SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/29/23 TIME: 1:30 P.M. DEPT: A CASE NO. CV2000996

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: MICHELLE FRANCK vs. DEFENDANT: UDR, HIGHLANDS OF MARIN	

NATURE OF PROCEEDINGS: 1) ORDER TO SHOW CAUSE – DISMISS RE: PLAINTIFF'S FAILURE TO PROSECUTE CASE
2) MOTION – OTHER: THE ALTERNATIVE MOTION TO COMPEL DEPOSITION WITH MONETARY SANCTIONS [DEFT] HIGHLANDS OF MARIN [DEFT] UDR

RULING

Appearances required.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for August, 2023 is as follows:
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
Meeting ID: 160 292 5171
Passcode: 868745

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/29/23 TIME: 1:30 P.M. DEPT: A CASE NO. CV2100081

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: ROCIO MADRIGAL vs. DEFENDANT: SOLANGE MANAGEMENT, INC., ET AL (COMPLEX CASE)	

NATURE OF PROCEEDINGS: MOTION – OTHER: AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT [PLTF] ROCIO MADRIGAL

RULING

Plaintiff's unopposed motion for preliminary approval of class-action settlement is **GRANTED**.

The court preliminarily finds that the requirements for conditional class certification for settlement purposes are met in that (a) the parties are sufficiently numerous that it is impracticable to bring them all before the court; (b) there are questions of law or fact common to the class that are substantially similar and predominate over questions affecting individual members; (c) the claims of the named representative are typical of those of the class; and (c) the named representative can fairly and adequately protect the interests of the class. (Code Civ. Proc., § 382; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App. 4th 224, 240.)

Accordingly, the Court orders that:

1. The proposed class is conditionally certified and plaintiff is conditionally appointed class representative.

2. The court conditionally appoints Captsone Law Group, APC as class counsel and the settlement administrator (CPT Group, Inc.) as proposed.

3. The court has reviewed and approves the plan for notice, objections, and exclusion from the class.

4. After considering the factors set forth in *Clark v. American Residential Services LLC* (2009) 175 Cal.App. 4th 785, 799, the court preliminarily rules that the proposed class settlement is fair and reasonable.

5. The Court conditional finds, subject to final approval, that the proposed attorney's fee amount set at no more than one third of the gross settlement is fair and appropriate.

6. Subject to consideration of any objections, the Court preliminarily approves the PAGA settlement.

7. **A final approval hearing shall be held on December 5, 2023 at 1:30 p.m. in Department A.**

Plaintiff shall prepare a proposed order and submit it to the Court for approval.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/29/23 TIME: 1:30 P.M. DEPT: A CASE NO: CV2101996

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: CHRISTIAN J. MARTINEZ and DEFENDANT: ERIKA H. HASTETTER	

NATURE OF PROCEEDINGS: MOTION – OTHER: AND MOTION OF DEFT ERIKA HASTETTER FOR JUDGMENT ON THE PLEADINGS UNDER SUPREMACY CLAUSE [DEFT] ERIKA H. HASTETTER

RULING

Defendant Erika Hastetter's motion for judgment on the pleadings is **DENIED.**

Allegations in the Complaint

Plaintiff Christian J. Martinez alleges that he owns the property at 19 Pixley Avenue in Corte Madera and that Defendant Erika Hastetter is the owner and lessor of 7 Pixley Ave. Defendant leases the property to the United States Postal Service ("USPS"). (Complaint, ¶¶3, 4.) In 1968, the Town of Corte Madera approved an application for a conditional use permit, variance and design review permit ("Conditional Use Permit") with certain assurances by the Post Office that it would comply with local rules and regulations and otherwise give reasonable consideration to the welfare of local residents. (*Id.*, ¶7.)

