two six-year-old twin sons, Decedent Jamari Humble and Plaintiff Jamani Humble." (FAC ¶ 1 p. 2:7-11; ¶¶ 15-16.) "Decedent Ryniqueka Dowell passed away at the scene, Decedent Jamari Humble died from his collision-related injuries approximately four days later, and Plaintiff Jamani Humble sustained serious but non-fatal injuries." (FAC ¶2 p. 2:15-19, ¶17.) With respect to Vasquez, Plaintiffs allege that he "was the Chief of Police for HPD and was acting within the course and scope of that employment. In that capacity, Defendant Vasquez was a policy making officer for Defendant City of Hercules." (FAC ¶ 7 p. 3:26-27.) Plaintiffs allege in ¶26 of the FAC that Chief Vasquez was negligent due to his alleged failure to: "(b) […] to properly training and supervise HPD officers with respect to the proper operation of patrol vehicles and vehicle pursuits; and [¶] (c) [Chief Vasquez's alleged] negligent retention of HPD [officers]." (FAC ¶ 26 p. 7:4-12. Plaintiffs conclude that "[a]s a direct and proximate result of Defendants' conduct…, Plaintiffs suffered damages…" (FAC ¶ 27 p. 7:13-14.)

Defendant Vasquez now demurs to the operative First Amended Complaint on grounds that it fails to state sufficient facts to support the first (wrongful death), second (personal injury), and third (survivorship action) causes of action. In particular, Vasquez argues that these causes of action based on allegations of negligent hiring, retention, training and/or supervision of officers Hallford and Vallejo (FAC ¶ 2), are unsupported by any facts to show he has personal liability for the accident.

Standard

The standard for construing a complaint on demurrer is long-settled: “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed. [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311,318.) “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.)

Analysis

All of plaintiffs’ causes of action against Vasquez sound in negligence for the alleged negligent hiring, retention, supervision and/or training of Officers Hallford and Vallejo.

In order to prove facts sufficient to support a finding of negligence, a plaintiff must show that the defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury." (Hayes v. County of San Diego (2013) 57 Cal. 4th 622, 629.) With respect to whether a cognizable duty exists here, plaintiffs allege that Vasquez, as a policymaking authority, had a duty of care to adequately hire, retain, and train or supervise the officers under his command. (See FAC at ¶¶ 7-31.)

The California Supreme Court has recognized that a public entity may be vicariously liable for negligent supervision by its administrators based on a special relationship creating a duty of care. (See *C.A. v. William S. Hart Union High Sch. Dist*. (2012) 53 Cal. 4th 861, 865 (William S. Hart) [school district could be vicariously liable under Cal. Gov't § 815.2 for the negligent supervision of its administrators based on the special relationship between school districts and students creating a "protective duty of ordinary care"].) “Absent such a special relationship,” however, “there can be no individual liability to third parties for negligent hiring, retention or supervision of a fellow employee….” (*Id*. at 877.)

As noted, plaintiffs claim that Vazquez was negligent in his hiring, retention, training or supervision of the involved officers. However, the FAC does not identify a statute or special relationship creating a duty of care owed by Vazquez, and the cases plaintiffs cite at pp. 12-13 of their opposition are not on point.

For example, in arguing that a special relationship exists, plaintiffs cite to *Virginia G. v. ABC Unified School District* (1993) 15 Cal.App.4th 1848, which recognized the existence of a special relationship between school personnel and students in their care. M fact, *Virginia G.* held, “the responsibility of school officials for each of their charges, the children, is heightened as compared to the responsibility of the police for the public in general.” (Virginia G. at 1854.) In this case plaintiffs generally allege that Vasquez had a duty to protect people from harm and to exercise care in selection, retention, training, and supervision of employees. These alleged duties do not resemble the enhanced duties imposed on school personnel that formed the basis for a special relationship with the minor plaintiff in *Virginia G*.

Plaintiffs next cite to *Doe I v. City of Murrieta* (2002) 102 Cal.App.4th 899, 917-918 (Doe I), which recognized the existence of a special relationship between a police department and minors in the

custody of its "youth explorer program." *City of Murrieta* was a case that involved vulnerability and dependence similar to *Virginia G*., and plaintiffs do not explain the case is analogous.

Plaintiffs' third *case, Arista v. City of Riverside* (2018) 29 Cal. App. 5th 1051, found a special relationship where Sheriff Department Deputies took certain actions that placed the plaintiffs in a more dangerous situation than they would have otherwise faced. (*Id*., 29 Cal. App. 5th 1061.) The court found that the deputies, "through their actions, undertook the responsibility of rescuing the victim because the deputies were actively involved in all aspects of locating the victim." (*Ibid*.) There are no similar allegations of affirmative action here. The Court also notes that the question in this case is not whether responding officers had a special relationship with plaintiffs or their decedents because the officers may have engaged in acts that created or increased the peril, but whether Vasquez had such a relationship. (*William S. Hart*, *supra*, 53 Cal.4th at p. 877.)

In sum, the SAC does not currently allege facts suggesting the existence of a special relationship between the decedents or any other member of the public and defendant Vasquez, as the person alleged to have been responsible for the hiring, retaining, supervising and training the involved officers. On this ground alone, the FAC fails to state facts sufficient to state a cause of action against Vasquez based on a theory of negligent hiring, etc. The demurrer is therefore sustained with leave to amend with regard to the existence of a special relationship. Plaintiffs shall also have leave to amend to include any facts they deem necessary to overcome any other pleading deficiencies raised in the demurrer. Plaintiffs should not include new causes of action absent further leave or a stipulation of the parties.

8. 9:00 AM CASE NUMBER: C24-01840
CASE NAME: JOANA RAMIREZ VS. GINA MARIA MARTINEZ
***HEARING ON MOTION IN RE: LEAVE TO FILE A COMPLAINT-IN-INTERVENTION**
FILED BY: ILLINOIS MIDWEST INSURANCE AGENCY, LLC
****TENTATIVE RULING:****

The unopposed motion to file a complaint-in-intervention is granted for the reasons stated the motion. The complaint shall be filed by Illinois Midwest Insurance Agency by April 1, 2025.

9. 9:00 AM CASE NUMBER: C24-02044
CASE NAME: TOMMY VANCE VS. JOSE PENA
***HEARING ON MOTION IN RE: FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**
FILED BY: VANCE, TOMMY
****TENTATIVE RULING:****

Plaintiff's motion for leave to file a first amended complaint is granted for the reasons stated in the motion. Plaintiff shall file the first amended complaint by April 1, 2025.

10. 9:00 AM CASE NUMBER: C24-02339
CASE NAME: JUDY WOBLESKI VS. CITY OF WALNUT CREEK
***HEARING ON MOTION IN RE: FOR PRELIMINARY INJUNCTION**
FILED BY: WOBLESKI, JUDY
****TENTATIVE RULING:****

Moot. See Line 11.

11. 9:00 AM CASE NUMBER: C24-02339
CASE NAME: JUDY WOBLESKI VS. CITY OF WALNUT CREEK
HEARING ON DEMURRER TO: COMPLAINT
FILED BY: CITY OF WALNUT CREEK
****TENTATIVE RULING:****

Before the Court is Defendant City of Walnut Creek ("Defendant" or "Walnut Creek')'s Demurrer. The Demurrer relates to Plaintiff Judy Wobleski, Roger Stone, Mary Jo Painter, Karen Stiles, Shivakumar Sundaram, Aarthi Shivakumar, and Julie Welsh (collectively, "Plaintiffs")'s complaint for abatement of a public nuisance and injunctive relief. The Complaint alleges causes of action for (1) public nuisance, (2) injunctive relief to abate nuisance, and (3) declaratory relief.

Defendant demurs to Plaintiffs' compliant pursuant to Code of Civil Procedure ("CCP") § 430.10(a) and (e) on the grounds that the Court lacks jurisdiction to grant Plaintiffs' requested relief, and the grounds that Plaintiffs' nuisance claim is barred by Civil Code § 3482.

For the following reasons, Defendant's demurrer is **sustained**, without leave to amend.

Legal Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law." (*Holiday Matinee, Inc. v. Rambus, Inc*. (2004) 118 Cal.App.4th 1413, 1420.) A complaint "is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 ("*Doe*")), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the plaintiff's claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) Legal conclusions are insufficient. (*Id*. at 1098–1099; *Doe* at 551, fn. 5.) The Court "assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

Brief Factual Background

Plaintiffs are residents of Walnut Creek who live near the pickleball courts at 2261 Dapplegray Lane. (See Complaint at ¶ 16.) They allege that "[t]he noise emanating from the pickleball courts, not only from gameplay and from the vocalizations of the steady flow of participants who exuberantly scream regularly with gusto, but also from spectators congregating at benches and waiting to play has completely hindered and denied Plaintiffs the use and enjoyment of their homes[.]" (Complaint at

¶ 7.) They further allege that "[t]he pocks from the pickleballs are regularly louder than 55 dBA at each of Plaintiff's houses and are amplified by non-stop screaming of the players." (*Id*. at ¶ 9.)

Analysis

A "nuisance" is defined as "[a]nything which is injurious to health … or is indecent or offensive to the senses, … so as to interfere with the comfortable enjoyment of life or property." (§ 3479.) A nuisance is a "public nuisance" if it "affects at the same time an entire community or neighborhood." (§ 3480; see *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 160 (*Friends of H Street*).) Because "each individual in a community must put up with a certain amount of annoyance, inconvenience and interference … a public nuisance is actionable only if the requisite interference is "both substantial and unreasonable." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105 italics and internal quotations omitted; see also *Hacala v. Bird Rides, Inc*. (2023) 90 Cal.App.5th 292, 324.)

Jurisdiction

Defendant argues as a threshold issue that the Court lacks jurisdiction under the "separation of powers" doctrine. Specifically, Defendant argues that "[i]t does not matter that Plaintiffs allege a theory of nuisance against the City because the lawsuit, ultimately, seeks intervention by a court of law to dictate how the City exercises its power in a particular manner, i.e., that the City should allow tennis to be played at the Dapplegray courts, but not pickleball." (Dem. at 5:3-6.) In opposition, Plaintiffs argue that "[t]he separation of powers doctrine does not preclude injunctive relief, such as that sought by the Plaintiffs in this matter, when it is warranted by the circumstances as it is here." (Opp. at 3:24-26.) Plaintiffs further argue that pickleball play at the Dapplegray courts violates the City's general plan, as well as state and local codes regarding excessive noise. As a consequence, they contend, the Court is empowered to enjoin pickleball play as a public nuisance in violation of these laws.

Defendant relies primarily on *Friends of H Street v. City of Sacramento*, which held that "under the separation of powers doctrine, courts lack power to interfere with legislative action at either the state or local level[.]" ((1993) 20 Cal.App.4th 152, 165.)

Friends of H Street affirmed the lower court's dismissal of an action against the city for injunctive relief for a nuisance. One of the two independent bases for the trial court's dismissal of the lawsuit was that the action violated the separation of powers. The plaintiffs in *Friends* sought to require the defendant city to abate the alleged nuisance resulting from the city's inaction in response to complaints regarding traffic conditions on a street. (*Id*. at pp. 157-158.) The plaintiffs sought injunctive relief requiring the city to reduce traffic speed and volume on that street. (*Ibid*.) The trial court sustained the city's demurrer without leave to amend, stating: "The routing of traffic on city streets is basically a legislative function. To the extent that traffic is rerouted from H Street, it must be routed onto another street or highway. The selection among alternatives is a legislative act." (*Id*. at p. 158.) The *Friends of H Street* court affirmed the lower court's judgment for the city because the traffic changes sought by the plaintiff were matters of public policy for the legislative branch and beyond the power of the judicial branch. (*Id*. at pp. 164-166.)

