# Superior Court of California
# County of San Benito

## Tentative Decisions for April 28, 2025

### Courtroom #1: Judge Thomas Breen

**CU-21-00022 Joe Betancur v. Pride Conveyance Systems, Inc. 4-28-25**

On calendar for Plaintiff's unopposed 4-2-25 motion for Final Fairness and Approval of Class Action Settlement. Declaration of non-opposition filed by Defendant

Plaintiff: Larry W. Lee

Defendant: Anne Frassetto Olsen

This case arises from Plaintiff's claim for class and representative action complaint for 1) Violation of Labor Code §§201-204,558,1194,1197, and 1197.1 (Minimum wages for off the clock tasks) ;2) Violation of Labor Code §§201-204, 510, 558, 1194 (Payment of overtime for work in excess of eight hours in a workday or 40 hours in a workweek.); 3) Violation of Labor Code §26.7 (Failure to provide rest periods or paid premiums for missed rest breaks); 4) Violation of Labor Code §§226.7, 512,1174, 1198, and 1199 (Violation of meal periods or paid premium for missed meal periods); 5) Violation of Labor Code §§201-204, 223, and 246 (Failure to permit employee to use accrued sick leave); 6) Violation of Labor Code §226(a) (failure to provide accurate itemized wage statements); 7)Violation of Labor Code §2698, et seq. ( PAGA claims); 8) Violation of Cal. Bus. & Prof. §17200 (unfair business practices).

4-2-24 Plaintiff's unopposed motion final fairness hearing and approval of the Class Action Settlement. The settlement provides a $600K, non-reversionary common fund to be created for the Class's benefit from which attorneys' fees, litigation costs, payment to the California Labor &Workforce Development Agency, and the costs of settlement administration are to be paid. After these deductions, the net settlement amount will be paid to all class members who did not opt out of the settlement. The history of this case as recited in the Plaintiff's motion for Preliminary Approval of Class action will not be repeated, and that motion was unopposed and the court preliminarily approved settlement 12-13-24. As ordered, the administrator distributed notice to 396 class members, with a return of only one request for exclusion by 3-28-25, and no objections. Seven were returned as undeliverable and updated addresses for these could not be located after skip trace. With a 99.78% participation rate it is proper to infer that the class

supports the preliminary approval and finds the settlement fair and reasonable. As required, the class members were provided proper notice of the settlement. The terms are fair, adequate, and reasonable, warranting final approval. This is based on the strength of the underlying case and likelihood of class certification. The class is ascertainable with a well defined "community of interest. (*Ricmond v. Dart Industries* (1981) 29 Cal. 3rd 462 470.) Common questions of law and fact predominate in this matter, and the Plaintiff's claims are typical of the class. Further the Plaintiff adequately represents the class in these matters and has no interests adverse to the class, nor have such issues been raised. The Plaintiff believes a class can be certified, noting defendants would have contended they maintained lawful policies regarding payment of wages for all hours, providing timely meal and rest breaks, payment of sick pay, overtime, and meal and rest period premiums based on a regular rate of pay, and that they would have prevailed on class certification. The Plaintiff also believes in the fairness of the settlement that is based on consideration of the uncertainty and risks to Plaintiff involved in not prevailing on one or more of the causes of action, the possibility of non-certification and the potential for appeal, compounded by the holding of *Duran v. U.S. Bank Nat'l. Ass'n.* (2014) 59 Cal. 4th 1. Based on the foregoing there was substantial risk the Plaintiff would not prevail or obtain the amount of damages alleged, given the complex issues of this case, whose risks, expenses and complexity favor granting the motion. The settlement terms, the negotiation of it, and reception of the settlement by the class members support the conclusion that the settlement is fair, adequate and reasonable. The court may properly draw this inference from the lack of objection to it. (*Class Plaintiffs v. City of Seattle* (9th Circ. 1992) 955 F. 2nd 1268, 1291.) The court should grant final approval pursuant to the dictates of CCP §382 and Rule of Court rule 3.769, which indicates the court's inquiry is whether the settlement is fair, adequate and reasonable, meriting approval. Here the class's interests are better served by settlement than further litigation. Considering the circumstances framed here, the law favors settlement

11-13-24: The court granted the unopposed Motion for Preliminary Approval of Class Action Settlement. Final Fairness Hearing and Final Approval is set 2-24-25 at 10:30 a.m. CMC off calendar.

1-16-25 The parties stipulated and the court ordered continuance of the Final Fairness and Approval Hearing to 4-28-25 at 10:30 a.m. in dept 1.

Legal Standards: There is a two-step process to review a proposed class action settlement. First, is a preliminary hearing to determine whether the proposed settlement is "within the range of possible approval" and whether notice to the class of the settlement terms and scheduling of a final fairness hearing should be approved. (*Armstrong v. Bd. of Sch. Directors of City of Milwaukee* (1980, 7th Circ.) 616 F.2nd 305, 314 (overruled on other grounds in *Felzen v. Andreas* (1998, 7th Cir.) 134 F3rd 873); *Wershba v. Apple Computer Inc.* (2001) 91 Cal. App. 4th 224, 234-35.) In determining if a class settlement is fair, adequate, and reasonable the court must be provided with the basic information about the nature and magnitude of the claims and the basis for the conclusion that the consideration paid to release those claims represents reasonable compromise. (Clark *v. Am, Residential Svcs. LLC* (2009) 175 Cal. App. 4th 785, 790, 802-03.) At this phase, before final approval the court must conduct inquiry into the fairness of the proposed

settlement (CRC Rule 3.796(g).) The court may only approve a settlement of a class action that is fair, adequate, and reasonable. (*Roos v. Honeywell Int'l Inc.* (2015) 241 Cal. App. 4th 1472, 1481.) AS absent class members are not directly involved in the proceeding, oversight is needed to ensure that any settlement is fair and untainted by conflict; and this responsibility is shared between the class representative and the court. (*Mark v. Spencer* (2008) 166 Cal. App. 4th 219, 227.) The court's final approval is needed to prevent fraud, collusion, or unfairness to the class. (*Cellphone Termination Fee Cases* (2009) 180 Cal. App. 4th 1110, 1117.)

The court has broad discretion in determining if the class action settlement is fair and reasonable. (*Carter v. City of Los Angeles* (2014) 224 Cal. App. 4th 808, 819.) In exercising its discretion, the court applies several factors to determine the fairness of the settlement. If the court finds these a settlement is (*Id.*) These factors are not exhaustive and should be tailored to the specific case. They include "the strength of the Plaintiff's case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." (128 (quoting *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801.) Primary among the factors the court must consider in determining approval is the strength of the case on the merits balanced against the settlement amount offered. (*Munoz v BCI Coca Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 408; *Kullar, supra,* at 130.) There is a presumption of fairness when the settlement is 1) reached through arm's-length negotiation, 2) there is sufficient investigation and discovery to permit counsel and the court to act intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of objectors is small. (*Dunk, supra,* at 1806; *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723.)