Since the approval of the permit, operations at the Post Office have expanded considerably. (*Id.*, ¶8.) Instead of operating during normal hours as it had done previously, the facility now receives trucks from private enterprises at all hours of the day and night. The Post Office now houses up to 45 workers. At all hours of the night, workers unload trucks, push mail carts, drop tailgates, and process parcels using machines and/or equipment that creates excessive noise. There are 22 delivery vans, many of which park in the public park to accommodate the over-sized delivery trucks that back into the loading docks. Trucks often sit idle, create beeping alerts, and make noise on the property, a large air-conditioner runs throughout the night, and workers yell to each other at all hours. Motion-sensor lights are triggered upon the entry of the trucks and shine into neighboring windows. (*Id.*, ¶9.) These activities constitute a common law nuisance and violate statutory law, the Corte Madera Municipal Code, and the Conditional Use Permit. (*Id.*, ¶¶10, 11.) The activities have negatively impacted dozens of households with no fewer than 60 residents and the local firefighters who sleep next to the property. (*Id.*, ¶12.) For years the Post Office and Defendant have been repeatedly notified of the ongoing nuisance but have failed to

abate the nuisance. (*Id.*, ¶¶ 16-18.) On information and belief, Defendant's lease to the Post Office is month-to-month, but she continues to rent the property to the Post Office despite having actual knowledge of the nuisance. (*Id.*, ¶¶ 19, 20.)

The First Cause of Action alleges private nuisance, the Second Cause of Action alleges public nuisance, and the Third Cause of Action seeks an order enjoining Defendant from further violations of the law, including (1) driving of trucks to, from, and on the premises outside of regular business hours and in no case after 10 p.m. or prior to 6 a.m., (2) running heavy equipment, sorting equipment, and the air-conditioner outside of regular business hours and in no case after 10 p.m. or prior to 6 a.m., and (3) otherwise violating the law or creating a nuisance.

Legal Standard

A motion for judgment on the pleadings "may be made on the same ground as those supporting a general demurrer, i.e., that the pleading at issue fails to state facts sufficient to constitute a legally cognizable claim or defense." (*McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144.) "A common law motion for judgment on the pleadings 'ha[s] the purpose and effect of a general demurrer.'" (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146, quoting *Kortmeyer v. California Ins. Guarantee Assn.* (1992) 9 Cal.App.4th 1285, 1293).)

The standard for granting "a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law. (*Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 321-322, quoting *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216.) "All allegations in the complaint and matters upon which judicial notice may be taken are assumed to be true." (*Rippon v. Bowen* (2008) 160 Cal.App.4th 1308, 1313, citing *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216.)

Under a statutory motion for judgment on the pleadings, Code of Civil Procedure section 438(c)(1) provides that such a motion may only be made on one of the following grounds:

> (A) If the moving party is a plaintiff, that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint;
>
> (B) If the moving party is a defendant, that either of the following conditions exist:
>
> i. The court has no jurisdiction of the subject of the cause of action alleged in the complaint;
>
> ii. The complaint does not state facts sufficient to constitute a cause of action against that defendant.

(Code Civ. Proc., § 438(c)(1).)

Discussion

This is the second time the matter has come before the Court on a motion brought by Defendant for judgment on the pleadings. The previous motion was denied.

In the current motion, Defendant seeks judgment on the grounds that post office lessors are exempt from liability based on their tenant's alleged violation of state and local laws. Distilled to its essence, Defendant argues that the U.S.P.S. is an independent agency within the executive branch of the federal government and that Congress has authorized it to acquire and lease real property for the purpose of operating post offices throughout the country (39 U.S.C., §§ 401(5) and 403(b)(3).) Because the U.S.P.S. is authorized by federal law "to construct, operate, lease, maintain buildings, facilities, equipment" (39 U.S.C., § 401(6)) "[a]ny regulation of the post office project, whether against the property, the lessor, or the building contractors" would run afoul of the Supremacy Clause of the U.S. Constitution. (*United States Postal Service v. Town of Greenwich* (D. Conn. 1995) 901 F.Supp. 500, 507.) Since it is clear from the Complaint that the only allegations directed against Defendant are predicated upon the USPS's alleged violation of state and local laws, Defendant is entitled to judgment as a matter of law.

In Opposition, Plaintiff argues that the Court has already rejected this argument in the first motion for judgment on the pleadings, that the motion is untimely and unripe, and that Defendant failed to carry its burden to show that the supremacy clause applies.

The issue raised in the current motion is distinct from that raised in the prior motion and has not been directly ruled upon. Nor is the motion untimely or unripe. (Code Civ. Proc., § 438, subds. (e), (f) [Trial has been set for December 24, 2023, and no pretrial order has been entered].)

