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CC-LA JOLLA, INC., CCW-LA JOLLA, L.L.C., CC-
7 DEVELOPMENT GROUP, INC., AND CLASSIC
8 RESIDENCE MANAGEMENT LIMITED PARTNERSHIP

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN DIEGO

11
12 DONALD R. SHORT, JAMES F. GLEASON,
13 CASEY MEEHAN, MARILYN SHORT,
14 PATTY WESTERVELT, AND DOTTIE
YELLE, individually, and on behalf of all others
similarly situated,

15 Plaintiffs,

16 v.

17 CC-LA JOLLA, Inc., a Delaware Corporation,
18 CC-LA JOLLA, L.L.C., a Delaware limited
liability company, CC-DEVELOPMENT
19 GROUP, INC., CLASSIC RESIDENCE
MANAGEMENT LIMITED PARTNERSHIP,
20 and DOES 1 to 110, inclusive,

21 Defendants.

Case No. GIC877707

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION TO
STRIKE PLAINTIFFS' SECOND
AMENDED COMPLAINT**

**MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: August 17, 2007
Time: 10:30 a.m.
Judge: Hon. Yuri Hofmann
Dept: C-60

Date Action Filed: December 29, 2006
Trial Date: Not yet set

1 **I. INTRODUCTION**

2 Many allegations in Plaintiffs' Second Amended Complaint ("SAC") should be stricken as
3 irrelevant and improper.¹ Code Civ. Pro. § 436(a). Plaintiffs' silence in the face of the arguments in
4 Defendants' Motion to Strike speaks volumes. First, Plaintiffs fail to explain why the jurisdictional
5 precondition clearly set forth in the Master Trust Agreement ("MTA"), which terms were expressly
6 accepted by each of the Plaintiffs, should not be enforced and should not be found to bar all
7 allegations that refer to the Master Trust. Second, Plaintiffs fail to establish (and do not even argue)
8 that the allegations set forth in their fraud claims are actionable. Finally, Plaintiffs fail to establish
9 (and, again, do not even argue) that the allegations set forth in their negligent misrepresentation claim
10 are actionable. As such, Defendants' Motion to Strike should be granted in its entirety.

11 **II. STANDARD FOR MOTION TO STRIKE.**

12 Perhaps in realization of the futility of their position, the majority of Plaintiffs' Opposition is
13 spent arguing that a Motion to Strike is a procedurally inappropriate method to bring these issues to
14 this Court's attention. This is simply wrong.

15 A Motion to Strike is properly used to "[s]trike out any irrelevant, false, or improper matter
16 inserted in any pleading." Code Civ. Pro. § 436(a). A Motion to Strike can be used as a "scalpel" to
17 cut out and streamline any "irrelevant, false, or improper matter" asserted in a complaint. *Weil &*
18 *Brown*, CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group) (2007), section
19 7:177. Where a substantive defect affects only a portion of a cause of action, the proper challenge is
20 by Motion to Strike. *See PH II, Inc. v. Sup. Ct.*, 33 Cal. App. 4th 1680, 1681, 1682-83 (1995) (when
21 a substantive defect is clear from the face of a complaint, a defendant may attack that portion of the
22 cause of action by filing a motion to strike); *see also City of Rancho Cucamonga v. Regional Water*
23 *Quality Control Bd.*, 135 Cal. App. 4th 1377, 1386 (2006) (upholding motion to strike because "it is
24 well recognized a court may strike all or part of a pleading"); *Caliber Bodyworks, Inc. v. Sup. Ct.*,
25 134 Cal. App. 4th 365, 385 (2005) (directing court to strike improper demands for remedy; "The

26 ¹ Defendants' Motion to Strike is filed concurrently with, and in the alternative to,
27 Defendants' Demurrer. If this Court grants Defendants' Demurrer to Plaintiffs' SAC, Sections III.B
28 and III.C of this Motion to Strike will be rendered moot.