In determining whether the proposed settlement is fair, adequate, and reasonable, the trial court has broad discretion. (*In re Cellphone Fee Termination Cases* (2010) 186Cal. App. 4th 1380, 1389.) In making such an evaluation, the court requires basic data regarding the nature and magnitude of the claims at issue and a basis to determine that consideration paid to release those claims represents a reasonable compromise. (*Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal. App. 4th 116,133.) This is not determined based on what might have been recovered had the Plaintiff prevailed at trial, nor need the settlement recoup the maximum damages available to be deemed fair and reasonable. (*Wershaba, supra,* at 246,250.) To approve a class action settlement, the court must be satisfied that the class settlement is within the "ballpark" of reasonableness. (*Kullar, supra,* at 133.) The court's analysis is similar in the final review process, and the court has the duty whether there or objectors or not to consider these factors and independently evaluate the fairness of a proposed settlement.

Analysis: In the above case the Declaration of the class representative and counsel in support of the unopposed motion confirm that the settlement proposed in this case was reached after Plaintiff's counsel received and analyzed data and performed a damage analysis after arm's-length negotiations. The class data was obtained from shift and payroll data to determine the maximum damages, the size of the class (481 members), and through discovery. After

mediation with Michael Loeb, Esq, on June 13, 2024, which is described as both adversarial, without collusion and conducted at arm's length, the parties were able to reach settlement. After assessing the defenses to the Plaintiff's claims, the maximum damages as well as the deductions for PAGA payment to the LWDA, the representative plaintiff's enhancement, attorney's fees and administrative costs, the non-reversionary sum is $600,000.00, of which the class members will receive a raw average of $533.26. The Plaintiff's attorney, who seeks to be named as class counsel represents their experience in employment and labor law, as well as experience including class action matters, including prior approval as class counsel. The proposed administrator and administrative cost (not to exceed $8500.00) is reasonable given the comprehensive nature of the proposed settlement, the calculations already performed, and the ability to readily ascertain the members of the proposed class. Given the risk of not achieving class status, which could potentially leave the Plaintiff and the class without remedy, the amount offered in settlement and the nature and scope of the settlement appears to be reasonable, based on sufficient discovery and information, achieved at arm's length after adversarial litigation, and it appears presently that there are no known objectors to the proposed settlement. Given the lengthy arm's length bargaining between the parties attested to, the scope of the discovery engaged in as part of this process, and the level of the experience of counsel, and the single request for exclusion and lack of opposition otherwise, there is a presumption of fairness. Further in determining the reasonableness of the settlement agreement, as previously stated, the strengths of the named plaintiff's case evaluated against the risks, expense, complexity and possible duration of this case coupled with the risks of maintaining a class action status through trial favor settlement, given the amount proposed, supported by the discovery performed, and in the sound judgment of counsels' experience and coupled with the lack of opposition to the proposed settlement lead to the inference that the settlement was not the product of overreach, collusion, or fraud and is fair, reasonable, and adequate to all concerned.

Proposed Ruling: The court grants the Plaintiff's motion for Final approval of class action settlement, attorney's fees and costs, representative enhancement, and administrative costs.

**CU-23-00168 Maria Ochoa Barajas v Rufino Vasquez, Fengxiang "Tom" Zhao, et al. 4-28-25**

On for Order Releasing False and Fraudulent Judgment Lien; and for Prefiling orders prohibiting Plaintiff Barajas from filing any new litigation without leave of the Presiding Judge. (CCP§391.7)

Proposed ruling: The court will grant the Defendant's Petition to Release False and Fraudulent Judgment Lien (CCP§ 128); Prefiling orders prohibiting Plaintiff Barajas from filing any new litigation without leave of the Presiding Judge are granted. (CCP§391.7.)

Plaintiff: Self Represented

Defendants: David Taran

8-10-23 Complaint filed.

11-13-23 First Amended Complaint (FAC): Plaintiff seeks relief for 1) Breach of Contract; 2) Equitable Reformation of Contract; 3) Statutory and Equitable Rescission of Contract; 4) Declaratory Relief; 5) Preliminary and Permanent Injunctions; 6) Damages and Accounting.

12-15-23 Defendants' Petition to Compel Arbitration pursuant to C.C.P.§§1281.2, 1281.7. in lieu of Answer.

The case arises from a contract between the parties for the sale of a business property, JM, and is a title holder for the store and land on which a business known as Los Cuates Supermercado y Taqueria (the Business). In March 2023, the parties entered a contract for the purchase of the Business and for possible other arrangements involving the business operated on the site. The relationship fell apart and by April 2023 at which time it is alleged the goals and structure of the business relationship between the parties. Matters reached a critical impasse by July 2023. This suit follows. The parties subsequently were ordered to arbitration. After binding arbitration on the issues in this case occurred, a decision was rendered and a final award issued in favor of the Defendants which was incorporated into judgment in this case. On 11-6-24 the court heard the Petition to Confirm the Contractual Arbitration Award and granted the petition. Attorney's fees and costs as well as the cost of JAMS and arbitrator were set and awarded. The Defendants were ordered to submit a single proposed judgment to the court.

11-18-24 Plaintiff filed an amended petition to amend or vacate the Arbitration Award. Judgment was filed 11-19-24 and entered 11-20-24. On 11-21-24 Plaintiff filed her notice of appeal. On 2-7-25 the Court received notice of Plaintiff's bankruptcy stay. 3-3-25 Notice of related cases filed. The Bankruptcy Court granted Defendant' motion for Release from Automatic stay on April 7, 2025; a copy of that order was filed with this court 4-11-25

4-11-25 The court granted the Defendant's ex parte application to advance the hearing on their motion for an order releasing False and Fraudulent Judgment Lien (CCP§128); and a for a prefiling order prohibiting Plaintiff from filing any new litigation without leave of the Presiding Judge pursuant to CCP§391.7; the hearings were advanced from 6-16-25 at 10:30 a.m. to 4-28-25 at 10:30 a.m.

Motion: 3-26-25 Defendants seek an order releasing, striking, and expunging a false and fraudulent Notice of Judgment Lien filed 12-10-24 by the Plaintiff in the amount of $31,963,00.00 which references a Judgment on August 10, 2023, purportedly issued in this case, which has never issued nor been entered. The Defendants also seek a prefiling order prohibiting Plaintiff Barajas from filing any new litigation without leave of the presiding judge pursuant to CCP§391.7. No judgment was issued or entered on or about August 10, 2023, and the lien is false, criminal, and fraudulent. This court issued and entered judgment *against* Barajas and awarded the Defendants, *inter alia*, $18,474,363.33 and non-monetary declaratory, protective, and injunctive relief against Barajas, who was awarded nothing in the Judgment. Additionally, Barajas has filed and pursued numerous improper cases burdening both the Defendants and this court. (See order of 10-23-24 in this case declaring all cases related and stayed, the order of 3-17-25 sustaining defendant's demurrers, RJN ex 1 &2, Taran Dec ¶¶4-5.) Barajas filing of the judgment lien violates California Penal Code section 115, in addition to being disobedience of this Court's

judgment in violation of CCP§1209(a)(5). The court has the authority and should order Plaintiff to file a statement of release of the Judgment lien or order the Judgment lien or order the lien released pursuant to its inherent power under CCP§128. Finally, the Plaintiff is a vexatious litigant within the meaning of the code. Within the preceding seven-year period, she has commenced, prosecuted, or maintained in propia persona at least five litigations other than in small claims that have been finally determined adversely to her. (Taran dec ¶4.) Moreover, in violation of CCP§391(b)(2), after litigation has been finally determined against her, she has repeatedly attempted to relitigate, in propia persona, either the validity of the determination against the same defendant(s) as to whom the litigation was determined, or in the cause of action, claim, controversy, or issue determined or concluded with the same defendants as to whom litigation was finally determined. (Taran Dec. ¶4). That is the case in this matter as well as CU-24-00224. She has repeatedly filed unmeritorious motions, pleadings, papers, and engages in other tactics which are frivolous or intended to cause only needless delay. (Taran Dec ¶¶6-7).