The issue presented here is whether the relief requested by the Plaintiffs would require the Court to exercise the core functions of the legislative branch and to have power in an area where the Court has no special knowledge or expertise. Here, Plaintiffs seek to have "the use of the Dapplegray courts for pickleball be declared a continuing public nuisance as defined by California Civil Code sections 3479 and 3480." (Prayer at ¶ 1.) Plaintiffs also seek to enjoin the Defendant from "allowing the Dapplegray courts to be used for pickleball[.]" (Prayer at ¶ 4.) Essentially, Plaintiffs would have the court direct the

City of Walnut Creek to preclude a specific sport from play at a park over which it has exclusive concern.

It is well established that "park regulation is a municipal affair." (*Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 467.) "A charter city has inherent authority to control, govern and supervise its own parks. The disposition and use of park lands is a municipal affair." (*Id*. at 468 (internal quotations omitted); see also *City of Marysville v. Boyd* (1960) 181 Cal. App.2d 755, 757 [holding that charter city had authority to deed public parkland to the county for the purpose of erecting a courthouse in part because city's charter was silent on issue]; *Wiley v. City of Berkeley* (1955) 136 Cal. App.2d 10, 15.)

Courts have consistently held the matter of parks to be a local concern. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 211 [money used for construction of a park was money used for a municipal affair because the establishment of parks is a local concern]; *Wiley v. City of Berkeley*, *supra*, 136 Cal.App.2d at p. 14 [charter city had a right to build a firehouse in its park since the disposition and use of parklands is a municipal affair]; *Reagan v. City of Sausalito* (1962) 210 Cal.App.2d 618, 624-628 [a city's provision of parks is a local affair]; *Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 468 [charter city had right to transfer areas of a park to the city's department of works for use as public buildings and grounds, including use as police training facilities]; *People v. Trantham* (1984) 161 Cal.App.3d Supp.1, 13 [city ordinance proscribing entering, remaining, staying or loitering on park grounds during certain times of the night held proper].)

Here, the requested relief would place the Court in the position of declaring to the City of Walnut Creek which sports are permissible in its parks. As drafted, the requested relief would require the Court to carry out a legislative function. To the extent Plaintiffs seek an injunction to require a public entity to comply with the law, that is not reflected in their Prayer for Relief.

Section 3482 Immunity

Even assuming arguendo that the Court does not lack jurisdiction under the "separation of powers" doctrine, Defendant is entitled to statutory immunity under Civil Code section 3482. That section provides, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." (Civil Code § 3482.)

Section 3482 confers a statutory immunity that is a complete defense to a nuisance claim. (Civ. Code § 3482.) A demurrer may be sustained on the basis of statutory immunity. (See, e.g., *Leyva v. Nielsen* (2000) 83 Cal.App.4th 1061, 1065-1066.)

The statutory protection of Civil Code section 3482 does not apply "unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 (*Varjabedian*), quoting *Hassell v. San Francisco* (1938) 11 Cal.2d 168, 171.) Applying this standard requires a "particularized assessment of each authorizing statute in relation to the act which constitutes the nuisance." (Varjabedian, at p. 291, fn. 6; see also *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 102.)

The recent case of *City of Norwalk v. City of Cerritos* looked at cases which assessed whether an alleged nuisance was a "necessary implication" of the statute's express authorization. ((2024) 99 Cal.App.5th 977.) The Court concluded that "courts assessing whether an alleged nuisance is a "necessary implication" of a statute's express authorization should ask the following question: Is the alleged nuisance an inexorable and inescapable consequence that necessarily flows from the

statutorily authorized act, such that the statutorily authorized act and the alleged nuisance are flip sides of the same coin?" (*Id*. at p. 988.)

In *City of Norwalk*, the Court of Appeal held that the City of Cerritos was immunized from the public nuisance claim of a neighboring city under Civil Code § 3482. In that case, the diversion of heavy truck traffic and the attendant severe adverse effects of that heavier traffic into the neighboring city was the result of a statutorily authorized ordinance. The court in that case found that "the immunity conferred by section 3482 applies not only to the specific act expressly authorized by statute (namely, enacting an ordinance designating routes for commercial vehicles and those exceeding weight limits), but also to the inexorable and inescapable consequences that necessarily flow from that act (namely, that drivers unable to use those routes will take different routes, thereby causing adverse effects of heavier traffic on those other routes)." (*Id*. at p. 982.)

Using that same framework, the Court must examine whether the public nuisance alleged in this case—the noise associated with the use of the Dapplegray pickleball courts—inexorably and inescapably flows from any statutorily authorized act. Plaintiffs' characterization of the issue—that the City must "point to a specific statute that authorizes it to convert tennis courts to pickleball courts ***and*** a statute that authorizes it to create noise levels in excess of those allowed pursuant to the general plan" (Opp. at 8:4-6 [emphasis original])—is not supported by the case law. The City need only point to an act expressly authorized by statute—administration of parks and park facilities—and then the Court must determine whether the noise associated with the use of the Dapplegray pickleball courts is an "inexorable and inescapable consequence" of that act.

Furthermore, Plaintiffs' reliance on *Varjabedian* to reach a contrary result is inapt. *Varjabedian* concerned a sewage treatment plant that emitted noxious odors. The Supreme Court held that Civil Code section 3482 did not shield the defendant from liability for nuisance because the statutes authorizing the construction of sewage treatment plants could not be read to authorize the emission of bad odors. (*Varjabedian*, *supra*, at p. 292.) To the contrary, one object of sewage treatment facilities was to remove noxious effluents from the environment. (*Ibid*.)

Here, as the Complaint alleges, "[t]he City authorized, approved, and oversaw the conversion of the Dapplegray tennis courts to pickleball courts[.]" (Complaint at ¶ 31.) This decision was made under the City's municipal authority to regulate parks. The consequences of that decision (elevated noise levels experienced by Plaintiffs) are an inescapable consequence of the Defendant's authorized act. Defendant is entitled to statutory immunity for the public nuisance pursuant to Civil Code § 3482.

12. 9:00 AM CASE NUMBER: C24-02351
CASE NAME: SANDRA HERNANDEZ VS. NFP CORPORATE SERVICES (CA), INC.
***HEARING ON MOTION IN RE: TRANSFER OF ACTION**
FILED BY: NFP CORPORATE SERVICES (CA), INC.
****TENTATIVE RULING:****

Defendant NFP CA Insurance Services, Inc., NFP Corporate Services (CA), Inc., and Theodore Zouzounis bring this Motion to Transfer Venue to transfer San Francisco Superior Court Case No. CGC-23-606739

to this court on the basis that such action arises out of the same transaction and seeks the same damages as the instant case. Plaintiff Sandra Hernandez opposes the Motion.

The hearing on this Motion is continued to June 2, 2025, at 9:00 a.m. in Department 9.

13. 9:00 AM CASE NUMBER: C24-02589
CASE NAME: MICHAEL HOFFMAN VS. PETER DOCTER
***HEARING ON MOTION IN RE: FOR PROTECTIVE ORDER TO EXTEND DISCOVERY RESPONSE DEADLINE**
FILED BY: DOCTER, PETER
****TENTATIVE RULING:****

The court partially grants the protective order to extend the discovery response deadline to March 31, 2025.

14. 9:00 AM CASE NUMBER: C24-02589
CASE NAME: MICHAEL HOFFMAN VS. PETER DOCTER
HEARING ON DEMURRER TO: COMPLAINT
FILED BY: DOCTER, PETER
****TENTATIVE RULING:****

Before the Court is a demurrer to the complaint filed by defendants Peter Docter, Comerica Bank & Trust, N.A. as Special Trustee for the Robinson Family Trust, Mark Becker and Mark Becker, Inc. For the reasons set forth, the general demurrers to the first, second, third, fourth, seventh, and eighth causes of action are **overruled**, and the demurrer to the fifth cause of action is **sustained, with leave to amend.**

Background

This case involves a dispute between neighbors over construction and other related activities on defendant Peter Docter's property in Lafayette. The litigation generally involves a development project on residential properties located at 19 Springhill Road and 20 Springhill Road ("Docter Properties") which border Plaintiff Hoffman's residence at 18 Springhill Road. (Compl. ¶¶ 5, 6, 7.) Hoffman contends generally that Docter engaged in construction not approved by the City and that Docter obtained permits and approvals for modification of the project that was approved by the City's Resolution No. 2022-19 by the nonpublic submission of applications directly to City Zoning Administrator Gregg Wolff, who approved the plans "over the counter" without public notice or a public hearing in violation of both Resolution No. 2022-19 and the City Planning and Zoning Code. (*See generally* Compl. ¶¶ 1, 2, 20-42.)

Defendant Docter is one of the beneficial owners of the Docter Properties, which are titled to the Robinson Family Trust of which defendant Comerica Bank & Trust, N.A. is the special trustee. (Compl. ¶¶ 6, 7, 18.) Mark Becker is the principal of Mark Becker, Inc., the architect who prepared the plans and modifications for the construction project and submitted the plans, applications and modifications to the City for approval. Docter, Comerica, Becker, and Becker, Inc. are sometimes referred to collectively for convenience only in this ruling as the "Docter Defendants."

Resolution 2022-19 approved construction on 19 Springhill Road. (Compl. ¶¶ 24, 25.) The approval did not refer to or include any construction on 20 Springhill Road. (Compl. ¶ 26.) The construction and modifications of the project which Plaintiff alleges were not approved by Resolution No. 2022-19 include, but are not limited to, significant grading on 20 Springhill Road, an elevated trestle bridge as part of the train tracks and railroad system the extends over both of the Docter Properties, a long tunnel through the hillside of 20 Springhill Road, and an improvement allowed to be constructed within the 50-foot set back established in the Lafayette Municipal Code for the Hillside Overlay District in which these properties are located. (*See generally* Compl. ¶¶ 25, 27-31, 41.)

Plaintiffs' complaint alleges nine causes of action against the several defendants. The Docter Defendants do not demur to the sixth cause of action for trespass against Docter and Comerica. The ninth cause of action for violation of mandatory duties is alleged only against the City and is therefore also not part of the Docter Defendants' demurrer.

Legal Standards Governing Demurrer

In ruling on the demurrer, the Court must accept as true all well-pleaded factual allegations of the complaint, but not legal or factual conclusions or contentions of law. (*City of Dinuba v. County of Tulare* (2007) 41 Cal. 4th 859, 865; *Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 374.) The Court gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation omitted.]" (*Evans v. City of Berkeley* (2006) 38 Cal. 4th 1, 6.) (*See also* Code Civ. Proc. § 452.) A demurrer must dispose of an entire cause of action. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167, overruled in part on other grounds by *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 919; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.)

Statutory causes of action must be pleaded with particularity; the "complaint must plead every fact which is essential to the cause of action under the statute.'" (*Baskin v. Hughes Realty, Inc.* (2018) 25 Cal.App.5th 184, 207.) (*See also Fischer v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604.) "If the complaint states a cause of action under any theory . . . that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) If a complaint fails to state a cause of action but there is a reasonable possibility of amendment to cure the deficiencies, then leave to amend must be granted. (*Id.* at 39.)

Generally, a complaint is sufficient if it pleads "ultimate" facts. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549-550; *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) A plaintiff generally has no obligation to plead evidentiary facts in a complaint so long as the complaint alleges each essential element of the cause of action pled. (*C.A. v. William S. Hart Union High School Dist., supra,* 53 Cal.4th at 872 ["To survive a demurrer, the complaint need only allege facts sufficient

to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged. [Citation omitted.]"].)

Requests for Judicial Notice

Plaintiffs filed a request for judicial notice, asking the Court to take judicial notice of sections 1-304 and 6-7190 of the Lafayette Municipal Code. (Pls. RJN Exhs. A and B.) The unopposed request is granted. (Evid. Code § 452(c).)

Analysis

A. Fraud and Negligent Misrepresentation (1st and 2nd C/As)

The first and second causes of action of the Complaint for fraud and negligent misrepresentation, respectively, are alleged against Docter.