The central issue is whether Plaintiff's claims are barred (on the face of the Complaint) by the Supremacy Clause. Although the federal law may provide a complete defense, this motion raises issues of law and fact that cannot be determined on the face of the pleadings. The introduction of evidence will be necessary to show, for instance, whether the Supremacy Clause applies in these circumstances, that is, whether the application of local and state laws would in fact interfere with the Government's constitutional power to operate the postal system. (*United States v. City of Pittsburg, Cal.* (N.D. Cal. 1979) 467 F. Supp. 1080 aff'd, 661 F.2d 783 (9th Cir. 1981).) In addition, there are factual issues that cannot resolved on the face of the pleadings such as whether the USPS voluntarily agreed to the application of the state and local laws at issue. (See Compl., ¶ 7 [certain assurances given by USPS that it would comply with local rules and regulations and to otherwise give reasonable consideration to the welfare of local residents].)

For these reasons, the motion is denied.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/29/23 TIME: 1:30 P.M. DEPT: A CASE NO: CV2200155

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: ROSALINDA LOBRES MCCAULEY vs. DEFENDANT: SUBARU OF AMERICA, INC., A NEW JERSEY CORP.	

NATURE OF PROCEEDINGS: MOTION TO COMPEL – FURTHER RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS, SET ONE [PLTF] ROSALINDA LOBRES MCCAULEY

RULING

Plaintiff's motion to compel further responses to Document Request Nos. 5, 6, 10, 11, 13-15, 17 and 19-39 is **GRANTED.** Defendant is compelled to provide responses, without objections, to Nos. 6, 10, 11 and 15, as well as responsive documents, within 30 days of the hearing. Defendant is compelled to provide supplemental responses to Request Nos. 5, 13, 14 and 19-39, as well as responsive documents, within 30 days of the hearing; however, with respect to Request Nos. 17, 18, 21, 26 and 30-32, Defendant need only produce responsive documents from 2018 to the present. To the extent Defendant withholds any documents on privilege grounds, it must produce a privilege log to Plaintiff.

Procedural Background

Plaintiff filed her Complaint against Defendant on January 20, 2022, alleging that she purchased a new 2020 Subaru Impreza on January 25, 2020 and that the vehicle has serious defects including, but not limited to, engine and electrical system defects. Plaintiff asserts causes of action for breach of express warranty, breach of implied warranty and violation of Section 1793.2 of the Song-Beverly Consumer Warranty Act (the "Act").

On or about March 14, 2023, Plaintiff propounded Requests for Production of Documents, Set One, on Defendant. Defendant served responses on or about April 18 or 19, 2023. (Declaration of Gregory Sogoyan ("Sogoyan Decl."), ¶¶18 and 19 and Exhs. 3 and 4.) On or about May 24, 2023, Defendant served responses to Plaintiff's Request for Production, Set Two, and subsequently produced some documents.

Discussion

Request Nos. 5, 6, 10, 11, and 13-15

Request Nos. 5, 6, 10, 11 and 13-15 seek documents relating to Plaintiff's vehicle. Specifically, these requests seek documents relating to the inspection of Plaintiff's vehicle (No. 5), photographs and videos of the vehicle (No. 6), documents relating to the warranty repair history of the vehicle (No. 10), documents relating to contact between Defendant and Plaintiff (No. 11), documents relating to contact between Defendant and any other person relating to the vehicle (No. 13), documents relating to statements by anyone about the vehicle or Plaintiff's complaints (No. 14), and written warranties for the vehicle (No. 15)

Defendant did not provide any responses to Request Nos. 6, 10, 11 and 15. In response to Request Nos. 5, 13, and 14, Defendant asserted only boilerplate objections including that the request was overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and/or sought information protected by the attorney-client privilege and work product doctrine.

Plaintiff has satisfied her burden of proving the requested documents are relevant to her claims as the documents pertain specifically to her vehicle. Defendant is compelled to provide responses, without objections, to Nos. 6, 10, 11 and 15, as well as responsive documents, within 30 days of the hearing. With respect to Request Nos. 5, 13 and 14, Defendant has failed to justify its objections. Defendant shall provide supplemental, substantive responses to these requests, as well as responsive documents, within 30 days of the hearing. To the extent Defendant withholds any documents on privilege grounds, it must produce a privilege log to Plaintiff containing sufficient information for Plaintiff to evaluate the legitimacy of the claimed privilege.