3-26-25 Defendant's request for Judicial Notice referencing orders and filings made in this case and related cases within this court, as well as a copy of the purported Judgment Lien filed by Plaintiff on or about December 10, 2024, with the Secretary of State referencing a judgment date on August 10, 2023. Pursuant to Ev. Code 452 and 453.

Opposition: None in file ; however an opposition to this motion appears to have been filed in CU-24-00231. She states that the ex parte application was both prejudicial and procedurally improper as they are seeking to alter the case's timeline without good cause and which harms her ability to meaningfully respond. There is an active appeal regarding the judgment in this case. She was denied due process in the arbitration and not permitted to submit discovery. She is working on retaining new legal counsel. She is preparing for the proceeding in CU -24-00231 and joining or advancing this case prejudices her ability to respond. There is no urgency justifying the ex parte relief sought. The liens are based on substantial evidence of fraud by the Defendants which this court and the court of appeal has yet to review. She was never allowed to present key information. The attempt to both strike the lien and impose a vexatious litigant order before the appellate review is complete is premature and improper. This case also should not be consolidated with CU-24-00231, that matter is separate and she needs adequate time to prepare. Advancing the hearing denies her due process and hinders her access to justice.

Legal Argument: Pursuant to CCP§128 every court has the power to do all of the following. . .(4)[t]o compel obedience of its judgments, orders and processes, and to the order of a judge out of court in a n action or proceeding pending therein." Every court has this power to compel obedience to its judgments, orders and processes in actions pending before it. It also has the authority to use all necessary means to carry its jurisdiction into effect, even when those means are not specifically pointed out in statute. (*Fairfiled v. Sup. Ct. of Los Angeles County* ( 1966) 246 Cal. App. 2nd 113.) Moreover, the court has the inherent power, through summary means, to prevent frustration, abuse or disregard of their processes. (*Neal v. Bank of America Nat. Trust & Svgs. Ass'n.* (1949) 93 Cal. App. 2nd 678.) The court notes that with regard to the issue of filing a purported judgment lien that is false, California Penal Code §115(a) states that '[e]very person who knowingly procures or offers any false or forged instruments to be filed, registered, or

recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony." The purpose of the statute and its definition of the offense of offering a false instrument for recordation is to protect the integrity and reliability of public records. This function is served by interpretation prohibiting any knowing falsification of public records. (*Hudson v. Sup. Ct.* (2017) 213 Cal. Rptr. 3rd 227.) AT a minimum, an instrument, for the purpose of this definition, is a type of document (*Peo. v. Murphy* (2011) 52 Cal. 4th 81.)

As to vexatious litigants, CCP§391 defines vexatious litigants, in relevant part at sub section (b) of the statute. A vexatious litigant is a person who does any of the following things: 1) in the immediately preceding seven-year period has commenced, prosecuted, or maintained in propia personal at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or(ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing; 2) After litigation has been finally determined against the person , repeatedly relitigates or attempts to relitigate, in propia persona either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of the action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined; 3) In any litigation while acting in propia persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay. " Section 391.7(a) provides that among the relief the title provides, the court may, on its own or on the motion of a party, enter a "prefiling order which prohibits a vexatious litigant from filing any new litigation" in this court in propia persona without first obtaining leave of the presiding judge.

Analysis: Defendant argues Plaintiff is a vexatious litigant within the meaning of CCP§391(b) and pursuant to CCP§391.7 the court may "on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propia persona without first obtaining leave. . . ." The court is inclined to agree. In the seven years immediately preceding this motion, Plaintiff Barajas has commenced, prosecuted, or maintained in propia persona at least five litigations other than in the small claims court that have been finally determined against her. Specifically, the following related cases CU-23-00168(Lead Case); CU-23-00214 (Unlawful Detainer); CU-23-00178 (Petition for Protective Order); CU-23-00179 (Petition for Protective Order), CU-24-00478 (Unlawful Detainer); CU-24-00224, case CU-24-00231 (related Cases). A The related cases except for case ending 231 where a demurrer is pending, have been either dismissed or adjudicated against Plaintiff Barajas. (Taran Dec ¶4.) She has also filed numerous motions, pleadings or other papers or engaged in tactics that are frivolous or solely intended to result in needless delay. After his court entered judgment in this case, the lead file, on 11-19-24, the Plaintiff filed the subject Notice of Judgment Lien in the amount of $31,963,000.00 referencing a judgment on August 10, 2023, purportedly issued in this case. No such judgment exists. (Taran Dec ex 4.) Moreover, on 3-17-25 this court sustained demurrer in CU-24-00224 on res judicata and collateral estoppel grounds (Ex 5, Taran Dec.) Subsequently on March 18, 2025, the Plaintiff filed an ex parte application requesting an evidentiary hearing to relitigate the issues already decided in this court

or by the arbitrator and confirmed in the Judgment of November 19, 2024. This motion was denied on March 20, 2025. By any rational consideration, Plaintiff Barajas falls within the definition of a vexatious litigant and the relief requested by the Defendants is proper.

Pursuant to CCP§128 the court has the power to "compel obedience of its judgments" (CCP§128(4).) and to "order and processes and the orders of a judge out of court in an action or proceeding pending before it, and to use all necessary means to carry its jurisdiction into effect. (*Fairfield v. Sup. Ct. for Los Angeles Cty* (1966) 246 Cal. App. 2nd 113.) Moreover, the California Penal Code at section 115(a) defines the offense of offering a false instrument is to protect the integrity and reliability of public records, and the purpose is served by an interpretation that prohibits any knowing falsification of public records. (*Hudson v. Sup. Ct,* (2017) 213 Rptr 3d 227.) Having reviewed its own file, and cognizant of the only Judgment issued in this matter, filed on November 19, 2024, in favor of the Defendants, the Judgment Lien recorded by the Plaintiff purporting to be for a Judgment in this case issued on or about August 10, 2023, a judgment which does not exist, the court orders that the Judgment Lien filed by the Plaintiff, Doc 2024-0006040, consisting of four pages, shall be expunged from the record and shall be released. Contrary to Plaintiff's argument, her purported judgment lien does not protect her interests in the outcome of the pending appeal, as no such judgment exists.

Proposed ruling: The court grants the Defendants' motion to have Plaintiff Barajas declared a vexatious litigant, and to issue prefiling orders requiring Plaintiff Barajas to obtain leave of the Presiding Judge of this court before filing any new litigation. The court grants the Defendants' request for Judicial notice. The Court grants the Defendants' motion to release and expunge the purported judgment lien filed with the Secretary of State by the Plaintiff. This lien is void from its initiation.

**CU-24-00231 Maria Ochoa Barajas v. Rosalinda Ornelas Perez 4-28-25**

On calendar for Defendant's Demurrer to FAC.