1 appropriate procedural device for challenging a portion of a cause of action seeking an improper
2 remedy is a motion to strike.”) Here, a Motion to Strike is the right vehicle to dispose of the
3 allegations excerpted in Defendants’ moving papers because those allegations are improper *and*
4 irrelevant. Indeed, even if each of these allegations is later evidenced, none are actionable (and none
5 will ever be actionable) because they are each improper.

6 **III. ARGUMENT**

7 **A. Plaintiffs’ Allegations Related to the Master Trust Should be Stricken Because** 8 **Plaintiffs Failed to Meet the Contractually-Based Jurisdictional Requirement.**

9 Plaintiffs’ Opposition fails to set forth any valid reason that this Court should not strike every
10 single allegation related to the Master Trust. Plaintiffs do not contest that they each signed a Joinder
11 In Master Trust Agreement (“Joinder”). Plaintiffs do not contest that the Joinders attached to the
12 Defendants’ Request for Judicial Notice are authentic and accurate. (RJN Ex. E-H.) Plaintiffs do not
13 contest that each of these Joinders expressly incorporates all of the terms of the MTA by stating the
14 following:

15 *[Residents] hereby adopt and agree to be bound by all the provisions of*
16 *the Master Trust Agreement and agree that the Contribution Amount*
17 *deposited in trust with the Trustee pursuant of this Joinder in Master*
18 *Trust Agreement shall be . . . distributed as an integral part thereof in*
accordance with the provisions of said Master Trust Agreement and all
of the provisions of said Master Trust Agreement are incorporated
herein.

19 (RJN Ex. E-H at ¶ 3) (emphasis added). Plaintiffs do not contest that this language, in fact,
20 incorporates all of the terms of the MTA into the Joinders signed by each Plaintiff. Plaintiffs do not
21 contest that the MTA itself contains an express precondition to bringing any action with respect to the
22 trust by stating the following:

23 *[N]o Grantor shall have any right by virtue, or by availing, of any*
24 *provisions of the Trust to institute any suit, action or proceeding in*
25 *equity or at law upon or under or with respect to the Trust unless not*
26 *less than a majority of the Grantors shall have made written request*
27 *upon the Trustee to institute such action, suit or proceeding in its own*
28 *name as Trustee hereunder and shall have offered to Trustee payment*
of, or such reasonable indemnity as it may require against the costs,
expenses and liability to be incurred therein or thereby, and the Trustee
for 60 days after its receipt of such notice, request, and offer of
indemnity, shall have failed to institute any such action, suit or
proceedings . . .

1 (RJN Ex. D at ¶11.1) (emphasis added). Nor do Plaintiffs even attempt to suggest that they have
2 complied with the above, contractually-based preconditions to bringing suit with respect to the
3 Master Trust.

4 Instead of addressing any of these issues head on, Plaintiffs ask this Court to deny
5 Defendants' Motion to Strike for several unconvincing reasons. First, Plaintiffs argue that the Court
6 should not take judicial notice of the MTA which contains the contractually mandated precondition
7 for bringing suit. However, as more fully set forth in Defendants' Request for Judicial Notice, it is
8 proper for this Court to take judicial notice of a document which forms the basis for a Complaint, but
9 is not attached to it. *See Ascherman v. General Reinsurance Corp.*, 183 Cal. App. 3d 307, 310-11
10 (1986) (trial court properly considered contract on demurrer that formed basis of the parties'
11 relationship, but was not attached to the complaint). This is what Defendants are asking this Court to
12 do.²

13 Second, Plaintiffs argue that a Motion to Strike is an inappropriate vehicle by which to raise
14 the issues about the mandatory precondition for bringing suit. Instead, Plaintiffs state that the
15 appropriate method would be to raise the issue by affirmative defense or "waive[]" the issue.
16 (Opposition, p. 3.) Although Defendants understand that Plaintiffs would like the issue waived or, at
17 least, addressed at a later time, this is unnecessary. Instead, under California law, a Motion to Strike
18 can be used to "[s]trike out any . . . improper matter." Code of Civ. Pro. § 436(a). Here, all
19 allegations relating to the Master Trust are improper based on the language in the controlling MTA.
20 Therefore, a Motion to Strike is an appropriate method to bring this issue to the Court's attention.
21 *See Wiz Tech., Inc. v. Coopers & Lybrand*, 106 Cal. App. 4th 1, 11-12 (2003) (affirming summary
22 judgment for auditor because plaintiff failed to follow contractual preconditions for bringing action);