1. Elements of the Claims; Specificity Requirement

"' 'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citation, internal quotations omitted.] 'Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings … will not ordinarily be invoked to sustain a pleading defective in any material respect.' [Citation, internal quotations omitted.]" (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal. App. 4th 221, 234 [quoting *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 and *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, *superseded by statute on other grounds*].)

"The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. [Citation omitted.] In contrast to fraud, negligent misrepresentation does not require knowledge of falsity. A defendant who makes false statements ' "honestly believing that they are true, but without reasonable ground for such belief, . . . may be liable for negligent misrepresentation . . . ." [Citations.]" [Citation omitted.] However, a positive assertion is required; an omission or an implied assertion or representation is not sufficient. [Citations omitted.]" (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.)

"A claim of fraud based on mere nondisclosure may arise when there is a confidential relationship, when the defendant has made a representation that is likely to mislead absent a disclosure, when there is active concealment of the undisclosed matter, or 'when one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known to or reasonably discoverable by the other party.' [Citation omitted.]" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1382 [emphasis added].) (*See also Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1082 [fraud includes " 'misleading half-truths' "]; *American Trust Co. v. California Western States Life Ins. Co.* (1940) 15 Cal.2d 42, 65 ["Regardless of whether one is under a duty to speak or disclose facts, one who does speak must speak the whole truth, and not by partial suppression or concealment make the utterance untruthful

and misleading."].) Civil Code section 1710 defines deceit to include "[t]he suggestion, as a fact, of that which is not true, by one who does not believe it to be true," "t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true" or "[t]he suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." (Civ. Code § 1710, subd. 1, 2, and 3 [emphasis added].)

The specificity requirement means that Plaintiffs must allege facts "which 'show how, when, where, to whom, and by what means the representations were tendered.' " [Citation and internal quotations omitted.]" (*Lazar, supra,* 12 Cal.4th at 64 [quoting *Stansfield v. Starkey* (1990) 220 Cal. App. 3d 59, 73].) "If the duty to disclose arises from the making of representations that were misleading or false, then those allegations should be described. [Citation omitted.]" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384.) However, "[l]ess specificity should be required of fraud claims 'when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy," [citation]; "[e]ven under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party . . . ." ' [Citation omitted.]" (*Alfaro, supra,* 171 Cal.App.4th at 1384.)

2. Whether the Complaint Meets the Specificity Requirement

The Docter Defendants contend the fraud and negligent misrepresentation claims are not pled with specificity. The Court finds the claims are pled with sufficient particularity as they allege when and how Peter Docter made the misrepresentations and misleading half-truths (fall 2022, in person at Plaintiffs' residence), to whom (the Plaintiffs), and what was misrepresented and what material facts were omitted that made the representations made by Docter regarding the construction misleading. (Compl. ¶¶ 23-25, 29-35.)

Plaintiffs allege that Peter Docter met with Plaintiffs in the fall of 2022 in Plaintiffs' home and provided details regarding their construction project: (a) the project involved building a driveway and a "small, private" cottage for guests on 19 Springhill Road; (b) the guest cottage would be built within the footprint of the existing home on 19 Springhill Road, which met the minimum 50-foot set back requirement from Plaintiffs' property line; (c) the structure would be secluded and not visible; and (d) there would be a line of train tracks from 20 Springhill to the guest cottage. (Compl. ¶ 23.) Plaintiffs allege that plaintiff Deborah Lindes attended the December 2022 public hearing on approval of the Docters' construction plans, which were consistent with the description Peter Docter provided in the fall 2022 meeting with Plaintiffs, and were approved by Resolution 2022-19, as summarized in the Complaint. (Compl. ¶¶ 24, 25.) Plaintiffs allege the representations were false and also misleading by omission, in that in 2023 the Docters submitted modified plans that, among other things, moved the footprint of the cottage materially closer to Plaintiffs' property and within the 50-foot set back requirement and significantly expanded the nature and scope of the construction project to include construction on the 20 Springhill Road property, a materially more visible and not secluded structure which was elevated 10 feet above street level, an elevated trestle bridge for the train, and significant tunneling in the hillside without associated geological or other reports. (Compl. ¶¶ 19-34.) The modified plans submitted in 2023 were part of plans prepared for the project in 2022 but excluded

from the project plans presented for public comment and approval by the City. (Compl. ¶¶ 21, 22, 24-26.) The specificity requirement is satisfied.

3. Whether Docter's Statements Regarding the Project Are Nonactionable Opinion or Predictions of Future Events

The Docter Defendant argue that Docter's statements about the construction project were "no more than projections about proposed construction work, not about then-past or presently conducted work," and therefore they were merely nonactionable "predictions" about future events. (Dem. p. 8.) Though the general rule is that opinions and predictions regarding future events are not actionable, there is an exception to the general rule. "A statement couched as an opinion, by one having special knowledge of the subject, may be treated as an actionable misstatement of fact. [Citations omitted.]" (*Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1080-1081 [statement by broker of estimated square footage].) (*See also Cohen v. S & S Construction Co.* (1983) 151 Cal.App.3d 941, 946 [summarizing exceptions to the general rule: " '(1) where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; [and] (3) where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion.' [Citation omitted.]"].)

Further, where the misrepresentations alleged are not "merely" predictions of future events but embody present facts as well, the misrepresentations can be actionable. (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 662, 665 ["We thus agree with CalPERS that the record supports the inference that the ratings were not merely predictions regarding the SIVs' future value, but affirmative representations regarding the present state of their financial health and, more specifically, regarding their capacity to provide payments to investors as promised (which capacity they did not in fact have."].) *(See also Apollo Capital Fund LLC v. Roth Capital Partners, LLC, supra,* 158 Cal.App.4th at 240-244 [reversing order sustaining demurrer to fraud and negligent misrepresentation claims based on the representations party had commitments to purchase all of a preferred stock offering from which bridge notes would be repaid and that the party would pay off the bridge notes from the offering, when party failed to disclose known limitations on the preferred stock offering, stating "The allegation that Roth misrepresented that the bridge notes would be paid off with the proceeds of the preferred stock offering is a positive assertion which, even if Roth believed it to be true, was allegedly not warranted by the information Roth had about restrictions on the preferred stock offering—i.e., a statement made without reasonable grounds for believing it to be true."].)

Lacher v. Superior Court (1991) 230 Cal.App.3d 1038 is factually and procedurally similar, a case in which the Court of Appeal reversed the trial court's order sustaining a demurrer to fraud and negligent misrepresentation causes of action. There, the developer made representations regarding the nature of a development by representing the development would preserve ocean views for the neighboring property owners and that houses on one of the streets would be one story in order to induce neighbors not to oppose the project and win review board approval. (*Id*. at 1045.) The Court found the complaint alleged actionable, intentional misrepresentations by the developer, stating "Although Southwest had no duty to explain or discuss the development project with petitioners, having voluntarily done so, it was obligated to truthfully explain the project." (*Id.*) The Court also held

the complaint adequately alleged a claim for negligent misrepresentation, stating that "when Southwest sought petitioners' support in the land use approval process, it had a duty to tell the truth and not negligently misrepresent the nature and scope of the project." (*Id.* at 1048.)

A demurrer must dispose of an entire cause of action. (*Daniels v. Select Portfolio Servicing, Inc., supra,* 246 Cal.App.4th at 1167; *PH II, Inc. v. Superior Court, supra,* 33 Cal.App.4th at 1682-1683.) The Court finds there are allegations of affirmative statements and misleading half-truths regarding the nature and scope of the construction project alleged in the Complaint and summarized in part above that are not mere opinions or predictions of future events but actionable misrepresentations under the standards of the case law. The Complaint adequately alleges that they are representations of fact regarding the nature and scope of the Docter's construction project on which Plaintiffs could reasonably rely, based on Docter's superior knowledge of the project as the property owner and proponent of the project and based on their consistency with the project as approved in Resolution 2022-19. (Compl. ¶¶ 23-25.) Plaintiffs have adequately alleged that the representations and misleading half-truths were contrary to the true nature and scope of the construction project Docter had planned, based on Docter's undisclosed plans from 2022 implemented through nonpublic plan modifications presented in 2023 that were inconsistent with the representations made to Plaintiffs. (Compl. ¶¶ 21, 22, 29-34.)

The demurrers to the first and second causes of action are **overruled**.

B. <u>Private and Public Nuisance (3rd and 4th C/As)</u>

The third and fourth causes of action for private and public nuisance, respectively, are alleged against each of the Docter Defendants.

1. <u>Private Nuisance</u>

Civil Code section 3479 defines a nuisance as "anything which is injurious to health . . . 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 private nuisance claim requires plaintiff to prove (1) interference with the plaintiff's use and enjoyment of his property; (2) that the "invasion of plaintiff's interest in the use and enjoyment of the land [is] *substantial,* i.e., that it cause[s] the plaintiff to suffer 'substantial actual damage'"; and (3) that the interference is unreasonable, meaning that it is "'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.'" (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 262-263 [Citations omitted, italics in original, quoting *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938.].) (*See also* W*ilson v. Southern California Edison Co.* (2018) 21 Cal.App.5th 786, 802-803; Civil Code §§ 3479, 3481.)

> The requirements of *substantial damage* and *unreasonableness* are not inconsequential. . . . "The very existence of organized society depends upon the principle of 'give and take, live and let live,' and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*."

(*Mendez v. Rancho Valencia Resort Partners, LLC*, *supra,* 3 Cal.App.5th at 263 [italics in original, quoting *San Diego Gas & Electric Co. v. Superior Court, supra,* 13 Cal.4th at 938.].)

Both the substantial and unreasonable elements "are to be judged by an objective standard." (*Mendez v. Rancho Valencia Resort Partners, LLC*, *supra,* 3 Cal.App.5th at 263.) However, "the elements of substantial damage and unreasonableness necessary to making out a claim of private nuisance are questions of fact that are determined by considering all of the circumstances of the case. [Citations omitted.]" (*Id.* at 263-264.)

The Docter Defendants focus on the temporary noise, dust, and inconveniences during daytime construction as the basis for the private nuisance, arguing that "Construction is, by its very nature, a temporary disturbance to those living nearby." (Opp. p. 10.) Plaintiffs' private nuisance claim is not limited to the temporary construction issues. The claim alleges the Docter Defendants, among other things (a) added a "spite fence" of redwoods along the parties' property line, (2) undertook construction after hours and on weekends that blocked access to Plaintiffs' property and caused significant and excessive dust and debris to flow onto Plaintiffs' property, (3) routinely played loud music at all hours of the day and burned bonfires, causing smoke to enter Plaintiffs' resident, (4) caused excessive noise with the "constant" running of the train on the Docter Properties, with a "clanging bell," which also attracts spectators to the property, (5) caused excessive noise from an aggressive, barking dog on their premises, and (6) built a raised structure that exceeds the height limits in the Lafayette Municipal Code zoning provisions and obstructs Plaintiffs' views and enjoyment of their property. (Compl. ¶¶ 34, 39, 41.) (*See, e.g., Wilson v. Handley* (2002) 97 Cal.App.4th 1301, 1304, 1310-1312 [row of trees can be a spite fence if it violates the spite fence statute, Civil Code section 841.4, as well as a nuisance, stating "Section 841.4 does not specify that the fence must interfere with something more than light and air to be a nuisance, and we are not at liberty to read any such additional requirement into the statute."]; *Chase v. Wizmann* (2021) 71 Cal.App.5th 244, 253 [excessive noise can be a sufficient interference with the use or enjoyment of land to constitute a private nuisance]; *Mendez v. Rancho Valencia Resort Partners, LLC, supra,* 3 Cal.App.5th at 264 [same, citing, among others *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 764].)