Request Nos. 17, 19-39

Request Nos. 17 and 19-31 seek documents relating to Defendant's warranty and repurchase policies, procedures and practices Specifically, these requests seek documents relating to Defendant's warranty claims and policy manual(s) (No. 17), documents relating to Defendant's procedures for handling complaints (No. 19), documents relating to policies for refunds or replacement vehicles (Nos. 20 and 21), documents relating to training manuals for how to calculate a repurchase (No. 22), documents relating to policies for determining whether a vehicle is eligible for a repurchase (No. 23), documents relating to policies to encourage another opportunity to repair (No. 24), documents relating to policies defining what constitutes a repair (No. 25), documents relating to policies for authorized repair facilities to follow regarding requests for refund or replacement vehicle (No. 26), documents evidencing Defendant's lemon law escalation process (No. 27), documents evidencing Defendant's call center escalation process (No. 28), documents evidencing predictive models used to determine if a vehicle is a candidate for escalation (No. 29), documents provided by consultants relating to the Act (No. 30), documents evidencing policies or procedures provided to Defendant by any agency regarding substantial nonconformity under the Act (No. 31), and documents evidencing statistics for the number of repurchases and replacements made in response to customers' personal requests (No. 32).

Request Nos. 33-39 seek documents relating to the 2020 Subaru Impreza more generally. Specifically, these requests seek documents evidencing the number of owners of 2020 Subaru Impreza vehicles who have complained of the same defects about which Plaintiff complains (No. 33), documents evidencing Technical Service Bulletins which have been issued for 2020 Subaru Impreza vehicles (No. 34), documents evidencing recalls issued for the 2020 Subaru Impreza (No. 35), documents discussing above-average repair rates to 2020 Subaru Impreza vehicles (No. 36), and documents evidencing sales brochures or promotional materials regarding 2020 Subaru Impreza vehicles (No. 37).

In response to these requests, Defendant asserted only boilerplate objections (i.e., vagueness, overbreadth, relevancy, privilege, proprietary/trade secret information) and did not state it would produce any responsive documents.

Defendant has failed to support its vagueness objection to any of these requests, and its objection that the requests seek confidential or proprietary information, or information of other vehicle owners, can be addressed by the protective order in this case. Defendant has also failed to show the requested documents are not relevant or reasonably calculated to lead to the discovery of admissible evidence. The requested documents could demonstrate that Defendant was aware of the defect, including its cause, and knew that it lacked any fix for the defect. This information is relevant to establishing civil penalty liability, which requires a showing of willfulness. (Civ. Code § 1794(c) ["If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages . . . ."]; *Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1050-1052.) Information regarding a manufacturer's corporate policies and practices regarding reacquisition, repair and complaint information relating to other vehicles, and special service bulletins issued by the manufacturer, may be relevant for this purpose. (*See Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, 347-348; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1198-1199; *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 153; *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 978-979; *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1105; *Jensen v. BMW of North America* (C.D. Cal. 2019) 328 F.R.D. 557, 562-563; *see also Norton v. Superior Court* (1994) 24 Cal.App.4th 1760, 1761 [discussing liberal standard for discovery].)

The Court does agree that some of the requests, which seek documents dating back to 2010, are overbroad. Plaintiff provides no explanation as to why documents from 13 years ago are relevant to her claims. Accordingly, the Court orders Defendant to produce documents in response to Request Nos. 17, 18, 21, 26, 30, 31 and 32 only from the past five years, from 2018 to the present.

Defendant's Opposition focuses primarily on its production of documents in response to a subsequent set of discovery requests (Set Two) propounded by Plaintiff. This production does not make its responses to the requests at issue in this motion (Set One) Code-compliant. If Defendant has produced all responsive documents to a particular request, or if it contends it has no responsive documents or only some responsive documents, it must provide a supplemental response consistent with the requirements of Code of Civil Procedure Sections 2031.210-230. If Defendant is withholding any documents on the ground of privilege, it must provide a privilege log to Plaintiff.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/29/23 TIME: 1:30 P.M. DEPT: A CASE NO. CV2200399

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: AMIKA KNIGHTEN vs. DEFENDANT: SHALAMO INCORPORATED, A CALIFORNIA CORPORATION	

NATURE OF PROCEEDINGS: MOTION – OTHER: MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT AND PROVISIONAL CERTIFICATION OF CLASS [PLTF] AMIKA KNIGHTEN

RULING

Plaintiff's unopposed motion for preliminary approval of class-action and PAGA settlement is **GRANTED**.