Plaintiff: Self Represented

Defendant: David Taran

12-3-24 FAC: Plaintiff seeks recovery for general negligence. She avers that the Defendant during Plaintiff's transfer of a business (JM Supermarkets), to others, that after the Defendant was informed that the sale of the business was cancelled, Defendant who ostensibly worked for her at the subject business permitted the alleged purchasers to have access to the business premises, its accounts, and surveillance systems. She believes that therefore the Defendant was an accomplice with the purchasers of the business in thus depriving her of her property. She believes that the Defendant was induced to these actions by an offer of higher pay and thus benefitted herself from the situation.

12-16-24: Peremptory Challenge filed by Plaintiff re Hon. Lydia Villarreal. (granted)

3-3-25: Notice of related cases filed: CU: 24-00224, CU-23-00168

3-26-25: The cause of action framed herein by the Plaintiff is effectively the same cause of action and based on the same set of facts that were adjudicated in CU-23-00168. The Defendant therefore demurs pursuant to CCP§430.10 (c), (e). The Plaintiff's claims are barred by res judicata and/or collateral estoppel. The allegations in the complaint, along with judicially noticeable matters, show that the Plaintiff is attempting to relitigate the same claims, primary rights, and legal issues previously compelled to and determined in a binding arbitration in favor of Defendant. In a related pending action judgment was entered confirming the final arbitration award, which precludes the entire complaint and cause of action in this proceeding.

3-26-25 Defendant's request for judicial notice of the related cases in this court's own records pursuant to Evidence code §§452,453.0

4-10-25 Objection: This case is materially different from those in the other case. Defendant Plaintiff's employee at the time in question was the manager of the restaurant and was thus directly involved in the fraudulent activities alleged herein. She was responsible for providing Zhao with unauthorized access to personal and business information, a key part of the fraud and Defendant's part in this cannot be ignored. Zhao then unlawfully took over Plaintiff's business and Defendant suddenly had an increase in her compensation, suggesting she colluded in and benefitted from the fraud. Further The fraud against her was facilitated by the Defendant disclosing sensitive information to Zhao who unlawfully gained control of the business, and this should not be conflated with other legal matters. This case is about fraud, Defendant's breach of fiduciary duties and misuse of confidential information. It is not a continuation of prior litigation but a separate legal matter focusing on Defendants' actions in committing fraud, disclosing confidential information, and benefitting from the fraudulent takeover of her business.

Legal authority: Demurrer serves to test the legal sufficiency of the complaint. In other words, it serves to test, as a matter of law, whether the facts the plaintiff alleges in the complaint state a cause of action under any legal theory. (*New Livable Cal. v. Assoc. of Bay Area Gov't's* (2020) 59 Cal. App. 5th 709, 714-715.) A demurrer does not test the truth or accuracy of the facts alleged in the complaint, rather, the court must assume the truth of all properly pleaded factual allegations. In determining whether a complaint states sufficient facts to constitute a cause of action, the court must consider all material facts pleaded in the complaint and matters of which the court may take judicial notice, but not contentions, deductions, or conclusions of fact or law. (CCP§430.30 (a); *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal. App. 4th 651, 658.) A demurrer is proper where the pleading fails to state facts sufficient to constitute a claim. (CCP§430.10 sub. (e).) A general demurrer tests the pleading and each cause of action to which it is directed for each failure to state material facts. (*Banerian v. O'Malley* (1974) 42 Cal. App. 3d 604, 610.) Other proper statutory grounds for demurrer include that there is another action pending between the same parties on the same cause of action, or that a pleading does not state sufficient facts to constitute a cause of action (CCP§430.10 sub (c), (e). ) this includes

situations where the other case involving the same parties and the same causes of action have reached judgment.

Analysis: Contrary to Plaintiff's argument, the causes of action presented here are the same causes of action levied in CU-23-00168, including against this defendant, Ms. Perez. The complaint here is predicated on claims and issues that were framed in CU-23-00168 and which were ordered to binding arbitration and judgment issued against the Plaintiff. The final award in that case establishes that the Defendants, including this defendant, prevailed against Plaintiff's claims. That judgment serves as a complete bar to this complaint. AS such, the plaintiff is unable to state any cognizable claim against the Defendant. In CU-23-00168 the Plaintiff disputed the validity of the sale of the business to the defendants named in that case, *including* Defendant Perez. (Taran Dec ¶¶1-2). A general demurrer is properly sustained when the facts needed to show a cause of action are barred by res judicata or collateral estoppel are within the complaint or are subject to judicial notice. (*Tensor Grp. V. City of Glendale* (1993) 14 Cal. App. 4th 154, 159.) When a ruling on demurrer is based on res judicata, the court may take judicial notice of official acts or records of any court in this state. (*Plan &Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal. App. 4th 210, 225, Ev Code §452(c), (d).) This also includes the official acts and records of any court confirming an arbitration award which would therefore be entitled to preclusive effect. (*CCP§1287.4.)* Here there are both a final arbitration award and a judgment incorporating that arbitration award in the lead file, CU-23-00168. The claims raised here are the same claims raised in CU-23-00168, and the same issues are involved in this case as are presented in the lead file. Thus, the claims in this matter are irretrievably flawed and no amount of pleading will cure these defects.

Proposed ruling. The court grants the Defendant's request for judicial notice pursuant to Evidence Code §§452, 453. The court sustains the demurrer to the FAC without leave to amend. The Claims presented in this action are barred by the entry of the final arbitration award and judgment in CU-23-00168

**CU-23-00049 DeCarlo v. EnviroServices, et al. 4-28-25**

Matter is on for: Defendants(Enviro Services, Keith Merrell, Kelly Crestani, et al.) 12-12-24, Demurrer to 4th Amended Complaint; Defendant Agromin Corporation's 3-28-25 Demurrer to 4th Amended Complaint ; 3-28-25 Defendant Agromin's motion to strike exemplary damages for the 4th Amended Complaint , 7th Cause of Action.

Plaintiffs: John Crowley

Defendants: Adron Beene (EnviroServices, LLC, Kelly Crestani, Jim Friebel, Jim Friebel Trucking, Keith Merrell.) )

Defendant: Frank Perretta (Agromin Corp.)

*2-28-25* Fourth Amended Complaint for : 1) Fraud (Crestani, Merrell, Mitchell, Friebel) ; 2)Involuntary Dissolution of LLC (EnviroServices); 3) Rescission of Operating Agreement (EnviroServices); 4) Extortion (Crestani, Agromin, Merrell); 5) Negligent Misrepresentation (Crestani, Friebel, Mitchell, Merrell) ; 6) Negligence (Agromin, Crestani, Merrell); 7) Nuisance (Agromin, Crestani, Merrell); 8) Negligence (Friebel Trucking, Friebel); 9) Defamation (Merrell, Crestani); 10) Wrongful Termination -De Carlo; (EnviroServices, Crestani) 11) Retaliation - DeCarlo; (EnviroServices, Crestani) 12) Failure to Reimburse Business Expenses- De Carlo (EnviroServices) ; 13) Wrongful Termination -Brum; (EnviroServices, Crestani ) 14) Retaliation- Brum; (EnviroServices, Crestani)

This case arises from Plaintiff's claim that the Defendants improperly ousted them from the operation and control of their business: an agricultural and construction waste recycling business.