The Docter Defendants cite *Wolford v. Thomas* (1987) 190 Cal.App.3d 347, a case decided after a bench trial on a private nuisance claim in which the trial court found for the defendants on an evidentiary record. The case may support the absence of an actionable nuisance based on interference with an adjoining property owner's light, air, or view, and where the defendants exercised ordinary care in the construction on their property and were not using their land for unlawful purposes. (*Id.* at 359-360.) (*See also Pacifica Homeowners' Assn v. Wesley Palms Ret. Cmty.* (1986) 178 Cal.App.3d 1147, 1152 [affirming dismissal based on demurrer to nuisance claim for trees blocking view].) The interference with light, air or views are not the only nuisance allegations made in the Complaint, however.

At least some of the facts alleged and summarized above, accepted as true on demurrer, are sufficient to state a claim that the Docter Defendants' activities on the Docter Properties have caused a substantial and unreasonable interference with Plaintiffs' use and enjoyment of their property. *Wolford v. Thomas* addressed only the general rule that a nuisance cause of action that impairing a view or blocking light to a neighbor's property is not actionable nuisance, but the case does not foreclose a nuisance claim based on excessive noise, a spite fence of trees, or violations of a municipal

code land use or zoning provisions. Read liberally as the Court must on demurrer, Plaintiffs' complaint about the structure on the Docter Properties is not merely that the structure interferes with Plaintiffs' view, light or air but that it is built within the 50-foot set back provided under the City ordinance, such that the nuisance is not merely interference but also a violation of the zoning rules. (Lafayette Mun. Code §§ 1-304 and 6-7190.)

The Court cannot resolve as a matter of law the factual question of whether the excessive noise, dust, and other interferences with the use and enjoyment of Plaintiffs' property alleged in the Complaint were or are sufficiently substantial and unreasonable to warrant a judgment for nuisance. The allegations are however, sufficient to state a cause of action for private nuisance at the pleading stage.

2. Public Nuisance

Docter Defendants argue that Plaintiffs do not have standing to pursue a claim for public nuisance related to their construction project. Under the Civil Code, a public nuisance "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.) "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." (Civ. Code § 3493.) (See also *Mendez v. Rancho Valencia Resort Partners, LLC*, *supra,* 3 Cal.App.5th at 262

Courts recognize that analysis of whether an activity constitutes a public nuisance involves some weighing of the activity and the interference it causes, balancing the social utility of the activity against the gravity of the harm caused by the activity. (*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 301.) " 'It is this community aspect of the public nuisance . . . that distinguishes it from its private cousin, and makes possible its use, by means of the equitable injunction, to protect the quality of organized social life. Of course, not every interference with collective social interests constitutes a public nuisance. To qualify, and thus be enjoinable, the interference must be both substantial and unreasonable. . . . " 'Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together." ' [Citation omitted.]' " (*Id.*) Whether an activity is a public nuisance is evaluated under an objective standard, analyzing whether based on an impartial and objective assessment of the " 'whole situation' " the activity would be considered unreasonable. (*Id.*)

The excessive noise from a train with a clanging bell running constantly causing spectators to gather, excessive noise from barking dogs and construction not limited to daytime, normal business hours, are allegations that support a public nuisance with standing by Plaintiffs as the next door neighbors particularly affected by the activities given their proximity. Further, "[v]iolations of a planning code constitute a public nuisance. [Citation omitted.]" (*Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 255.) (*See also City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1163-1164 [finding marijuana dispensary which operated without a tax certificate required by the City Municipal Code to be a nuisance per se, stating " '[T]o rephrase the rule, to be considered a

nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law.' [Citation omitted.]"].)

The Lafayette Municipal Code expressly declares that "any condition caused or permitted to exist in violation of a provision of this code is a public nuisance." (Lafayette Muni. Code § 1-304.) The Complaint alleges that the cottage, which was supposed to be built in the footprint of the prior residence that was demolished and met the 50-foot set back requirement under Lafayette Municipal Code section 6-7190, is now built substantially closer to Plaintiffs' residence and inside the 50-foot set back. (Compl. ¶¶ 34, 40.) These facts, accepted as true, allege a public nuisance by the terms of the Lafayette Municipal Code, and the Complaint alleges sufficient facts to support their standing. They allege facts showing the public at large in the neighborhood is affected by the non-compliance with the Lafayette Municipal Code set back requirements and the specific injury Plaintiffs are suffering as a result of the proximity of the structure to their residence. (Compl. ¶¶ 34, 40.) The proximity of Plaintiffs' residence as alleged makes Plaintiffs' property more impacted by the noncompliance with the set back requirements and supports standing based on their special injury from the zoning violation. Plaintiffs have alleged other violations and injuries that may also support the public nuisance claim, but the allegations regarding the violation of the set back requirement are alone enough to state the cause of action in the face of a demurrer.

The demurrers to the fourth and fifth causes of action are **overruled.**

C. <u>Invasion of Privacy (5th C/A)</u>

Plaintiffs allege an invasion of privacy cause of action against all of the Docter Defendants. Invasion of privacy may be a common law claim or a claim founded on the California Constitution, and the elements of the claims are similar. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286-288 [describing these claims, their differences and similarities in detail].) "A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, <u>the intrusion must occur in a manner highly offensive to a reasonable person</u>. [Citation omitted.]" (*Id.* at 286 [emphasis added].)

To meet the first element, "the defendant must have 'penetrated some zone of physical or sensory privacy . . . or obtained unwanted access to data' by electronic or other covert means, in violation of the law or social norms. [Citation omitted.] In either instance, the expectation of privacy must be 'objectively reasonable.' [Citation omitted.]" (*Id*.) The "highly offensive" element is a policy determination, and "[r]elevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives. [Citation omitted.] Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, 'California tort law provides no bright line on ["offensiveness"]; each case must be taken on its facts.' [Citation omitted.]" (*Id.* at 287.) "[T]he common law right of privacy is neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right is judicially recognized. A plaintiff's expectation of privacy in a specific context must be objectively reasonable under the circumstances, especially in light of the competing social interests involved." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 26-27.)

"Whether a legally recognized privacy interest exists is a question of law to be decided by the court. [Citations omitted.] The issue of whether there is a reasonable expectation of privacy under the circumstances is a mixed question of law and fact. [Citations omitted.]" (*Sanchez-Scott v. Alza Pharms.* (2001) 86 Cal.App.4th 365, 372-373.) Plaintiffs contend that the Court cannot determine the issue of Plaintiffs' reasonable expectation of privacy on a demurrer because whether there is a serious invasion of privacy is a mixed question of law and fact, relying on *Mezger v. Bick* (2021) 66 Cal.App.5th 76, 87, also cited and relied on by the Docter Defendants.

Mezger affirmed summary adjudication of a common law invasion of privacy claim, holding that the facts showed the "impact on plaintiffs' privacy interests was . . . insubstantial as a matter of law." (*Id.*) The Court in *Mezger* explained in affirming summary adjudication for the defendants who photographed and recorded their next door neighbors, " 'Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.' [Citation omitted.]" (*Mezger v. Bick, supra,* 66 Cal.App.5th at 87 [emphasis added].) The decision does not stand for the proposition that the claim cannot be decided on demurrer. In fact, it can be determined on demurrer where the facts alleged are insufficient to show the activity is "highly offensive" under the reasonable person standard applicable to an intrusion claim. (*Fogelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, 992-993 [affirming trial court order sustaining demurrer to constitutional and common law invasion of privacy claims].)

Some of the allegations on which Plaintiffs base this cause of action repeat the allegations underlying their nuisance claims, such as excessive noise, dust and debris. (Compl. ¶ 75.) Those allegations may state facts supporting an interference with Plaintiffs' property interests in the use and enjoyment of their residence, but Plaintiffs cite no authority that supports that those intrusions constitute an invasion of privacy rights by "intrusion into private matters." (*Hill v. National Collegiate Athletic Assn., supra,* 7 Cal.4th at 24 [one of the four types of activities violating privacy protection adopted by the California common law].)

In addition to the allegations regarding dust and noise addressed above, Plaintiffs allege the design and construction of the structure with an elevation and location within the 50-foot set back space allows the inhabitants of the Docter Properties to look into Plaintiffs' yard and residence, and the amusement park like project constructed on the Docter Properties "bring[s] crowds of gawking spectators to Plaintiffs' property." (Compl. ¶ 75.) The Court does not find either of those two factual allegations to be sufficient to state there has been an intrusion into Plaintiffs' private matters in "a manner highly offensive to a reasonable person," or to support that the alleged intrusion into Plaintiffs' privacy interest is an "egregious breach of social norms." (*Hill v. National Collegiate Athletic Assn., supra,* 7 Cal.4th at 37; *Mezger v. Bick, supra,* 66 Cal.App.5th at 87.)

The demurrer to the fifth cause of action for invasion of privacy is **sustained, with leave to amend.**

D. Negligence (7th C/A)

Plaintiffs allege negligence against only Docter and Comerica as owners of the Docter Properties. Plaintiffs allege as owners of the Docter Properties, Docter and Comerica owed a duty to exercise ordinary care in the management of the properties so as to avoid exposing others, including the

Plaintiffs, to an unreasonable risk of harm. (Compl. ¶ 87.) They allege Docter and Comerica breached their duty of care by, among other things, performing the construction on the Docter Properties negligently, causing, among other things, physical damage to Plaintiffs' property, including "dumping other debris on Plaintiffs' property," and "damaging and/or destroying plants and trees located on the 18 Springhill Property." (Compl. ¶ 88.)

The elements of a negligence claim are " 'duty, breach of duty, proximate cause and damages.' [Citations omitted.]" (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526.) (*See also Beacon Residential Comm. Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573.) Docter and Comerica do not dispute that Plaintiffs have alleged a valid legal duty they owed to the Plaintiffs as neighboring property owners, specifically the "duty to exercise ordinary care between neighbors, to avoid unreasonable risk of harm." (Memo. ISO Dem. p. 12.) Docter and Comerica contend the facts alleged in the Complaint do not allege a breach of the duty by the failure to exercise due care in their conduct of the construction activities on the Docter Properties, focusing on Plaintiffs' allegations regarding the design of the structures. They also contend any damage caused by construction dust and debris was "temporary" and could be cleaned up. They cite only the *Beacon Residential* decision, a case which addresses the duty owed by an architect to future owners of the building the architect designs in the context of a homeowners association which sued the architects who designed a condominium project over construction defects. (*Id*. at 571.) The Court held "an architect owes a duty of care to future homeowners in the design of a residential building" where the architect is the project's principal architect. (*Id.*) It does not stand for the proposition that an owner of adjacent property does not owe a duty of care not to damage the neighbor's property while engaging in construction.

Interpreting the Complaint liberally as the Court must in ruling on a demurrer and accepting the allegations as true, Plaintiffs allege Docter and Comerica breached their duty to exercise due care in allowing the construction activities on the Docter Properties to cause physical damage to Plaintiffs' property, including depositing debris on their property and damaging foliage on their property. These allegations are sufficient to support the elements of a negligence claim. Docter and Comerica cite no authority that indicates a property owner who engages in construction in a manner that causes of damage to the neighbor's property either does not a breach of the duty to exercise due care or that the damage is not actionable damage for purposes of a negligence claim. The Court need not address the sufficiency of the other allegations, since a demurrer can only be sustained if it fully disposes of a cause of action. (*Daniels v. Select Portfolio Servicing, Inc., supra,* 246 Cal.App.4th at 1167; *PH II, Inc. v. Superior Court, supra,* 33 Cal.App.4th at 1682-1683.)

The demurrer to the seventh cause of action for negligence is **overruled.**

E. <u>Civil Conspiracy (8th C/A)</u>

Plaintiff alleges the civil conspiracy cause of action against all of the Docter Defendants. " 'Conspiracy' " itself is not a cause of action; conspiracy allegations are typically made in order to assert liability against an actor who did not participate in the underlying wrongful conduct alleged to have been committed by another defendant. [Citations omitted.]" (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1473.) (*See also Daniels v. Select Portfolio Servicing, Inc*., supra, 246 Cal.App.4th at 1172.) "[A] plaintiff must plead '(1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the

common design.' [Citation omitted.]" (*Daniels v. Select Portfolio Servicing, Inc., supra,* 246 Cal.App.4th at 1173.) (*See also Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1581.)