The Court preliminarily finds that the requirements for conditional class certification for settlement purposes are met in that (a) the parties are sufficiently numerous that it is impracticable to bring them all before the court; (b) there are questions of law or fact common to the class that are substantially similar and predominate over questions affecting individual members; (c) the claims of the named representative are typical of those of the class; and (c) the named representative can fairly and adequately protect the interests of the class. (Code Civ. Proc., § 382; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App. 4th 224, 240.)

Accordingly, the Court orders that:

1. The proposed class is conditionally certified and plaintiff is conditionally appointed class representative.

2. The court conditionally appoints the Otkupman Law Firm as class counsel and the settlement administrator (Simpluris) as proposed.

3. The court has reviewed and approves the plan for notice, objections, and exclusion from the class.

4. After considering the factors set forth in *Clark v. American Residential Services LLC* (2009) 175 Cal.App. 4th 785, 799, the court preliminarily rules that the proposed class settlement is fair and reasonable.

5. The Court conditional finds, subject to final approval, that the proposed attorney's fee amount set at no more than 35% of the gross settlement is fair and appropriate.

6. Subject to consideration of any objections, the Court preliminarily approves the PAGA settlement.

7. **A final approval hearing shall be held on December 5, 2023 at 1:30 p.m. in Department A.**

Plaintiff shall prepare a proposed order and submit it to the Court for approval.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/29/23 TIME: 1:30 P.M. DEPT: A CASE NO: CV2202113

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: ROBERT DOUGLAS CRAIG, ET AL vs. DEFENDANT: FEDERAL EXPRESS CORPORATION, ET AL	

NATURE OF PROCEEDINGS: MOTION TO COMPEL – FURTHER RESPONSES TO FORM INTERROGATORIES FROM DEFT [PLTF] ROBERT DOUGLAS CRAIG

RULING

The Court previously continued this matter to August 29, 2023 and ordered the moving party to inform the Court and the parties no later than noon on Thursday August 24, 2023 whether the motion was withdrawn. No notification having been received, this matter is ordered **OFF CALENDAR.**

The Court once again the Court expresses its appreciation for the work of the Court's discovery facilitator.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/29/23 TIME: 1:30 P.M. DEPT: A CASE NO. CV2203536

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: ALBA CECILIA GARCIA ARCHILA vs. DEFENDANT: CHRIS COLPITS, ET AL	

NATURE OF PROCEEDINGS: MOTION TO COMPEL – DEFENDANT CAROLYN COLPITS' RESPONSES WITHOUT OBJECTIONS TO SPECIAL INTERROGATORIES, SET NO. 1; FORM INTERROGATORIES, SET NO. 1; REQUEST FOR PRODUCTION OF DOCUMENTS, SET NO. 1; ETC. [PLTF] ALBA CECILIA GARCIA ARCHILA

RULING

The current Motion to Compel defendant Carolyn Colpits's Responses without objections to Special Interrogatories, Set No. 1, Form Interrogatories Set No. 1, Request for Production of Documents, Set No. 1, Request for Admissions, Set No. 1, and Request for Sanctions was filed by plaintiff Alba Cecilia Archila Garcia[1] ("Plaintiff") on June 15, 2023, with an Amended Notice of Motion filed on June 20, 2023. Pursuant to Marin County Rule, Civil 2.13B, parties to a civil case discovery dispute are required to participate in Marin County Superior Court's Discovery Facilitator Program. The motion was inadvertently overlooked for referral to the Facilitator Program.

Once it was discovered that the matter had not been referred, on August 23, 2023, Mark DeLangis was appointed as the Discovery Facilitator to preside over the above discovery motion. The Court recognizes the minimal amount of time the parties have been provided to arrange facilitation of the discovery dispute.

Accordingly, and to afford the parties an opportunity to resolve this discovery dispute without Court intervention, Defendant's motion is **CONTINUED to September 19, 2023 at 1:30 p.m. in Courtroom A**. The parties shall further comply with MCR Civ 2.13H prior to the new hearing date on the motion, should the matter not resolve.

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[1] The original caption on the complaint filed in October 2022 lists plaintiff's name as Alba Cecilia Garcia Archila. The latest filing by plaintiff, including the caption, lists plaintiff's name as Alba Cecilia Archila Garcia.