7-31-24 After hearing argument regarding the Demurrer and amends its tentative ruling as to the 12th Cause of action, sustaining the demurrer with leave to amend. Plaintiffs have 20 days to file a third amended complaint.

8-13-24 The matter was calendared for an ex parte application for a continuance. The motion to continue was granted and order was signed. The OSC hearing and CMC are continued to 8-28-24 at 3:30 p.m. in dept 1.

8-28-24 The court sustained demurrer to the 1st, and 10th causes of action without leave to amend; the demurrer to the 12th cause of action was sustained with leave to amend until 9-27-24.

9-25-24 Motion to be relieved as counsel (Defendant) is granted as prayed.

1-24-25 The court finds both Mr. DeCarlo and DeCarlo Enterprise not guilty of contempt as there is no evidence in support of the Contempt.

1-27-25: Defendant Agromin's Demurrer to the 7th Cause of Action in the TAC for Nuisance is sustained with leave to amend. The motion to strike is granted as requested. The fifteenth and Sixteenth causes of action are new causes of action added to the Third Amended Complaint without leave of court to do so. Amended Complaint is to be filed by March 7, 2025.

2-10-25 The Demurrer filed by EnviroServices, Merrell, and Crestani to the TAC is Sustained, with leave to amend and file a Fourth Amended Complaint by March 7, 2025, granted. (First, Fifth, Seventh Causes of Action)

*2-28-25 Plaintiff requested Default and Default entered against Jim Friebel and Friebel Trucking.*
*3-4-25 Notice of Entry of (Default) Judgment filed.*

**Argument**: 3-28-25 Defendant (Agromin) demurs to the seventh cause of action (Nuisance) and requests the court deny leave to amend. They allege that pleadings as drafted fail to plead this claim with sufficient particularity to frame a cause of action (CCP§ 430.10 sub (e).). Additionally, the pleading is uncertain (including ambiguousness and unintelligibility) pursuant to CCP §430.10 sub. (f). Plaintiff's current pleading of its Seventh Cause of Action (Nuisance) fails to

cure its deficiencies. As noted there Plaintiffs again assert a collective harm, but fails to identify to what how it differs from any harm allegedly suffered by the general public which arise solely from the alleged nuisance. As the court noted in sustaining the demurrer to the nuisance claim in the Third Amended Complaint, a private person may maintain an action for a public nuisance, if it is especially injurious to himself, but not otherwise. (Civ. Code §3493.) Moreover, the damage suffered must differ in kind, not just in degree, from that suffered by other members of the public. (*Kempton v. City of Los Angeles* (2008)165 Cal. App. 4th 1344, 1349.) As noted, this element must be pled, as the statute requires, with particularity. Once again, the Fourth Amended Complaint's seventh cause of action for public nuisance fails to plead specific facts stating a cause of action for a public nuisance. As the court had previously noted, the allegations of the TAC of poor health, stress and emotional distress from being in contact with or in close proximity to the alleged nuisance are no different from the harm suffered by the public generally. Plaintiff also makes vague and conclusory allegations that he was purportedly fired "because of the nuisance" and that he was "defamed." (4th Amd. Complaint ¶148) Conclusory allegations without supporting facts are ambiguous as a matter of law. (*Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal. App. 3rd 531, 537.) Moreover, in pleading the essential facts on which determination of the controversy depends should be stated with clarity and precision, so nothing is left to surmise. (*Philbrook v. Randall* (1924) 195 Cal. 95, 103.) Merely conclusory allegations are properly disregarded by the court at demurrer. (*Burt v. County of Orange* (2004) 120 Cal. App. 4th 273, 277.) Nothing is pled factually that would allow the claims of being fired or defamation to be damages having anything to do with nuisance, nor have the plaintiffs pled any factual allegations establishing how the alleged nuisance caused or contributed to the Plaintiff(s) being fired or defamed. Moreover, such allegations are duplicitous and are not new; Plaintiff has a separate claim for defamation (9th Cause of action) and for being fired (10th Cause of Action). It is time to put this issue to rest- despite repeated attempts to plead factually and specifically that the public nuisance in some manner created damages particular and unique to the Plaintiff(s), they have yet to be able to do so. The court should thus sustain the demurrer without leave to amend.

3-28-25 Defendant Agromin's Motion to Strike plea for exemplary damages from the Fourth Amended Complaint: The allegations in the 7th Cause of Action for "nuisance" are insufficient as a matter of law to state a claim for punitive damages. Paragraph 149 of the Fourth Amended Complaint is insufficient- allegations that "some or all of the defendants" demonstrated a "willful and conscious disregard for the rights and safety of others" does not specify or give notice to which defendants, if any, are exposed to punitive damages. Notably, the law disfavors imposing punitive damages, and they should be permitted only with great caution and in the "clearest of cases." (*Henderson v. Security National Bank* (1977) 72 Cal. App. 3rd 764, 771.) Conduct which may be characterized as "unreasonable, negligent, grossly negligent, or reckless does not satisfy the highly culpable state of mind warranting punitive damages (*internal citation omitted*) Conduct which warrants punitive damages must be of 'such severity or shocking character[as]warrants the same treatment as accorded to willful misconduct--conduct in which defendant intends to cause harm." (*Wollstrum v. Mailloux* (1983) 141 Cal. App. 3rd Supp. 1, 10.) Demand for punitive damages for the commission of any tort requires more than the bare allegation of the act being wrongful and intentional, or alleging "oppression, fraud, and malice" –

the language found in Civil Code section 3294. The allegations of fact must, in their totality, describe a state of mind and a motive that would sustain an award of punitive damages. (*Perkins v. Sup. Ct.* (1981) 117 Cal. App. 3rd 1, 6-7.) Mere conclusory allegations that the defendant's conduct was purportedly willful and in conscious disregard for the rights and safety of others are insufficient as a matter of law. Simply alleging that there was an intentional tort committed is also insufficient (*Grieves v. Sup. Ct.* (1984) 157 Cal. App. 3rd 159, 166.) Facts must be pled to support the claim that there are circumstances of oppression, fraud, or malice. The mere inclusion of these words does not describe the conduct but rather asserts a subjective characterization of them by the plaintiff. (*Everfield v. Sup. Ct.* (1981) 115 Cal. App. 3rd 15, 19.) The Conclusions pled at paragraph 149 of the 4th Amended Complaint are thus insufficient as a matter of law to support a claim for punitive damages. Moreover, pursuant to Civil Code section 3294 sub (b), a corporation, like Agromin, cannot be held liable for punitive damages unless an officer, director, or managing agent of the corporation authorized, directly engaged in, or ratified the conduct that constituted malice, fraud or oppression. No such specific allegation is made. Whether a corporation will be liable for punitive damages depends not on the nature of the consequences, but rather whether the malicious employee belongs to the leadership group of officers, directors, or managing agents. (*Crus v. Home Base* (2000) 83 Cal. App. 4th 160, 167-168.) The court should thus strike the claim for exemplary damages from the seventh cause of action at paragraph 149, specifically: "Defendants, and each of them, had actual knowledge of the defective conditions and the nuisance they created at the Facility. The conduct of some or all defendants in causing and failing to abate the nuisance demonstrates a willful and conscious disregard for the rights and safety of others. Plaintiffs are therefore entitled to recover punitive damages from some or all defendants in an amount sufficient to deter."