"Conspiracy is not a separate tort, but a form of vicarious liability by which one defendant can be held liable for the acts of another. [Citations omitted.] To establish conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage. [Citation omitted.] A conspiracy requires evidence 'that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it.' [Citation omitted.] Thus, conspiracy provides a remedial measure for affixing liability to all who have 'agreed to a common design to commit a wrong' when damage to the plaintiff results. [Citation omitted.]" (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 652].) The Court in *Kidron* cites the explanation of civil conspiracy from Witkin: "As Witkin explains, 'If [the plaintiff] can show that each [of several defendants] committed a wrongful act or some part of it, e.g., that each made false representations, he has no need of averments of conspiracy. But if A alone made representations, the plaintiff can hold B and C liable with A only by alleging and proving that A acted pursuant to an agreement (conspiracy) with B and C to defraud.' [Citation omitted.]" (*Kidron v. Movie Acquisition Corp., supra,* 40 Cal.App.4th at 1581 [emphasis added].)

Under the foregoing authorities, Plaintiffs do not have to allege that each of the co-conspirators committed wrongful acts, such as fraud. Rather, as the Court in *Kidron* explains in the quoted passage, Plaintiffs only need to allege that one of the co-conspirators committed fraud or some other wrongful act and that the other co-conspirators committed some act, even if not wrongful, pursuant to or in furtherance of an agreement with the other co-conspirators to defraud Plaintiffs or commit some other tort against Plaintiffs.

Liberally construing the allegations of the Complaint, Plaintiffs allege (1) that Docter misrepresented the nature and scope of his construction project on the Docter Properties (fraud cause of action found sufficient above) to the Plaintiffs and to the City in presenting plans which were approved at the December 2022 public hearing resulting in Resolution 2022-19, and (2) that the Docter Defendants and Wolff made an agreement to act in concert to help Docter and Comerica as the owners of the Docter Properties evade the City of Lafayette's design review committee review of the "real" construction plans which were in existence in 2022 before the December 2022 public hearing and were only presented thereafter in 2023 by means of a non-public, "over the counter" approval by Wolff and which materially modified the nature and scope of the construction to Plaintiffs' detriment and injury. (Compl. ¶¶ 20-34, 39-41, 44-54, 93-97.) These allegations meet the essential elements of a civil conspiracy cause of action under the foregoing authorities.

The demurrer to the eighth cause of action for civil conspiracy is **overruled.**

15. 9:00 AM CASE NUMBER: C24-02589
CASE NAME: MICHAEL HOFFMAN VS. PETER DOCTER
HEARING ON DEMURRER TO: COMPLAINT
FILED BY: WOLFF, GREG
TENTATIVE RULING:

Before the Court is a demurrer to the complaint filed by defendants City of Lafayette and Greg Wolff. For the reasons set forth, the general demurrers to the first, eighth, and ninth causes of action are **overruled**.

Background

This case involves a dispute between neighbors over construction and other related activities on defendant Peter Docter's property in Lafayette. The litigation generally involves a development project on residential properties located at 19 Springhill Road and 20 Springhill Road ("Docter Properties") which border Plaintiff Hoffman's residence at 18 Springhill Road. (Compl. ¶¶ 5, 6, 7.) Hoffman contends generally that Docter engaged in construction not approved by the City and that Docter obtained permits and approvals for modification of the project that was approved by the City's Resolution No. 2022-19 by the nonpublic submission of applications directly to City Zoning Administrator Gregg Wolff, who approved the plans "over the counter" without public notice or a public hearing in violation of both Resolution No. 2022-19 and the City Planning and Zoning Code. (*See generally* Compl. ¶¶ 1, 2, 20-42.)

Defendant Docter is one of the beneficial owners of the Docter Properties, which are titled to the Robinson Family Trust of which defendant Comerica Bank & Trust, N.A. is the special trustee. (Compl. ¶¶ 6, 7, 18.) Mark Becker is the principal of Mark Becker, Inc., the architect who prepared the plans and modifications for the construction project and submitted the plans, applications and modifications to the City for approval. Docter, Comerica, Becker, and Becker, Inc. are sometimes referred to collectively for convenience only in this ruling as the "Docter Defendants."

Resolution 2022-19 approved construction on 19 Springhill Road. (Compl. ¶¶ 24, 25.) The approval did not refer to or include any construction on 20 Springhill Road. (Compl. ¶ 26.) The construction and modifications of the project which Plaintiff alleges were not approved by Resolution No. 2022-19 include, but are not limited to, significant grading on 20 Springhill Road, an elevated trestle bridge as part of the train tracks and railroad system the extends over both of the Docter Properties, a long tunnel through the hillside of 20 Springhill Road, and an improvement allowed to be constructed within the 50-foot set back established in the Lafayette Municipal Code for the Hillside Overlay District in which these properties are located. (*See generally* Compl. ¶¶ 25, 27-31, 41.)

Plaintiffs' complaint alleges nine causes of action against the several defendants. Plaintiffs allege a first cause of action (fraud) and eighth cause of action (civil conspiracy) against defendant Greg Wolff, the Zoning Administrator of the City of Lafayette, and a ninth cause of action against the City for violation of mandatory duties with regard to the approval of Docters' project. Wolff and the City are collectively referred to sometimes in this ruling as the "City Defendants." The City generally demurs to the ninth cause of action, and Wolff generally demurs to the first and eighth causes of action.

Legal Standards Governing Demurrer

In ruling on the demurrer, the Court must accept as true all well-pleaded factual allegations of the complaint, but not legal or factual conclusions or contentions of law. (*City of Dinuba v. County of Tulare* (2007) 41 Cal. 4th 859, 865; *Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 374.) The Court gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation omitted.]" (*Evans v. City of Berkeley* (2006) 38 Cal. 4th 1, 6.) (*See also* Code Civ. Proc. § 452.) A demurrer must dispose of an entire cause of action. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167, overruled in part on other grounds by *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 919; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.)

Statutory causes of action must be pleaded with particularity; the "complaint must plead every fact which is essential to the cause of action under the statute.'" (*Baskin v. Hughes Realty, Inc.* (2018) 25 Cal.App.5th 184, 207.) (*See also Fischer v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604.) "If the complaint states a cause of action under any theory . . . that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) If a complaint fails to state a cause of action but there is a reasonable possibility of amendment to cure the deficiencies, then leave to amend must be granted. (*Id.* at 39.)

Generally, a complaint is sufficient if it pleads "ultimate" facts. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549-550; *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) A plaintiff generally has no obligation to plead evidentiary facts in a complaint so long as the complaint alleges each essential element of the cause of action pled. (*C.A. v. William S. Hart Union High School Dist., supra,* 53 Cal.4th at 872 ["To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged. [Citation omitted.]"].)

Requests for Judicial Notice

Both Plaintiffs and the City Defendants filed requests for judicial notice, in which each side requests the Court take judicial notice of provisions of the City of Lafayette Municipal Code (referred to as "Code" herein). The unopposed requests are **granted**. (Evid. Code § 452(c).)

Analysis

A. Fraud (1st C/A) and Conspiracy (8th C/A)

Plaintiffs allege fraud and civil conspiracy causes of action against Wolff based on his involvement in the process by which the plans were formulated.

1. Fraud

"' 'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citation, internal quotations omitted.] 'Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings … will not ordinarily be invoked to sustain a pleading defective in any material respect.' [Citation, internal

quotations omitted.]" (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal. App. 4th 221, 234 [quoting *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 and *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, *superseded by statute on other grounds*].)

Concealment is another form of fraud. (Civ. Code § 1710, subd. 3 [defining "deceit"].) "The required elements for fraudulent concealment are (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact. [Citation omitted.]" (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606 [quoting *Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 870].)

"A claim of fraud based on mere nondisclosure may arise when there is a confidential relationship, when the defendant has made a representation that is likely to mislead absent a disclosure, when there is active concealment of the undisclosed matter, or 'when one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known to or reasonably discoverable by the other party.' [Citation omitted.]" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1382 [emphasis added].) (*See also Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1082 [fraud includes " 'misleading half-truths' "]; *American Trust Co. v. California Western States Life Ins. Co.* (1940) 15 Cal.2d 42, 65 ["Regardless of whether one is under a duty to speak or disclose facts, one who does speak must speak the whole truth, and not by partial suppression or concealment make the utterance untruthful and misleading."].) Civil Code section 1710 defines deceit to include "[t]he suggestion, as a fact, of that which is not true, by one who does not believe it to be true," "t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true" or "[t]he suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." (Civ. Code § 1710, subd. 1, 2, and 3 [emphasis added].)

2. Civil Conspiracy

"[C]ivil conspiracies do not involve separate torts. The doctrine provides a remedial measure for affixing liability to all persons who have 'agreed to a common design to commit a wrong.' [Citation omitted.] [¶] Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. [Citation omitted.] They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. [Citation omitted.] It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree--expressly or tacitly--to achieve it. Unless there is such a meeting of the minds, ' "the independent acts of two or more wrongdoers do not amount to a conspiracy." ' [Citation omitted.]" (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [addressing sufficiency of evidence at trial for civil conspiracy to commit federal civil rights violation].)

"To establish conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage. [Citation omitted.] A

conspiracy requires evidence 'that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it.' [Citation omitted.] Thus, conspiracy provides a remedial measure for affixing liability to all who have 'agreed to a common design to commit a wrong' when damage to the plaintiff results. [Citation omitted.]" (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 652].) The Court in *Kidron* cites the explanation of civil conspiracy from Witkin: "As Witkin explains, 'If [the plaintiff] can show that each [of several defendants] committed a wrongful act or some part of it, e.g., that each made false representations, he has no need of averments of conspiracy. But if A alone made representations, the plaintiff can hold B and C liable with A only by alleging and proving that A acted pursuant to an agreement (conspiracy) with B and C to defraud.' [Citation omitted.]" (*Kidron v. Movie Acquisition Corp., supra,* 40 Cal.App.4th at 1581 [emphasis added].)

"While a complaint must contain more than a bare allegation the defendants conspired, a complaint is sufficient if it apprises the defendant of the 'character and type of facts and circumstances upon which she was relying to establish the conspiracy.' [Citations omitted.]" (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1022 [recognizing the nature of conspiracy means its existence " 'must often be inferentially and circumstantially derived' " from the acts done and the circumstances].)

3. Application of Legal Framework to Allegations of Complaint

The City Defendants do not directly dispute that the elements of the fraud cause of action are adequately pled against Docter. To the extent they contend that Docter had no duty to speak and therefore Plaintiffs cannot state a claim for fraud, the Court rejects that position both in the concurrent ruling on the Docter Defendants demurrer and based on the authorities cited above regarding actionable "misleading half-truths."