The Court reminds the parties that compliance with MCR Civ 2.13H not only includes the timely filing of the Declaration of Non-Resolution by each party five court days prior to the hearing, but also requires that "[t]he Declaration shall not exceed three pages and ***shall briefly summarize the remaining disputed issues and each party's contentions***." (MCR Civ 2.13H(1), emphasis added.)

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 08/29/23 TIME: 1:30 P.M. DEPT: A CASE NO: CV2300675

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

PLAINTIFF: THE NOVATO BUSINESS CENTER CONDOMINIUM OWNERS ASSOCIATION, INC. vs. DEFENDANT: BARBARA HUSAK	

NATURE OF PROCEEDINGS: DEMURRER – TO THE FIRST AMENDED COMPLAINT [DEFT] BARBARA HUSAK

RULING

Defendant's demurrer to the First and Second Causes of Action is **OVERRULED.** The demurrer to the Third Cause of Action is **SUSTAINED** with leave to amend.

Procedural Deficiencies

The Court draws Defendant's attention to Local Rule 2.8(C)2, which requires attachment of the operative pleading as an exhibit to the demurrer. It is also unclear whether Defendant adequately satisfied her meet and confer requirements prior to filing the demurrer. Defendant's counsel has submitted a declaration stating that she "initiated" meet and confer efforts by telephone and then met and conferred by sending emails to Plaintiff's counsel. If no substantive conversation was had in person or by telephone, Defendant did not comply with Code of Civil Procedure section 430.41, which requires the party filing the demurrer to meet and confer "in person or by telephone." The demurrer will not be overruled on this basis. (Code Civ. Proc. §§ 430.41(a)(4).) The Court nevertheless admonishes Defendant to follow all applicable rules when filing matters with the court.

Allegations in the First Amended Complaint

Plaintiff alleges that it is an association of the owners of 19 condominiums units at a condominium development on Digital Drive in Novato (the "Development"). (First Amended Complaint ("FAC"), ¶2.) Defendant is the owner of Unit 14 at the Development and is a member of the association. (*Id.*, ¶3.) The units in the Development are subject to certain covenants, conditions and restrictions ("CC&Rs"). Article VIII, Section 9, of the CC&Rs provides that no building, alteration or improvement can be made until it is approved by the

association Board and, if required by applicable ordinances, by the City of Novato. (*Id.*, ¶6.) Plaintiff is informed and believes that, at some point after construction of the Development but before the early 2000's, a previous owner or tenant of Unit 14 installed a partial second floor of approximately 1,500 square feet without the approval or knowledge of the association board. (*Id.*, ¶7.)

Plaintiff discovered the unlawful conditions in or about July 2022, when a tenant who was conducting due diligence for a prospective purchase noticed disparity between the prior construction in two other units (Units 4 and 6) and the work done in Unit 14 and Unit 3. Upon inspection, Units 3 and 14 did not appear to have proper concrete footings for the support posts or large enough support posts or any glue-laminated beams to support the floor joists. (*Id.*, ¶8.) Two tenants then hired a structural engineering firm to inspect the construction of Units 3 and 14 and the firm concluded that the second floors in those units violated applicable building codes and were not seismically sound. (*Id.*, ¶9.) Based on this, Plaintiff now believes that the second floor of Unit 14 was constructed without a permit. (*Id.*, ¶10.)

Plaintiff alleges it had no reason to discover the unlawful conditions before July 2022. There is no obligation in the CC&Rs requiring a unit owner to provide proof of a permit to the HOA for work within the unit, and Plaintiff had no reason to suspect that Defendant's work was unpermitted. There is also no obligation that the association regularly inspect the interior of the units. (*Id.*, ¶11.) The unlawful, unpermitted conditions at Unit 14 create a dangerous condition that could potentially cause injury to owners, tenants and visitors at the unit, and damage to other units at the Development. It also appears that the association's insurer will not renew the liability portion of its policy with the association. (*Id.*, ¶13.)

Plaintiff's First Cause of Action seeks declaratory relief, the Second Cause of Action alleges breach of the CC&Rs, and the Third Cause of Action alleges a continuing public nuisance.

Request for Judicial Notice

Plaintiff's request for judicial notice of the First Amended Complaint is granted. (Evid. Code §§ 452, 453.)

Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law, and it raises only a question of law." (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint "ordinarily is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550), 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 [citation and internal quotations omitted].) Legal conclusions are insufficient. (*Id.* at 1098–1099; *Doe,* 42 Cal.4th 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.)