4-7-25 Defendants EnviroServices, Crestani, and Merrell demur to the first, fifth, and seventh causes of action of the Fourth Amended Complaint pursuant to Code of Civil Procedure section 430.10 sub (e), and (f), for failing to state facts sufficient to constitute a cause of action, and on the ground that the cause of action as framed is vague , uncertain, or unintelligible as to the defendants. Notably this is the fifth opportunity afforded to the Plaintiffs to properly allege sufficient facts to plead their causes or action for fraud (Cause of action 1), negligent misrepresentation (Cause of action 5), and for nuisance (Cause of action 7.) The current iteration of the complaint does not cure the defects raised and sustained in their demurrer to the TAC. Part of the ambiguity previously pled continues to exist with the ongoing blurring of the roles and claims for damages by DeCarlo Senior and Junior, as if they were a single entity as well as the ongoing failure to ferret out which of the jointly named defendants did what, to whom, by what specific acts, and under what authority. Under the heightened pleading standards needed to plead Fraud, Negligent Misrepresentation, and Nuisance, this lack of specificity is fatal. The elements of fraud must be pled with specificity (Small *v. Fritz Companies, Inc.* (2003)30 Cal. 4th 167, 182.) General and conclusory allegations are insufficient to support a claim of fraud. *(Dowling v. Zimmerman* (2001)85 Cal. App. 4th 1400, 1402.) The complaint must provide the defendant(s) with the factual information needed to allow them to determine the exact representations made, to whom, where the representations were made, under what circumstances, and in what capacity the representations were tendered, and the actual reliance thereon. (*Cansino v. Bank of America* (2014) 224 Cal. App. 4th 1462, 1469; *Lazar v. Sup. Ct.*

(1996) 12 Cal. 4th 631, 645.) AS previously demurred, the Plaintiffs continue to amalgamate Merrell, Freibel, and Crestani as representing to the plaintiffs an amorphous promise that "*they*" would obtain new equipment or machinery, and that "they" represented to that Defendants Merrell and Crestani invested $2Million in personal funds into EnviroServices. (4th AC ¶80, 21:18-21; formerly TAC ¶76, 19-24-28.) The Court previously noted that the promises are in the LLC agreement and that DeCarlo, Sr., was never a party to that agreement. The only difference in the current ¶80 is to add the dates that "in or about November and December…", which does not address the defects previously raised in prior demurrers and the court's previous ruling. Similarly, the change from the language of "Defendants, and each of them. . . ." to "defendants Merrell, Friebel, and Crestani" continues to have the same collectivization and generalization problem previously noted in the TAC. (4th AC ¶80, 21:18, 21:26-27 ¶84; 22:25-26; ¶¶85,86,87.) Plaintiff's allegations alleging the "fraudulent" promissory note continue to lack specificity as need to allege fraud and negligent misrepresentation. Additionally, the statement that the promissory note was forged by Crestani, Merrell, Friebel, and Mitchell without distinguishing between them and describing any facts surrounding the claim is of itself insufficient for the serious allegation of fraud. As previously stated by the Court, all promises are set forth in the complete integrated LLC agreement which has already been found to be dispositive on the issue regarding the alleged promissory note. The 5th Cause of Action similarly falls short of the strict pleading requirements of meticulousness and specificity. (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal. 4th 979, 993.) As was true in the prior pleadings, the 4th AC suffers the same defects as the slightly revised 1st Cause of Action as it again fails to identify and distinguish between various defendants with the needed exactness to plead negligent misrepresentation. Plaintiff again melds all Defendants together without stating what each of the Defendants allegedly stated, when the statements were made, which Defendants allegedly made what supposed misrepresentation, whether they were made orally or in writing, at what time, and in what capacity, and what specific harm was suffered as the result of the alleged misrepresentation. (*Morgan v. AT&T Wireless Svcs. Inc.* (2009) 117 Cal. App. 4th 1235, 1261-1262.) Nor did the Plaintiff's attend the court's ruling that alleged false promises cannot be the basis for a claim of Negligent Misrepresentation. The vague and superficial changes to the seventh cause of action for Nuisance do not cure the defects the court noted in their ruling on the demurrer to the TAC. A claim of nuisance must be pled with particularity, and a private party may only maintain an action for public nuisance if it injures him personally in a manner different from the public generally. The Plaintiffs have substituted vague claims of collective personal harm and now substitute vague alleged economic losses. Such generally pled and vague economic damages are not causally related to a claim for nuisance and are not stated with particularity . Paragraph 146 does not identify which and to what extent the four identified defendants allegedly caused or contributed to this alleged economic loss, or what the nature of the loss was with any specificity. Moreover, to seek to use Health and Safety Code §41700 the Plaintiffs must plead every element of their claim with s specificity. This is not done.

4-15-25 Plaintiff's opposition to Agromin's Demurrer. The narrative provided details a pattern of continuing fraudulent transactions, tortious business and environmental mismanagement by Agromin, and the wrongful termination of both Brum's and DeCarlo's employment. Agromin is incorrect in asserting that the cause of action for nuisance because the plaintiffs already allege

causes of action for wrongful termination and defamation based on overlapping fact patterns. Plaintiff opposes asserting that the facts as pled must be accepted as true when challenged by demurrer, and the court must liberally construe the allegations with a view to substantial justice between the parties. (*Buxbom v. Smith (1944) 23 Cal. 2nd 535, 542.)* And, in determining whether the allegations state a cause of action, the Court must liberally construe them in favor of the pleader, and the court must read the complaint as a whole. The Plaintiffs have adequately pled the cause of action for nuisance. The elements of nuisance are as set forth in CACI number 2021. It is well settled that when negligent conduct (i.e. that which violates a duty of care to another, also interferes with the other's free use and enjoyment of his or her property, nuisance liability arises. Crucial to this is the fact plaintiffs have alleged specific injuries including suffering emotional distress which is sufficient to state an injury distinct from that suffered by the general public. The fact that the allegations are pled in a summary fashion is of no importance. The plaintiffs have pled specific personal, financial and emotional injuries sufficiently distinct from those of the general public. ( 4th AC ¶148) The claim of physical illness, emotional distress coupled with the loss of business, violation of the Cal Recycle permit and the potential liabilities stemming therefrom are sufficient damages for nuisance to withstand demurrer. The court is not limited to the Plaintiff's theory of recovery but must instead determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. In ruling on demurrer, the complaint must be construed liberally with all inferences drawn in favor of the Plaintiff. They have put forth all necessary elements to present a viable claim of nuisance and the demurrer must be overruled. If not, they should be granted leave to amend.

Plaintiff's 4-15-25 Opposition to Agromin's motion to strike. Plaintiff opposes and asserts that there is an exception because the4th AC properly frames the punitive damages claim. Motions to strike are disfavored, as allegations must be liberally construed with a view to substantial justice between the parties. (CCP§452.) Whether the plaintiffs have the ability to prove the claim is of no concern at this stage. (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 33 Cal. 3rd 197, 214.) Punitive damages serves the purpose of punishing wrongdoers in order to deter wrongful acts. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal. App.3rd 381, 388.). Here the plaintiffs allege the defendants committed the offending acts in support of their causes of action with malice, fraud, and/or oppression or other means so vile as to warrant punitive damages ($th AC ¶¶68-73, 86,87,107,108,134,145,166, 189, and p. 42:23.) When read in the whole, it plain describes the actors and their actions and thus the motion to strike must fail. To survive a motion to strike an allegation of punitive damage, ultimate facts showing entitlement to such relief must be pled by the Plaintiff. In passing on the correctness of a ruling on a motion to strike, the court must read the allegations of a pleading subject to the motion to strike as a whole, with all parts in their context, assuming their truth. Allegations should not be read in isolation. (*Clauson v. Sup Ct.* (1998) 67 Cal. App. 4th 1253, 1255.)