23
24 ² Plaintiffs also argue that the MTA attached to Defendants' Request for Judicial Notice is
25 incomplete. (Opposition, p. 2.) This is inaccurate. Although the MTA refers to loan documents, it
26 does not incorporate those documents or otherwise require that they be attached. The terms "Loan
27 Agreement" and "Loan Documents" are both defined within the MTA, and the terms clearly
28 reference separate documents. (RJN Ex. D., ¶ 1.11 and 1.12.) Not surprisingly, Plaintiffs offer no
law to support this argument. Furthermore, Plaintiffs are in possession of the loan documents and
although they claim that they should be considered in conjunction with this Court's review of the
MTA, they fail to attach them for this Court's consideration.

1 *see also Great W. Casinos v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1420 (1999)
2 (defendant could not be sued because plaintiff did not comply with provisions in the parties' contract
3 detailing preconditions of suit); *PH II, Inc.*, 33 Cal. App. 4th at 1681, 1682-83 (when a substantive
4 defect is clear from the face of a complaint, a defendant may attack that portion of the cause of action
5 by filing a motion to strike).

6 Third, Plaintiffs argue that the precondition clearly set forth in the MTA is unconscionable
7 and, therefore, unenforceable. However, Plaintiffs are not requesting that the Master Trust be set
8 aside. Indeed, they rely on the Master Trust in numerous causes of action in the SAC. (SAC ¶¶ 15,
9 16, 146(c)-(d), 165(b), 171.) Plaintiffs, simply put, cannot have their cake and eat it too.
10 Furthermore, even taking Plaintiffs' allegations as true,³ Plaintiffs allege in their attached declarations
11 that Defendants refused to provide Plaintiffs, after this lawsuit was filed, with the information that
12 would allow them to comply with the contractual preconditions. (Conger Decl. ¶¶ 2-3) (Eichberg
13 Decl. ¶ 3). However, Defendants are not required to provide this information in an informal manner
14 after litigation has commenced.⁴ Furthermore, Plaintiffs do not allege that they requested the
15 information from the Trustee of the Master Trust itself. The bottom line is that prior to the institution
16 of their action, Plaintiffs did not comply with the contractual preconditions of the MTA which they
17 expressly accepted through the signing of the Joinders.

18 Finally, Plaintiffs argue that their claims in this lawsuit are not "under or with respect to the
19 Trust." (Opposition, p. 4.) If this were true (which it is not), then the Defendants should not object to
20 the Court striking all allegations relating to the Master Trust, as set forth in the moving papers, as

21 ³ Plaintiffs allege that Defendants failed to provide Plaintiffs with copies of the MTA. This is
22 plainly untrue. In fact, Defendants have always given each and every resident who has asked for a
23 copy of the MTA a copy of that agreement.

24 ⁴ To the extent Plaintiffs contend that "a non-plaintiff," Mr. Norman Eichberg, sought the
25 information from Defendants, they completely ignore the fact that, as a current resident of the
Community, Mr. Eichberg is a putative class member as defined by Plaintiffs' own SAC.

26 Moreover, although Plaintiffs attach correspondence between counsel for the parties regarding
27 the Plaintiffs' informal request for names and contact information for all Grantors under the MTA,
28 Plaintiffs never followed up on Defendants' offer to provide this information in response to a formal
discovery request. In fact, to date, no discovery request for this information has been propounded.

1 “irrelevant” pursuant to section 436(a) of the Code of Civil Procedure. However, the allegations that
2 Defendants have asked this Court to strike are rampant throughout the SAC and appear in the
3 majority of the claims asserted by Plaintiffs. (SAC ¶¶ 15, 16, 146(c)-(d), 165(b), 171.)