The City Defendants contend that Plaintiffs have not alleged an intent to defraud or Plaintiffs' justifiable reliance on any misrepresentations by Wolff, that Plaintiffs have not alleged Wolff made any affirmative misrepresentations, and that Wolff had no duty to make disclosures to Plaintiffs. As to the conspiracy cause of action, the City Defendants argue in their reply that, for the reasons stated in the demurrer to the Complaint, the Complaint does not adequately allege a fraud claim against the Docter Defendants, and therefore the civil conspiracy claim against Wolff fails. (Reply p. 5.) The fraud claim against Docter does not fail as alleged.

a. Fraud

With respect to fraud against Wolff, liberally construed and accepting the allegations as true, Plaintiffs allege that (1) Wolff was involved in the process by which the plans were formulated for presentation to the City and the public for hearing and approval in 2022 that were presented in a staff report and ultimately approved by Resolution 2022-19 in December 2022; (2) Wolff knew the true nature and extent of the complete project plans; (3) Wolff told the Docter Defendants the components of the plans to remove from the plans presented for public comment and approval to facilitate obtaining public approval; (4) Wolff provided the information on the components to exclude from the publicly noticed plans so that the additional, undisclosed components of the construction project could be presented to Wolff alone directly for approval, without notice or comment by interested parties or the public, through Wolff's approval of applications for modifications of the publicly approved plans "over the counter" as "minor" modifications, even though those components

were known to him to be part of the "project"; and (5) Wolff engaged in this conduct with knowledge that he was misleading the Plaintiffs and the public about the true nature and scope of the construction project to avoid public scrutiny of components likely to be controversial and subject to objection. Those omitted components include a 235-foot tunnel through a hillside, 1,501 additional cubic yards of grading above the 1,075 cubic yards approved by Resolution 2022-19, and an elevated trestle bridge for the railroad, as well as construction on the 20 Springhill Road property, a separate lot that was not identified in the publicly submitted project plans or approved in Resolution 2022-19, and a change in the location of the structure being built so that it would be located within the 50-foot set back provided in the Hillside Overlay Ordinance. (Compl. ¶¶ 21, 22, 24-34, 40, 45, 47, 49, 51, 53, 54; Code § 6-7190.) Plaintiffs also allege that Wolff had a mandatory duty to disclose the undisclosed components of the construction project to Plaintiffs, neighbors, the Design Review Committee, and the City, in addition to the allegations that failure to disclose those known, intended components in the public plans and public hearing was a fraudulent concealment based on disclosure of "half-truths." (Compl. ¶ 45.)

The City Defendants argue that advising homeowners is part of Wolff's job description under Code section 6-107 (Memo. ISO Dem. p. 8), but nothing in section 6-107 supports that Wolff's job included advising homeowners on how to circumvent public notice and hearing requirements under the City Code. The City Defendants repeat in their reply that Wolff had the authority to decide what construction project modifications are "minor" under Code section 6-276. That provision states in pertinent part: "(1) The zoning administrator shall review projects for design review if it finds that the projects are minor." (Code § 6-276(a)(1) [emphasis added].)

Reading the allegations of the Complaint liberally and accepting them as true on demurrer, Plaintiffs allege there were undisclosed components of the "project" on the Docter Properties of which Wolff was aware and concealed in the "explanation" of the development project presented in the publicly noticed approval process that materially omitted parts of the "project" in violation of the Code. (Code § 6-210.) Whatever discretion Wolff may have had to approve a "minor project," Plaintiffs contend he did not have discretion to misrepresent the nature and scope of the development project the Docter Defendants planned for the Docter Properties in the staff report for the project or the plans presented and approved by the City by Resolution 2022-19 on which Plaintiffs, neighbors, the public and the City were relying. Plaintiffs have alleged actionable fraud based on disclosure of information with material omissions that misled Plaintiffs and the City about the "project."

The City Defendants do not address any of the mandatory disclosure and hearing provisions of the Code cited in Plaintiffs' opposition that require notice and a hearing for variances or development in the Hillside Overlay District, including the 20 Springhill property which was not mentioned in the publicly presented plans. (Compl. ¶ 14.) These provisions include Code section 6-210 which requires an "explanation of the matter to be considered" which Plaintiffs allege in the case of the project subject to Resolution 2022-19 excluded an explanation of several components of the development project actually planned and that were not approved in that resolution. (*See* Code §§ 6-210, 6-211 [detailing notice requirements, including under subsection (b) for variances, stating "For a public hearing on an application for a variance permit, the notice is by posting and mailing as required under subparagraphs (2) and (3) of subsection (a) of this section."], 6-214 [stating "A variance is a modification of the requirements of zoning regulations as to lot area, lot coverage, width, depth, side

yard, rear yard, setback, parking requirements, height of building, or other regulation affecting the size, shape or design of a lot or the placement of buildings on it." (emphasis added), and setting forth specific findings and conditions that must be met to grant a variance], 6-215 ["A land use permit is an authorization for a use consistent with other permitted uses in the applicable zoning district. It may be granted only after a public hearing and determination that the particular use sought is appropriate to the specific location," setting forth specific findings and conditions that must be met], 6-2064 ["Notice of a public hearing on an application for a hillside development permit shall be given in the same manner as the notice requirement for a variance as prescribed in Section 6-211."].) (*See also* Code § 6-7190 [requiring buildings in district in which Docter Properties are located to be "a minimum of 50 feet from property lines"].)

Plaintiffs have also adequately alleged that they relied on the information provided in the public materials regarding the nature and scope of the project and that were detailed in Resolution 2022-19 as reflecting the true nature and scope of the project, and that they did not know the facts about the true nature and scope of the project and the concealed components of the project that were not part of the public materials in Resolution 2022-19. They learned about the true facts and the concealment of components of the project from the public explanation of the project through public records requests after extensive construction of the Docter Properties commenced. (Compl. ¶¶ 35, 38, 49.) The Complaint adequately alleges the essential elements of the fraud claim against Wolff.

b. Conspiracy

The City Defendants argue that the email alleged in paragraph 22 from Wolff is not enough to allege there was a meeting of the minds among the defendants to commit fraud. The Complaint, however, alleges other communications and meetings between Wolff and Becker, the architect drawing Docter's original and modified plans and making the permit applications in 2023, which taken together are sufficient to allege that Wolff agreed with the Docter Defendants on a plan to not disclose the complete nature and scope of the project through the public notice and hearing process so as to have a pared-down version of the plans approved through the public hearing process by Resolution 2022-19, while the "true," materially different plans were approved as a "minor" project with modified plans approved "over the counter" directly by Wolff without notice or a hearing. Taken together, the facts allege that Wolff knowingly entered into an agreement with the Docter Defendants to defraud the public in obtaining approvals for the construction project on the Docter Properties, by providing an incomplete and misleading "explanation" of the "project" for the public notice, hearing, and approval in violation of provisions of the Code and in violation of the Docter Defendants and Wolff's obligations to disclose the true and complete nature of the construction project contemplated. (Compl. ¶¶ 21-41, 45, 47, 49, 93-96.) Civil conspiracy is adequately alleged against Wolff.

4. Immunity Defenses

Statutory liabilities of public entities and public employees under Government Code section 815 are subordinated to statutory immunities. (*Torres v. Department of Corrections & Rehabilitation* (2013) 217 Cal.App.4th 844, 849 [citing *Harshbarger v. City of Colton* (1988) 197 Cal.App.3d 1335, 1340–1341].) The City Defendants identify two immunities that they contend preclude the fraud and civil conspiracy claims against Wolff.

a. Government Code Section 822.2

Government Code section 822.2 addresses a public employee's immunity from liability for misrepresentation, which the courts have assumed covers all types of fraud and deceit, including concealment. (*Thomas v. Regents of University of California* (2023) 97 Cal.App.5th 587, 638.) The statute provides: "A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice." (Govt. Code § 822.2.) The term actual fraud used in Government Code section 822.2 means that in addition to pleading "the essentials of common law deceit," a complaint against a public employee must allege "motivation by corruption or actual malice" on the part of the employee, meaning " 'a conscious intent to deceive, vex, annoy or harm the injured party.' [Citation omitted]" (*Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 42 [emphasis added, holding demurrer properly sustained because the complaint did not allege corruption or malice by the employee defendants].)

The City argues the Complaint does not plead corruption or malice. (Memo. ISO Dem. p. 9.) Plaintiffs allege that "in doing the wrongful acts alleged herein, Wolff acted with actual fraud, corruption, and/or malice within the meaning of Government Code section 822.2." (Compl. ¶ 54.) They also allege Wolff intended "to deceive and defraud Plaintiffs and induce Plaintiffs' reliance." (Compl. ¶ 49.) Those allegations, however, follow numerous other allegations of the manner in which Wolff acted in concert with the Docter Defendants to reformulate the project plans presented for public notice and approval in a manner that concealed the true nature and scope of the plans by omitting material components for later approval by surreptitious, "over the counter" means without notice or public hearing. They allege that Wolff and the Docters live in Piedmont, and that Wolff was involved in a long history of other construction projects undertaken by the Docters at the 19 Springhill property since 2008 which were met with extensive public comment and objections. (Compl. ¶¶ 6, 11, 14-17.) For purposes of a demurrer, the Court finds that the Complaint adequately alleges facts supporting that Wolff acted with "malice" within the meaning of that term cited above so as to take his conduct outside the scope of the immunity of Government Code section 822.2. (S*ee Cooper v. Jevne* (1976) 56 Cal.App.3d 860, 869-874 [reversing order of dismissal of county building inspectors for fraud and remanding to allow plaintiffs to amend to allege all elements of a fraud claim for building inspectors' misrepresentation and nondisclosure of material facts regarding building defects].)

b. Government Code Section 820.2 (Discretionary Acts)

The City Defendants also argue Wolff is immune under Government Code section 820.2, which provides immunity for public employees exercising discretion vested in the employee. That statute provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." The City Defendants contend that, under Code section 6-276, Wolff had the discretion to decide whether a project is "minor" such that he had the authority to approve the modifications and applications for different permits made after Resolution 2022-19 was adopted. (Code § 6-276.)

The fact that a public employee exercises discretion alone is not enough to support immunity under Government Code section 820.2. The California Supreme Court in *Caldwell v. Montoya* (1995) 10

Cal.4th 972 explained the standard for applying the immunity granted under Government Code section 820.2 based on the Court's prior decision in *Johnson v. State of California* (1968) 69 Cal.2d 782, and how subsequent decisions have applied the standards set in that decision:

> [A] "workable definition" of immune discretionary acts draws the line between "planning" and "operational" functions of [**1326] government. [Citation omitted.] Immunity is reserved for those "basic policy decisions [which have] . . . been [expressly] committed to coordinate branches of government," and as to which judicial interference would thus be "unseemly." [Citation omitted.] Such "areas of quasi-legislative policy-making . . . are sufficiently sensitive" [citation omitted] to call for judicial abstention from interference that "might even in the first instance affect the coordinate body's decision-making process" [citation omitted].
>
> On the other hand, said *Johnson*, there is no basis for immunizing lower-level, or "ministerial," decisions that merely implement a basic policy already formulated. [Citation omitted.] Moreover, we cautioned, immunity applies only to deliberate and considered policy decisions, in which a "[conscious] balancing [of] risks and advantages . . . took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision. [Citations]." [Citation omitted.]

(*Caldwell v. Montoya, supra,* 10 Cal.4th at 981 [holding individual school board members immune from suit for wrongful termination of school superintendent under FEHA.].)

> The decision to apply discretionary act immunity requires a two-part analysis. First, we decide whether the decision at issue is a discretionary, as opposed to a ministerial one. . . . But this is only part of our inquiry.
>
> The second part of the discretionary act immunity analysis is whether the employee who made the decision at issue "actually reached a considered decision knowingly and deliberately encountering the risks that give rise to plaintiffs complaint. . . . [¶] . . . [T]o be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision." [Citation omitted.] In *Caldwell v. Montoya* (1995) 10 Cal.4th 972 (*Caldwell*), the California Supreme Court applied the same test: "Johnson precludes a finding of immunity solely on grounds that 'the [affected] employee's general course of duties is "discretionary" . . . ' [citation], and requires a showing that 'the specific conduct giving rise to the suit' involved an actual exercise of discretion, i.e., a '[conscious] balancing [of] risks and advantages.' " [Citation omitted.]

(*D.G. v. Orange County Social Services Agency* (2025) 108 Cal.App.5th 465, 473-474.)