4-15-25 Plaintiff's opposition to EnviroServices, et al's, demurrer. The court notes that the argument presented in response to the seventh cause of action is in parallel to the argument presented in opposition to Agromin's demurrer and will not be recapitulated here. The plaintiff notes that Defendants ask the court to look past the face of the 4th AC to find reasons to sustain

the demurrer, and for that reason the demurrer must be overruled, or the court should permit further amendment. The allegations further demonstrate the Defendants engaged in a scheme of forgery, execution, and utilization of promissory note and leasehold documents in order to defraud the plaintiffs. The claim is incorrect that the misrepresentation claim must fail because the promise on which it is based addresses future actions. The court must only look at the forged promissory note and leasehold documentation to determine that the allegations are about past and obviously fraudulent conduct. They have adequately pled the elements of fraud (First Cause of action.) The alleged default on the fake promissory note provided the Defendants the putative ground to rescind DeCarlo's membership in the LLC, which the Plaintiffs do not properly address. The 4th AC provides the necessary, who, what, and when needed to support the claims. Moreover, the general rule of pleading with specificity is inapplicable where the full information of the facts lies more in the knowledge of the opposing party, which it is here, because the Defendants made up the promissory note and the false grounds on which to rescind the membership of the LLC. (*Quelimane Co. v. Stewart Title Guaranty Co.*(1998) 19 Cal. 4th 26, 47 [ we also note…in the pleading of fraud, the rule is relaxed when it is apparent from the allegations that the defendant necessarily possesses knowledge of the facts.].) Similarly, the claim for negligent misrepresentation is adequately pled, when viewed through the lens of the forged promissory note, the liberal requirements of notice pleading are satisfied. The pleadings hear present facts demonstrating that the Defendants acted on a plan to defraud , and steal from the Plaintiffs, conduct work outside the scope of the Caal. Recycle Permit, and ultimately to terminate the plaintiff's employment. Moreover, the allegations show intentional conduct, including that of Agromin's agent German Cervantes, which supports punitive damages (FAC §§41-48, 71-73, ex 5) . Based on the framework establish in case law the pleading is sufficient and within the guidelines of statute.

Legal Authority:

Demurrer: A demurrer generally serves to test the legal sufficiency of the complaint's factual allegations. (*Genis v. Schainbaum* (2021) 66 Cal. App. 5th 1007, 1014.) A party may demur when any ground for objection to a complaint appears on the face of it, or from a matter from which the court is required or may take judicial notice. (CCP§430.30 (a); *Levya v. Neilson* (2000) 83 Cal. App. 4th 1061, 1063.) Demurrer lies where it appears on the face of the complaint that the plaintiff has not alleged facts sufficient to state a cause of action. (CCP§430.10(e) ; *James v. Sup. Ct.* (1968) 261 Cal. App. 2nd 415.) In testing the sufficiency of the cause of action It does not test the factual accuracy or truth of the facts alleged. The court must assume the truth of all properly pled allegations. The process of a demurrer does not serve to test the merits of the Plaintiff's case. (*Tenet Health System Desert Inc. v. Blue Cross of CA. (2016*) 245 Cal App 4th 821, 834.) Because a demurrer only challenges the defects on the face of the complaint, it can only refer to matters outside the pleadings which are subject to judicial notice. (*Tenet, supra,* at 831.)" When any ground for objection to a complaint…appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading." (CCP§430.30 sub (a); *Levya v. Nielson* (2000) 83 Cal. App. 4th 1061, 1063.) For the purpose of demurrer, a judge must treat the demurrer as an admission of all material facts properly pled in the challenged pleading or that reasonably rise by

implication, however improbable they are. (*Collins v. Thurmond* (2019) 41 Cal. App 5th 879, 894.) For the purpose of testing the sufficiency of a cause of action, contentions, deductions, or conclusions of law are not admitted as true, and must be ignored. (*Aubry v. Tri-City Hosp Dist*. (1992) 2 Cal. 4th 962, 966-67.) Additionally, a party may not allege facts inconsistent with the exhibits to the complaint. (*Moran v. Prime Healthcare Management, Inc. (2016)* 3 Cal. App. 5th 1131, 1145-6.)

Legal Authority: Motion to Strike: CCP§435 (b)(1) allows a party to move to strike the whole or any part of a complaint, noting a motion to strike is proper when a pleading is "not drawn or filed in conformity with the laws of this state, a court rule, or order of the court." (CCP §436(b). Following an order sustaining demurrer with leave to amend a plaintiff may amend his or her complaint only as authorized by the court's order. (*Peo. ex rel. Dept. Pub. Wks. v. Clausen* (1967) 248 Cal. App. 2nd 770, 785.) A plaintiff may not amend the complaint to add new causes of action without first obtaining permission to do so, unless the new cause of action is within the scope of the order granting leave to amend. (*Patrick. V. Alacer Corp.* (2008) 167 Cal. App. 4th 995, 1015.)

Argument and Analysis; Demurrer: Agromin

The 7th Cause of Action for Nuisance, addresses public nuisance, and what must be pled by a private person seeking to abate it. The statute provides the definition that a nuisance is "[a]nything which is injurious to health, including but not limited to, the illegal sale of controlled substances, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property..." Civil Code section 3480 clarifies that a public nuisance" is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. "(See *Birke v. Oakwood Worldwide* (2009) 169 Cal. App. 4th 1540, 1547-48.) Civil Code section 3493 limits who can file a public nuisance claim, limiting standing to private persons who can make a claim of public nuisance only "if it is especially injurious to himself, but not otherwise. "Further, the harm to the individual must differ in kind, not just in degree to the harm suffered by the general public. This element is again not pled, as required by statute, "with particularity." (*Lopez v. Southern Cal. Rapid Transit Dist*. (1985) 40 Caol. 3rd 780, 795.) That dictate is applicable here, and as noted the TAC is wanting in this regard. Plaintiffs have not pled as required that they have suffered harm that is different in kind, not just degree, from that suffered by the public generally, as is needed to put forward a prima facie case. (*Cal. Dept. of Fish and Game v. Sup. Ct.* (2011) 197 Cal. App. 4th 1323, 1352, citing CACI 2021.)