4 Because Plaintiffs have failed to comply with a mandatory precondition of suit, to which they
5 agreed upon the signing of their Joinders, all allegations related to the Master Trust should be
6 stricken. Nothing in the Plaintiffs’ Opposition establishes otherwise.

7 **B. Plaintiffs’ Fraud Allegations that are Statements of Opinion, Predictions of**
8 **Future Actions and/or Vague Should be Stricken as Improper.**

9 Plaintiffs’ Opposition demonstrates their fundamental misunderstanding of the allegations
10 necessary to support a claim for fraud. The allegations identified in Defendants’ moving papers that
11 should be stricken are either statements of opinion, statements that are too vague to be enforced, or
12 promises of future conduct without any allegation of no intent to perform when the promises were
13 made. *See Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 835 (2002) (vague statements and opinions not
14 actionable in fraud claim); *Magpali v. Farmers Group, Inc.*, 48 Cal. App. 4th 471, 481 (1996) (more
15 than nonperformance or abandonment of a promise after the promise was made is required to prove
16 intent not to perform in a fraud claim). Plaintiffs do not argue that such statements are legally
17 actionable, nor could they. Nor do Plaintiffs contend that the allegations that appear in the SAC (that
18 are excerpted in Defendants’ Motion to Strike) are legally actionable, nor could they. Instead, in their
19 Opposition, Plaintiffs only question whether a Motion to Strike is the appropriate method to raise
20 these issues. It is.

21 As set forth above, a Motion to Strike is properly brought to strike “improper” allegations
22 contained in a complaint. Code Civ. Pro. § 436(a).⁵ Here, the allegations are “improper” because
23 they are legally insufficient. *See Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 811
24 (2002) (reversing order denying motion to strike and directing trial court to strike complaint in its

25
26 ⁵ Plaintiffs’ argument that Defendants are improperly “demurring” to portions of the SAC
27 through this Motion to Strike is nonsensical. Instead, Defendants have properly submitted a
28 Demurrer to dispose of entire causes of action and properly submitted a Motion to Strike to order to
strike portions of the causes of action that cannot be addressed by Demurrer.

1 entirety because alleged comments are too vague to be capable of being proven true or false and
2 therefore are not actionable on defamation claim); *see also PH II, Inc.*, 33 Cal. App. 4th at 1681,
3 1682-83 (1995) (when a substantive defect is clear from the face of a complaint, a defendant may
4 attack that portion of the cause of action by filing a motion to strike). In other words, it does not
5 matter whether Plaintiffs are able to evidence the improper allegations made in their SAC, the
6 allegations will remain unactionable precisely because they are "improper" as set forth above.
7 Therefore, Defendants' Motion to Strike should be granted.

8 **C. Plaintiffs Concede that their Negligent Misrepresentation Claims Should be**
9 **Stricken as Improper.**

10 Plaintiffs concede that a claim for negligent misrepresentation is improper if it contains an
11 allegation of a future promise. The cases cited in Plaintiffs' Opposition support the theory that a
12 claim for *intentional misrepresentation*, as opposed to *negligent misrepresentation*, is properly
13 supported by an allegation of a future promise with no present intent to perform. Defendants agree
14 with Plaintiffs' analysis.⁶ However, this analysis has no bearing on Plaintiffs' claim for *negligent*
15 *misrepresentation*. A claim for negligent misrepresentation cannot be based on an alleged false
16 promise of future conduct. *See Tarman v. State Farm Auto. Ins. Co.*, 2 Cal. App. 4th 153, 159 (1991)
17 ("The specific intent requirement also precludes pleading a false promise claim as a negligent
18 misrepresentation."). For these reasons, and because Plaintiffs do not contend otherwise, the
19 negligent misrepresentation allegations excerpted in Defendants' moving papers should be stricken as
20 improper.⁷

21
22
23
24 ⁶ However, for the reasons set forth in Defendants' Demurrer and Reply in support of
25 Demurrer, Plaintiffs have failed to follow the case law that they cite and have failed to allege that
Defendants had no intent to perform a future promise in their *intentional misrepresentation* claims.