In *Regents of University of California v. Superior Court* (2018) 29 Cal.App.5th 890 cited by Plaintiffs, the Court rejected a claim of discretionary immunity by university officials in connection with a negligence claim against the university by a student who was injured by another student who was receiving mental health treatment from the university. The Court explained that "[t]he Supreme Court has interpreted section 820.2 to 'allow[] immunity for basic policy decisions' by government officials, but not for 'the ministerial implementation of that basic policy.' [Citation omitted.] In *Johnson*, the court characterized this 'distinction' as being 'between the "planning" and "operational" levels of decision-making.' [Citation omitted.] '[T]here is no basis for immunizing lower level decisions that merely implement a basic policy already formulated. [Citation.] The scope of the discretionary act immunity "should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions.' " [Citation omitted.]" (*Id.* at 914-915.) In concluding that discretionary immunity did not apply to the student's claim in that case, the Court explained:

> [A] university's decision to create specific programs and protocols to identify and respond to threats of violence on campus would appear to qualify as a planning or policy determination, and thus "discretionary" within the meaning of Government Code section 820.2. Rosen's claim, however, does not challenge the adequacy of the university's safety programs or protocols. Instead, she challenges the manner in which the university and its employees executed those programs with respect to an individual student whom Rosen alleges presented a foreseeable threat of harm. These alleged acts and omissions constitute "subsequent ministerial actions in the implementation of [the] basic decision" [citation omitted] to adopt measures to maintain a safe campus. Even though the UCLA officials involved in this matter may have exercised highly skilled, professional judgment in making choices among complex alternatives in their responses to the situation presented by Thompson, Government Code section 820.2 does not bar Rosen's negligence claim.

(*Regents of University of California v. Superior Court* (2018) 29 Cal.App.5th 890, 915-916.) (*See also Barner v. Leeds* (2000) 24 Cal.4th 676, 688 [public defender's decisions in representing client not subject to discretionary immunity despite exercise of discretion in performance of the work, as "he or she is not immune for the negligent performance of professional duties that do not amount to policy or planning decisions." (emphasis added).]; *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal. 3d 406, 415 [judgment for plaintiff against city clerk for defamation affirmed, stating "Although defendants' contention is arguable that Mongan may have had discretion to discuss the Sanborn matter with the press, we cannot conclude that the decision to do so was in the nature of a 'basic policy decision' made at the 'planning' stage of City's operations. A governmental officer's discussions with the public or press regarding the functioning of his office would seem, instead, to fall within the category of those routine, ministerial duties incident to the normal operations of that office."].)

Under the guidance of these authorities, and based on the allegations of the Complaint, the Court cannot conclude as a matter of law on demurrer that Wolff's conduct in connection with the

presentation of a "pared down" version of the plans for development of the Docter Properties or his allowing the omitted portions of the project to be submitted and approved "over the counter" without notice and a hearing was a "policy" or "planning" decision rather than an operational implementation of the City's Zoning and Planning ordinances implementing the basic policies already formulated by the City. (*Regents of University of California v. Superior Court, supra,* 29 Cal.App.5th at 914-915.)

The demurrers by Wolff to the first and eighth causes of action are **overruled.**

B. City's Failure to Comply with Mandatory Duties (9th C/A)

The City contends the Complaint does not allege a mandatory duty owed to Plaintiffs that was violated by the City. In support of the argument in their initial papers, they note that the Code provides a variance "may" be granted (Code § 6-7192) and the height limitations in yards limits landowners but does not mandate any duty by the City. (Memo. ISO Dem. p. 11.)

Government Code section 815.6 provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." The Court in *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490 addressed that statute, stating, "We cannot agree with the City and amici curiae that liability under section 815.6 requires that the enactment establishing a mandatory duty itself manifest an intent to create a private right of action, for their position is directly contrary to the language and function of section 815.6. When an enactment establishes a mandatory governmental duty and is designed to protect against the particular kind of injury the plaintiff suffered, section 815.6 provides that the public entity "is liable" for an injury proximately caused by its negligent failure to discharge the duty." (*Id.* at 499 [emphasis added].)

The Court need not address all the mandatory duties Plaintiffs contend they have alleged that apply to the construction on the Docter Properties subject to this claim, as the failure to comply with the mandatory notice and other provisions for the City to allow a development on the 20 Springhill property are sufficient to warrant overruling the demurrer. Plaintiffs allege that both of the Docter Properties are located in the City's Hillside Overlay District. The City does not address, among other things, the mandatory duty imposed under Code section 6-2074 and related provisions. (Opp. pp. 17-18.)

Code section 6-2074 states the City "shall not authorize the issuance of a building permit nor an occupancy permit for a development unless it conforms to the terms and conditions of a hillside development permit." The Complaint alleges the 20 Springhill property is not part of Resolution 2022-19 and the plans approved pursuant to that Resolution after notice and the public hearing. (Compl. ¶¶ 14, 24-26.) Wolff, however, approved development on 20 Springhill "over the counter" without notice or a hearing or approval of the development by the City pursuant to Code sections 6-2061 through 6-2074. (Compl. ¶ 27.) Plaintiffs allege no application for a building permit was made for work on 20 Springhill, no hearing was undertaken as required, and no findings were made to support approval of development and issuance of a building permit for that property. (Code §§ 6-2061, 6-2064, and 6-2071; Compl. ¶¶ 27, 30.) (*See also* Code §§ 6-2061 [development in Hillside Overlay District "requires a permit"], 6-2064 [notice of public hearing for a hillside development permit "shall

be given in the same manner as the notice requirement for a variance" under Code § 6-211]; 6-7192 [while ordinance does not mandate that City issue a variance, it mandates that in order to grant a variance the City must provide comply with applicable provisions of Code sections 6-201-6-238, which include notice and a hearing, and Code § 6-214 which mandates that the City make a series of explicit findings in order to grant a variance].)

In its reply, the City does not argue that the foregoing ordinances are not obligatory and therefore do not impose mandatory duties on the City. Instead, in the reply, the City reiterates that Plaintiffs have not demonstrated that the list of City Code provisions cited by Plaintiffs in the opposition that impose mandatory duties to provide notice and a hearing before approving development in the Hillside Overlay District and issuing building permits or granting variances were enacted to prevent the type of harm Plaintiffs allege they have suffered. Rather, they argue, the Plaintiffs are only incidental beneficiaries of the Zoning and Planning ordinances with the notice and hearing requirements. (Reply p. 8.)

The City's position is unpersuasive. Notice of a hearing regarding a variance is required to be mailed to "owners of property which is contiguous to the subject property, and to the others of other property which, in the opinion of the planning director, is directly affected by the proposal" and at the hearing, "[e]ach person interested in the matter shall be given an opportunity to be heard." (Code §§ 6-211(a)(3), 6-212 [emphasis added].) (*See also Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 182 [finding contractual exemption from city's zoning "functionally resembles a variance. Such departures from standard zoning, however, by law require administrative proceedings, including public hearings (§ 65905; Mun. Code, ch. 17.72; *id.*, § 17.72.040), followed by findings for which the instant density exemption might not qualify. (*See* § 65906; Mun. Code, § 17.72.060.) Both the substantive qualifications and the procedural means for a variance discharge public interests. Circumvention of them by contract is impermissible." (emphasis added)].) The kinds of findings that the City has to make to grant approval of hillside development or a variance also support that the ordinances are to protect the interests of neighboring property owners such as those claimed to have been harmed in this case. (Code §§ 6-214, 6-2071 [including that the development will "minimize the loss of privacy to surrounding residents and not unduly impact, restrict or block significant views," among other required findings].)

Plaintiffs are the contiguous landowners to whom notice must be given for a hillside development and for a variance under the ordinances cited above. It seems clear based on these authorities that Plaintiffs are entitled to direct, individual notice of the proposed development and variance as property owners who are "directly affected by the proposal." (Code § 6-211(a)(3).) It seems equally clear that the City's obligation to provide them notice is to protect the interests of surrounding residents from harm from a development that does not meet the required findings, and to give those residents the opportunity to address any undue impact of the development or variance on their properties before it is approved.

The City's demurrer to the ninth cause of action is **overruled.**

16. 9:00 AM CASE NUMBER: C24-02651
CASE NAME: STARS HOLDING CO., LLC VS. KARIM MEHRABI
***HEARING ON MOTION IN RE: TO CHANGE VENUE**
FILED BY: MEHRABI, KARIM
****TENTATIVE RULING:****

Before the Court is Defendant Karim Mehrabi's Motion to Change Venue.

Defendant's Motion to Change Venue is **denied** for the reasons set forth below.

Factual Allegations and Procedural Posture

This matter involves a breach of contract between the parties. The contract at issue was for the purchase of real property (a gas station) located at 4507 Howard Street in Westley, California – which is in Stanislaus County. The Contract was executed in 2007 by Defendant Mehrabi and an individual named Kiumars E. Khajevandi. The Contract required a deposit of $270,000 and thereafter monthly payments of $6,300 until the remaining $1,080,000 balance was satisfied. The deposit was made, and payments were commenced.

In 2010, the Contract was assigned to Ameri Oil, an affiliate of Plaintiff. Defendant was informed of the assignment, and Ameri Oil continued to make payments under the terms of the Contract. In July 2011, Ameri Oil assigned the Contract to Plaintiff, who continued to make payments under the terms of the Contract.

Starting in 2022, Plaintiff was informed by the State of California that the gasoline storage tanks at the Property needed to be replaced. Plaintiff obtained bids for the work and applied to the State of grants and financial assistance. During this process, Plaintiff was informed that Defendant, as the title holder to the Property and registered owner of the tank, needed to be the party approving the work and applying for the State financing. Plaintiff made repeated attempts to obtain Defendant's cooperation in the process without any response. In May 2023, Plaintiff's counsel wrote to Defendant that it wished to proceed with fulfilling the Contract by paying out the remainder of the debt owed. No response was received. On June 29, 2023, Plaintiff again wrote Defendant about the offer to complete the purchase of the Property. Again, no response was received.

Thereafter, Plaintiff filed its Complaint on October 2, 2024, alleging claims for (1) breach of contract – anticipatory; (2) declaratory relief; and (3) breach of covenant of good faith and fair dealing. In essence, Plaintiff wants an order allowing it to pay off the remaining amounts of the Contract and enforce Defendant's obligation to sign over title to the Property to allow Plaintiff to move forward with the required gas tank remediation.

Defendant now moves under California Code of Civil Procedure section 395 to change venue to the Santa Clara Superior Court. Defendant contends that he does not reside in, the Property is not in, and the Contract was not breached in, Contra Costa County.

Standard

Plaintiff's notice of motion states that the motion is "made on the grounds that, pursuant to *Cal Code Civ Proc* § 395, venue is improper in Contra Costa County" for several reasons. (Notice at 1:25-2:1.)

"It is well established that a defendant is entitled to have an action tried in the county of his or her residence unless the action falls within some exception to the general venue rule." (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 483.) "Section 395 codifies this rule and provides that the trial of the action shall be in the county of the defendant's residence, '[except] as otherwise provided by law.'" (*Ibid.*)

Section 395 also provides, in pertinent part:

> "Subject to subdivision (b), if a defendant has contracted to perform an obligation in a particular county, the superior court in the county where the obligation is to be performed, where the contract in fact was entered into, or where the defendant or any defendant resides at the commencement of the action is a proper court for the trial of an action founded on that obligation, and the county where the obligation is incurred is the county where it is to be performed, unless there is a special contract in writing to the contrary."

"Thus, the general rule is that only two proper venues exist [in contract claims]: the county where the contract was entered into (obligation incurred) and the county of defendant's residence. A third proper venue will arise only when there is a 'special contract in writing to the contrary.'" (*Mitchell v. Superior Court* (1986) 186 Cal.App.3d 1040, 1045.)

"The burden of proof to negate proper venue in the county where the action is commenced is upon the party seeking to change venue. The prima facie presumption that plaintiff has selected the proper venue must be overcome by that moving party." (*Mitchell*, supra, 186 Cal.App.3d at 1046.)

Analysis

Defendant begins his argument by citing cases discussing the 'general rule' that venue is proper in the county where the defendant resides. He then quotes the portion of section 395 stated above regarding the proper venue locations relating to contract claims, highlighting the portion he believes is the most important section:

> "…if a defendant has contracted to perform an obligation in a particular county, the superior court in the county where the obligation is to be performed, where the contract in fact was entered into, or **where the defendant or any defendant resides at the commencement of the action** is a proper court for the trial of an action founded on that obligation…"

As noted by Plaintiff, the venue standard in Section 395 is disjunctive, with an "or" separating three distinct proper venues for such actions. In the above quote, the "or" just prior to the section bolded by Defendant is the key term. It gives Plaintiff the choice of where to bring a claim relating to the breach of contract claims in this case. "When, as here, venue is proper in more than one county, a plaintiff may choose among the available options." (*Crestwood Behavioral Health, Inc. v. Superior*

Court (2021) 60 Cal.App5th 1069, 1075 citation omitted.) "The plaintiff's choice of venue is presumed correct." (*Ibid.*)

Thus, while it is true that the county where the defendant resides at the commencement of the action is a possible proper venue, it is not the only proper venue. Another proper venue is the location where "the contract in fact was entered into." (Cal. Code Civ. Proc. § 395.)

"The place of the making of a contract is where the last act necessary to the validity and binding effect thereof is performed. This 'last act' is usually the acceptance of the offer." (*Mithcell,* supra 186 Cal.App.3d at 1045-46 citing *Braunstein v. Superior Court* (1964) 225 Cal.App.2d 691, 696.) Here, Plaintiff presents evidence that the Contract was "entered into" in Contra Costa County on April 13, 2007. Mr. Khajevandi, the "Buyer" in the Contract, states that his negotiations with Defendant led to the creation of the Contract. (Khajevandi Decl. ¶ 2.) The Contract was signed by Defendant and provided to Mr. Khajevandi via his attorney. (*Ibid.*) He signed the Contract in the presence of his attorney, Mr. Richard A. Stoll. (*Ibid.*)

Mr. Stoll submits a declaration confirming his representation of Mr. Khajevandi and that the Contract was "signed by Karim Mehrabi and provided to [Mr. Stoll] some time in early April 2007." (Stoll Decl. ¶ 2.) Mr. Stoll's office was in Pleasant Hill in Contra Costa County. (*Ibid.*) He confirms that on "April 13, 2007, Mr. Khajevandi signed the agreement in my presence in Contra Costa County and I notarized his signature." (*Ibid.*)

Based on the above, Plaintiff has established that the Contract was "entered into" in Contra Costa County. As such, under section 395, venue is proper in Contra Costa County.

"The burden of proof to negate proper venue in the county where the action is commenced is upon the party seeking to change venue. The prima facie presumption that plaintiff has selected the proper venue must be overcome by that moving party." (*Mitchell*, supra, 186 Cal.App.3d at 1046.) While Defendant contends that the "contract at issue was not entered into in Contra Costa County," (Motion at 3:10-11) Defendant does not present any evidence to support this contention. "Matters set forth in points and authorities are not evidence." (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 590].) Defendant also fails to submit any evidence on reply to contradict any of the above.

Other Arguments

As noted above, Defendant's notice of motion states that the motion is "made on the grounds that, pursuant to *Cal Code Civ Proc* § 395, venue is improper in Contra Costa County" for a number of reasons. (Notice at 1:25-2:1.) In his papers, Defendant makes arguments based on Section 397 and 392.

"A basic tenant of motion practice is that the notice of motion must state the grounds for the order being sought [cites], and the court generally may consider only the grounds stated in the notice of motion." (*Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268, 1277.) "The purpose of the notice requirement 'is to cause the moving party to 'sufficiently define the issues for the information and attention of the adverse party and the court.'" (*Ibid.*)

If Defendant was moving based on multiple statutory grounds, he should have indicated as such in his notice. As Plaintiff addressed the issues raised with respect to section 397, the Court will address those arguments. As to Defendant's arguments based on section 392, Defendant has failed to show that section overrides the provisions of section 395 – which is the actual statute upon which Defendant noticed his motion.

As noted by Defendant, section 397 states, in pertinent part:

> The court may, on motion, change the place of trial in the following cases:
> (a) When the court designated in the complaint is not the proper court.
> …
> (c) When the convenience of witnesses and the ends of justice would be promoted by the change.

Defendant argues that each of the above applies. As outlined above, Defendant has failed to show that this Court is not the proper court for Plaintiff's claims.

As for the arguments relating to the convenience of witnesses, Defendant's motion is premature. "[A] motion to transfer venue based on witness convenience cannot be made before an answer is filed." (*Buran Equip. Co. v. Superior Court* (1987) 190 Cal.App.3d 1662, 1665 citing *DeLong v. DeLong* (1954) 127 CalApp.2d 373, 374.) "Therefore, since no answer had been filed the trial court properly denied the motion made upon the ground of the convenience of witnesses." (*DeLong* 127 Cal.App.2d at 374; see also Cal. Code Civ. Proc. § 396b (d).)

As a leading treatise explains:

> "Until all defendants have answered, the court cannot ascertain the issues that may be involved at trial. Therefore, it cannot tell which witnesses' testimony at trial will be necessary and it cannot rule effectively on a motion for transfer based on 'convenience of the witnesses.'" (Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶3:567, pp. 3-163.)

Conclusion

Defendant's motion to change venue is **denied**.

17. 9:00 AM CASE NUMBER: C24-03001
CASE NAME: DONNA PRESS, AN INDIVIDUAL VS. COSTCO WHOLESALE CORPORATION, A WASHINGTON CORPORATION
***HEARING ON MOTION IN RE: TO DISQUALIFY PLAINTIFF'S COUNSEL DOWNTOWN L.A. LAW GROUP**
FILED BY: COSTCO WHOLESALE CORPORATION, A WASHINGTON CORPORATION
****TENTATIVE RULING:****

The court continues the hearing to April 7, 2025, at 9:00 a.m. in Department 9.

18. 9:00 AM CASE NUMBER: MSC21-00254
CASE NAME: HINES VS MONTANEZ
***HEARING ON MOTION IN RE: TO TAX COSTS**
FILED BY: HINES, SHERRY
****TENTATIVE RULING:****

Appearance required.

19. 9:00 AM CASE NUMBER: MSC21-00254
CASE NAME: HINES VS MONTANEZ
***HEARING ON MOTION IN RE: TO STRIKE AND TAX COSTS**
FILED BY: HINES, SHERRY
****TENTATIVE RULING:****

Appearance required.

20. 9:00 AM CASE NUMBER: MSC21-00514
CASE NAME: VERONICA MARTINEZ VS STATE OF CALIFORNIA
HEARING IN RE: APPLICATION FOR DETERMINATION OF GOOD FAITH SETTLEMENT
FILED BY:
****TENTATIVE RULING:****

The unopposed application for determination of good faith settlement is granted.

21. 9:00 AM CASE NUMBER: N23-1935
CASE NAME: PETITION OF: STATES RESOURCES CORP.
***HEARING ON MOTION IN RE: TO QUASH LEVY, VACATE JUDGMENT FOR IMPROPER VENUE UNDER CCP 473(D), AND ASSERT SEPARATE PROPERTY STATUS**
FILED BY: JAHED, FRED
****TENTATIVE RULING:****

Before the Court is Defendant FRED JAHED aka FARIBORZ JAHED aka FRED GOLNAZAR JAHED, an individual dba QUANTUM TRAVEL's Motion to Set Aside Default and Default Judgment.

Procedural Background

The Complaint containing the underlying basis for the lien was brought in Los Angeles County, case number GC041389 filed on August 28, 2008. The Complaint contained four cases of action centered around breach of a business loan between Bank of America and Defendant Quantum Travel. (See Gost Supp. Decl. at Ex. 1.) The Loan Agreement attached to the Complaint as Exhibit 1 is titled "Advantage Business Credit Line/Loan Agreement." (Id.) Default Judgment was entered on November 17, 2008. (RJN Ex. 1.) An Abstract of Judgment was recorded in the Contra Costa County Recorder's Office on December 12,2008 instrument number: 2008-0267743-00. (RJN Ex. 2.) A Renewal of Judgment recorded in the Contra Costa County Recorder's Office on April 3,2018. (RJN Ex. 4.) A Writ of Execution on Real Property was issued by the Superior Court of California in the County of Los Angeles, on June 1, 2023. (RJN Ex. 6.) A Notice to Judgment Creditor Request for Application for Order for Sate of Dwelling (CCP 704.750) was posted on the subject property on September 26, 2023, by the Levying Officer of the Contra Costa County Sheriff's Office. (RJN Ex. 8.)

Standard

The distinction between void and voidable orders is frequently framed in terms of the court's jurisdiction. Essentially, jurisdictional errors are of two types, the Court lacking fundamental jurisdiction or the court exceeding its jurisdiction. (*Lee v. An* (2008) 168 Cal.App.4th 558, 563.) Courts refer to jurisdiction over the parties and subject matter as "fundamental jurisdiction," and where this is lacking there is an entire absence of power to hear or determine the case. (*Airlines Reporting Corp. v. Renda* (2009) 177 Cal.App.4th 14, 19-20; citing *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 538.) "A court can lack fundamental authority over the subject matter, question presented, or party, making its judgment void, or it can merely act in excess of its jurisdiction or defined power, rendering the judgment voidable." (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) A judgment is void if the court lacked jurisdiction over the subject matter or parties, for example, if the defendant was not validly served with summons. (*Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 164.)

In contrast, a judgment is valid but voidable if it is the result of the court's failure to follow proper procedure. (*Ibid*.) "Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal … ," and generally are not subject to collateral attack once the judgment is final in the absence of unusual circumstances which prevented an earlier, more appropriate attack. (*People v. American Contractors Indemnity Co., supra*, 33 Cal.4th at p. 661.) "The difference between a void judgment and a voidable one is that a party seeking to set aside a voidable judgment or order must act to set aside the order or judgment before the matter becomes final." (*Lee v. An* (2008) 168 Cal.App.4th 558, 565-566; citing *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 780.)

Analysis

Defendant is requesting the Court to Vacate Judgment and Quash Levy for improper Venue under CCP 473(d) and assert separate property status.

Plaintiff Failed to Show Default Judgment in the LA County Case is Void

The LA County case that serves as the basis for Plaintiff's request for an order for the sale of Defendant's dwelling is a complaint consisting of four breach of loan agreement related causes of action. (Gost Supp. Decl. Ex. 1.) The Complaint prayed for $100,003.00, interest on the total amount from September 2007, late fees, attorney's fees, and cost of suit. (Gost Supp. Decl. Ex. 1 at pp. 4-5.)

The Court agrees with Plaintiff that the proper venue statute that applies in this case is CCP § 395 since the underlying LA County case is based on a breach of loan agreement and CCP § 395 provides that proper venue for a breach of contract includes the location where the contract was entered. (CCP § 395(a).)

Looking at the subject loan agreement, at the top of the third page it is addressed to Bank of America's physical address and the payment section lists a P.O. Box for payments to be sent, both addresses are in Pasadena, California. (Gost Supp. Decl. Ex. 1 at p. 3.) Pasadena is in Los Angeles County, thus Defendant failed to show that Plaintiff's default judgment was void under CCP § (d).

Separate Property Status

Defendant fails to provide a standard or authority that allows for this Court to determine the separate property status of the subject property. Without such standard and authority being provided the Court is concerned about granting advisory opinions and declines to rule on such status.

Conclusion

For the reasons analyzed above, Defendant's **Motion to Set Aside is denied**.

22. 9:00 AM CASE NUMBER: N24-2194
CASE NAME: CLAIM OF: LILA BECKER
***HEARING ON MINOR'S COMPROMISE**
FILED BY:
****TENTATIVE RULING:****

Appearance required.