Plaintiff's reliance on *Birke v. Oakwood Worldwide* (2009) 169 Cal. App. 4th 1540, is misplaced. In *Birke,* the alleged nuisance was secondhand smoke from the Defendant apartment complex' allowing those who use tobacco to smoke in the common areas appurtenant to the complex units. The FAC in this case alleged that the second hand smoke is generally noxious and harmful to health causing increased risk of lung cancer and heart disease, and the Plaintiff child, who suffers from asthma had increased incidence of asthma and multiple bouts of pneumonia that the Plaintiff's GAL asserted were caused by exposure to the second hand smoke, creating a

"miasma of toxic and carcinogenic smoke that often surrounds the pool, dining tables, etc, "in the outdoor common areas thus creating a health hazard. (*Id at Fn 2)*

In *Birke,* the Court of Appeal held that the claimed public harm ( generalized increased risk of lung and heart disease resulting from exposure to second hand smoke) as compared to the harms suffered by the named plaintiff (increased response to the allergen (smoke) resulting in increased number and severity of asthma symptoms, and resultant multiple bouts of pneumonia) were pled with sufficient specificity to differentiate it from the unspecified harms alleged to be suffered by the public. While they declined to assert whether this was merely a matter of degree as opposed to a difference in the kind of harm, they determined that it was nonetheless sufficient to survive demurrer. Such specificity is lacking here. Unlike the situation in *Birke*, wherein the Plaintiff also had a direct property interest as a tenant in the apartment complex operated by the Defendant, such that the Plaintiff could have maintained an action for private nuisance, that is not the situation here. The Plaintiffs do not have a property interest in the land on which the business operates, and the framing of the Restatement 2nd of Torts, as quoted, is not on all fours with the Plaintiff's circumstances as pled. Plaintiff has now added claims that they suffered a job loss and reputational harm, however these are not injuries that flow directly from the claimed nuisance. At best it can be suggested that if public nuisance causes a decrease in the market value of an individual's property, that loss in value could be recovered in addition to damages for personal harm. (i.e. the difference in the market value of the property before and after the alleged nuisance) However the Plaintiff did not plead this kind of harm, nor did the plaintiff own the property at issue for which he alleges the nuisance occurred. In short, the factual nexus is not pled, nor does it appear that it can be pled, given the extensive facts repeatedly framed in all five iterations of the complaint.

As to the requirements of pleading with specificity with regard to the elements of fraud, the court notes the argument presented by the Plaintiffs, and that the case to which they cite as primary authority for the position that the pleading requirements for fraud are relaxed when the facts are more within the knowledge of the defendant than the plaintiff, *Quelimane,* is not on point. The case which is, however, is *Committee on Children's Television, Inc. v. General Foods Corp. (*1983) 35 Cal. 3rd 197, 217) Most commonly, these are matters in *qui tam(*i.e. allowing individuals who act as whistleblowers on fraud against the government and are thus permitted to receive all or part of the financial recovery received by the government. In such an action, a realtor would bring action against a person or company on the government's behalf, and the government, not the realtor, would be considered the plaintiff.) Or, as in *Committee on Children's Television,* the courts have recognized that where the plaintiffs are alleging a widespread fraudulent scheme, alleging the minutiae of the scheme is neither required, nor practical. In *Committee on Children's Television,* the facts involved thousands of allegedly fraudulent advertisements over multiple years, in multiple markets, the making and content of which was particularly within the knowledge of the defendant, General Foods. To require this from the plaintiff would be unwieldly and would seriously hamper suits by public officials seeking to enjoin such schemes. Such is not the case here, despite the claims of a forged (and unattached to the complaint) promissory note, the facts at the heart of the claim are related to a singular transaction between as yet unspecified defendant(s) and as yet unspecified Plaintiff (s). The attempt to shift the

requirement to plead with specificity from the plaintiff(s) and requiring the Defendant to defend without the necessary clarity about allegedly who, specifically, did or said what, specifically, to whom, specifically, is absent. The collectivized allegations as again made in the TAC fail to provide sufficient specificity to support the Plaintiffs' cause of action for fraud. Similarly, because at least one of the Defendants is a corporate entity, the Plaintiff must also provide even more information regarding who, from the entity, in what capacity, conveyed the information allegedly relied upon, among other aforementioned elements. The Plaintiff has similarly failed to meet this pleading requirement. The court notes that the Plaintiff has now had four opportunities to correct these faults and has yet to do so.

As for the fifth cause of action, negligent misrepresentation is considered to be a form of fraud or deceit, and requires the defendant to make a false representation as to a past or existing material fact; that they made this representation without reasonable ground to believe it to be true; and in making that representation the defendant intended to deceive the plaintiff, resulting in the plaintiff's justifiable reliance on that representation and their resultant damages. (*Majd v. Bank of Am. N.A.* (2015) 243 Cal. App. 4th 1293, 1307; CACI 1903.) Notably future events are mere opinions and are not actionable as negligent misrepresentation. (*Pub. Employees' Ret. Syst. V. Moody's Investors Serv., Inc. (2014) 226 Cal. App. 4th 643, 662.* ) The court of appeal, for example, as deemed a representation "nonactionable as opinion or prediction…that [an investment] would be cash flow positive at the end of the first quarter 2000." (*Apollo Capital Fund, LLC. v. Roth Captial Partners, LLC,* (2007) 158 Cal. App. 4th 226, 241.) Additionally, representations of value are non-actionable as negligent misrepresentation. The court of appeal noted "[t]he law is quite clear that expressions of opinion are not generally treated as representations of fact, and thus are not grounds for a misrepresentation cause of action. Representations of value are opinions." (*Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal. App. 4th 303, 308. ) Similar to pleading fraud, the courts have held that claims for negligent misrepresentation must adhere to the same heightened pleading standards as fraud claims. *(Small v. Fritz Companies, Inc.* (2003) 30 Cal. 4th 167, 184.) For the same reasons that the Plaintiffs' claims of fraud are inadequate, so are their claims of negligent misrepresentation.

The court sustains the demurrer to the seventh cause of action without leave to amend, as the Plaintiff has now had four opportunities to cure this defect and has thus far been unable to do so, and it appears unlikely that they will be able to do so in the future, and this is as to Agromin, EnviroServices, Crestani, and Merrell. The demurrer to Plaintiffs' first and fifth causes of action likewise are sustained as to EnviroServices, Crestani, and Merrell. The fifth cause of action cannot be amended as the alleged misrepresentation is not a statement of present or existing fact, as it is a future promise to perform, and no amount of pleading will resolve that defect. The first cause of action for fraud has been pled no fewer than four times, and each time, the Plaintiffs have failed to provide the necessary specificity to frame out this cause of action. It appears unlikely that the Plaintiff will be able to rectify the defects as they have had ample opportunity before now to do so and have continued to fail to adequately amend their pleadings.

As to the motion to strike, the sustaining of the demurrer to the seventh cause of action as addressed to Agromin moots this motion to strike.

Proposed Rulings.

1. The demurrer to the Seventh Cause of action, as to Agromin is Sustained without Leave to amend
2. The demurrer to the First, Fifth, and Seventh causes of action as addressed to Enviroservices, Crestani, and Merrell are sustained without leave to amend.
3. The motion to strike pleadings by Defendant Agromin as to the claim for punitive damages in the Seventh Cause of Action is rendered moot by the sustaining of the demurrer.
4. The court on its own motion sets aside the default taken against Jim Friebel and Jim Friebel Trucking entered 3-28-25 and the default Judgment taken against these defendants on 3-4-25. This default and default judgment is for the Third Amended Complaint which was superseded by the Fourth Amended Complaint, which includes Jim Friebel and Jim Friebel Trucking as named Defendants.

**END OF TENTATIVE RULINGS**



****Please contact Judicial Courtroom Assistant, Maria Pantoja, at (831) 636-4057 x128 or mpantoja@sanbenitocourt.org with any objections or concerns.**