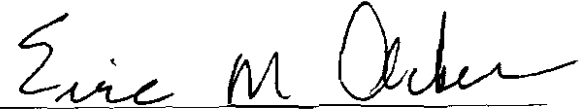
26 ⁷ To the extent that Plaintiffs repeated verbatim their arguments that a Motion to Strike is not
27 the appropriate vehicle to address these improper claims, these arguments are addressed in Section
28 III.B *supra*.

1 **IV. CONCLUSION**

2 For the reasons stated herein, this Court should grant Defendants' Motion to Strike in its
3 entirety.

4 Dated: August 10, 2007

ERIC M. ACKER
LINDA L. LANE
MORRISON & FOERSTER LLP

7 By: 
8 Eric M. Acker

9 Attorneys for Defendants
10 CC-LA JOLLA, INC.,
11 CCW-LA JOLLA, L.L.C.,
12 CC-DEVELOPMENT GROUP, INC.,
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO
10

11 DONALD R. SHORT, individually, and on
behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 CC-LA JOLLA, Inc., a Delaware Corporation,
15 CC-LA JOLLA, L.L.C., a Delaware limited
liability company, and DOES 1 to 70, inclusive,

16 Defendants.
17

Case No. GIC877707

DECLARATION OF SERVICE

Judge: Hon. Linda B. Quinn
Dept: 74

Date Action Filed: December 29, 2006
Trial Date: Not yet set

18 I, the undersigned, declare that I am employed with the law firm of Morrison & Foerster LLP,
19 whose business address is 12531 High Bluff Drive, Suite 100, San Diego, California 92130. I am
20 over the age of eighteen years and not a party to the within action. On August 10, 2007, I served the
21 documents named below on the parties in this action as follows:

22 **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS'**
23 **SECOND AMENDED COMPLAINT,**

24 SERVED UPON:

25 Michael A. Conger
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26 16236 San Dieguito Road, Suite 4-14
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27 Rancho Santa Fe, CA 92067
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28

Attorneys for Plaintiff DONALD R. SHORT

Telephone: 858.759.0200
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1 ☐ (BY OVERNIGHT DELIVERY) I am readily familiar with the practice of Morrison &
2 Foerster LLP for collection and processing of correspondence for overnight delivery and know that
3 the document(s) described herein will be deposited in a box or other facility regularly maintained by
4 UPS for overnight delivery.

5 ☒ (BY MAIL) I caused each such envelope, with postage thereon fully prepaid, to be placed in
6 the United States mail at San Diego, California. I am readily familiar with the practice of Morrison
7 & Foerster LLP for collection and processing of correspondence for mailing, said practice being that
8 in the ordinary course of business, mail is deposited in the United States Postal Service the same day
9 as it is placed for collection.

10 ☐ (BY FACSIMILE) The above-referenced document was transmitted by facsimile
11 transmission and the transmission was reported as complete and without error. The facsimile
12 machine I used complied with California Rules of Court, Rule 2003(3) and no error was reported by
13 the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a
14 transmission record of the transmission, a copy of which is attached to this declaration.

15 ☐ (BY PERSONAL SERVICE) I delivered to an authorized courier or driver authorized by
16 Worldwide Network, Inc., 701 B Street, Suite 324, San Diego, California 92101, to receive
17 documents to be delivered on the same date. A proof of service signed by the authorized courier will
18 be filed with the court upon request.

19 ☒ BY ELECTRONIC SERVICE [Code Civ. Proc sec. 1010.6] by electronically mailing a true
20 and correct copy through Morrison & Foerster LLP's electronic mail system to the e-mail address(s)
21 set forth above, or as stated on the attached service list per agreement in accordance with Code of
22 Civil Procedure section 1010.6.

23 I declare under penalty of perjury under the laws of the State of California and United States
24 of America that the foregoing is true and correct, and that this declaration is executed on August 10,
25 2007, at San Diego, California.

26 
27 Rose B. Sheehan
28