Discussion

The Court does not consider the factual assertions in the declaration of Barbara Husak because they go beyond the four corners of the First Amended Complaint and matters judicially noticeable. (See *Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 359 ["[A] demurrer looks *only* to the face of the pleadings and to matters judicially noticeable and not to the evidence or other extrinsic matter"][citation and internal quotations omitted] [emphasis in original]; *McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72, 77 [only issue in demurrer hearing is "whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action"] [citation and internal quotations omitted].)

First and Second Causes of Action/Statute of Limitations

Defendant argues that the First and Second Causes of Action are barred by the five year statute of limitations under Code of Civil Procedure Section 336(b), which begins to "run from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation .. . ." (Code Civ. Proc. § 336(b).) Defendant argues that Plaintiff should have discovered the violation earlier because construction of that magnitude should have caught the eye of at least one person in the association, which has only 19 units. There would have been trucks, equipment, materials and workers at the site, and there would have been noise for extended periods of time. Defendant argues "It is extremely unlikely work of this type and scale would not cause disruption or, at minimum, awareness to adjacent owners, occupants and, significantly, the HOA, especially when the units are all adjoining." (MPA, p.4:13-15.)

"[F]or a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed." (*Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 420; see also *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 ["In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred"].) "If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment . . .'" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325 [citation omitted].)

The untimeliness of the First and Second Causes of Action do not "clearly and affirmatively" appear in the First Amended Complaint. Defendant only speculates as to what Plaintiff should have noticed. As the cases make clear, it is not enough that the cause of action "may" be barred. Therefore, the demurrer will not be sustained on this basis.

Second Cause of Action/Damage or Harm

Defendant demurs to the Second Cause of Action on the additional ground that Plaintiff does not allege it was harmed. The demurrer on this ground is overruled. Plaintiff alleges that Unit 14 is in violation of the CC&Rs by having unpermitted work which poses risks to others, and that the

Development may lose insurance coverage. Plaintiff also seeks injunctive relief directing Defendant to abate the condition.

Third Cause of Action

Defendant demurs to the Third Cause of action on the ground that it is barred by the three-year statute of limitations under Code of Civil Procedure Section 338(b) because Plaintiff is actually alleging a permanent (rather than continuing) nuisance and the statute therefore began to run when the construction occurred approximately 20 years ago.

"Where a nuisance is of such a character that it will presumably continue indefinitely, it is considered permanent and the limitations period runs from the time the nuisance is created. Where, however, a nuisance may be discontinued at any time, it is considered continuing in character. A person injured by a continuous nuisance may bring successive actions, even though an action based on the original wrong may be barred." (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1489 [citations omitted].)

The basic difference between a permanent nuisance and a continuing nuisance is that the latter can be discontinued or abated. (*Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 677.) "Abatable" means that the nuisance "can be remedied at a reasonable cost by reasonable means." (*Mangini v. Aerojet–General Corp.* (1996) 12 Cal.4th 1087, 1103.) Abatability is a question of fact, and "cost is an appropriate factor to consider . . . ." (*Id.* at p. 1101.) A cost estimate may suffice to show abatement by reasonable means at a reasonable cost. (*Id.* at p. 1099.)

Here, whether the unpermitted condition is abatable is a question of fact. Plaintiff alleges that it requested Defendant to take immediate corrective action and attaches an estimated cost for some or all of the work (Exhibit 2 to the Complaint). Whether that estimated cost is reasonable is a question of fact not appropriate for determination on a demurrer.

Defendant also argues that Plaintiff failed to allege the requisite elements for a public nuisance. "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." (Civ. Code § 3480.) "[S]ufficient facts must be alleged so that the court may conclude that a nuisance exists within the provisions of the statute." (*People v. Lim* (1941) 18 Cal.2d 872, 881 [citation omitted].) The demurrer to the Third Cause of Action is sustained on this ground. Plaintiff does not allege that the unpermitted work affects at the same time an entire community or neighborhood, or any considerable number of people. Rather, Plaintiff alleges that the alleged condition affects only tenants and visitors at Unit 14, and potentially other units which share a wall or structure with Unit 14.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for August, 2023 is as follows:
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
Meeting ID: 160 292 5171
Passcode: 868745

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov