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and on behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

DONALD R. SHORT, JAMES F. GLEASON, CASEY MEEHAN, MARILYN SHORT, PATTY WESTERVELT, AND DOTTIE YELLE, individually, and on behalf of all others similarly situated, Plaintiffs, v. CC-LA JOLLA, Inc., a Delaware Corporation, CC-LA JOLLA, L.L.C., a Delaware limited liability company, CC-DEVELOPMENT GROUP, INC., CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP, an Illinois Limited Partnership, and DOES 1 to 110, inclusive, Defendants.	CASE NO: GIC877707 Date: August 17, 2007 Time: 10:30 a.m. Judge: Hon. Yuri Hofmann Dept: 60 Action Filed: December 29, 2006 Trial Date: Not yet set PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT

I. INTRODUCTION

A defendant may move to strike portions of a complaint that are "[1] irrelevant, [2] false, or [3] improper." (Code Civ. Proc., §§ 435, 436, subd. (b).) However, the grounds for such a motion must "appear on the face of the challenged pleading or from any matter of which the court is required [or permitted] to take judicial notice." (*Id.*, § 437, subds. (a)-(b).) A motion to strike allegations of fraud is not a substitute for a motion for summary judgment (Code Civ. Proc., § 437c) or the jury trial to which the plaintiffs' are constitutionally entitled (Cal. Const., art. I, § 16).

The defendants' motion to strike is without merit and should be denied because: (1) it

is not made on the statutory grounds; (2) for reasons explained in the plaintiffs' opposition to the defendants' request for judicial notice, the court cannot properly take judicial notice of the documents on which the motion to strike is based, must less the truth of the contents of those documents; (3) the court cannot conclude from the face of the Second Amended Complaint that any allegation is "[A] irrelevant, [B] false, or [C] improper" (Code Civ. Proc., § 436, subd. (b)); and (4) Paragraph 11.1 of the master trust agreement ("MTA"), on which the defendants rely, is patently unconscionable and unenforceable.

II. THE COURT SHOULD NOT STRIKE REFERENCES TO THE MASTER TRUST AGREEMENT.

The defendants have moved to strike plaintiffs' references to a master trust agreement "because plaintiffs failed to meet the preconditions required by the MTA to bring an action with respect to the trust." (Motion To Strike, p. 4, capitalization omitted.) That contention is without merit for several reasons.

First, for reasons explained in the plaintiffs' opposition to the defendants' request for judicial notice, the court may not take judicial notice of a private trust agreement (Evid. Code, §§ 451-453), much less the truth of the contents of such an agreement.[1] Moreover, the MTA of which the defendants have requested the court to take judicial notice is incomplete on its face, because it fails to include the referenced loan documents.

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[1] "For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper." (*Fremont Indemnity Company v. Fremont General Corporation* (2007) 148 Cal.App.4th 97, 114-115.) "A court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a document submitted in support of a demurrer." (*Id.*, at p. 115.) "In short, a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what the evidence appears to show." (*Ibid.*) "Thus, a court ruling on a demurrer cannot decide a question that may depend on disputed facts by means of judicial notice." (*Ibid.*) "This rule applies not only with respect to interpretation of a contract, but with respect to it enforceability." (*Ibid.*) "A court ruling on a demurrer cannot take judicial notice that a contract submitted in support of a demurrer is binding and enforceable if the plaintiff claims the contract is unenforceable due to fraud . . . ." (*Ibid.*)

Second, the alleged failure to comply with a contractual precondition for suit constitutes new matter that may be raised by affirmative defense in an answer (Code Civ. Proc., § 431.20, subd. (b)), or waived, but it is not a ground for a motion to strike (Code Civ. Proc., § 436, subd. (a)). The two, distinguishable cases relied upon by the defendants (Motion To Strike, p. 5:7-8) respectively involved a motion to quash (*Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1420) and a motion for summary judgment (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11-12), not a motion to strike.

Third, Paragraph 11.1 of the MTA, on which the defendants rely, is patently unconscionable, both procedurally and substantively, and therefore unenforceable.

As the Court of Appeal recently reaffirmed in *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 579: "Unconscionability has a procedural and a substantive element; the procedural element focuses on the existence of oppression or surprise and the substantive element focuses on overly harsh or one-sided results. [Citation.] To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the elements need not be present in the same degree. [Citation.] The analysis employs a sliding scale: 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]"

The plaintiffs have alleged that "the defendants failed to provide the plaintiffs and others similarly situated with copies of the Master Trust Agreement, failed to fairly disclose the terms of that trust, and misrepresented . . . the terms of the Master Trust . . . . (SAC, ¶ 171, p. 29:12-14.) Because they were asked to join in the MTA by oppressive means—without ever having been provided with a copy of it by the defendants, the plaintiffs are completely surprised by its terms, including Paragraph 11.1. The procedural unconscionability of the MTA is extreme.

Morever, as a matter of substance, Paragraph 11.1 of the MTA is overly harsh and oppressive. No person could comply with its terms without the names and addresses of all Grantors, but the defendants refuse to provide that information. When a *non-plaintiff*, Mr. Norman Eichberg, sought the information required for compliance with Paragraph 11.1, the defendants refused to provide the information. (Declaration of Norman Eichberg, ¶¶ 2-3.) And

when the plaintiffs' counsel requested such information, the defendants' counsel responded that his request should be made, and would be considered, only through a formal request for discovery in litigation. (Declaration of Michael A. Conger [etc.], ¶¶ 2-3, Exhs. 1-2.) This creates the absurd Catch-22 that Paragraph 11.1 can only be complied with by means of discovery in the litigation which the defendants contend *in their motion to strike* is precluded by Paragraph 11.1! The substantive unconscionability of Paragraph 11.1 of the MTA is also extreme.

Fourth, Paragraph 11.1 of the MTA is inapplicable to the plaintiffs' lawsuit. That paragraph provides in part that "no Grantor shall have any right by virtue, or by availing, of any provisions of the Trust to institute any suit, action or proceeding in equity or at law upon or under or with respect to the Trust" without complying with specified prior conditions (including a request by a majority of Grantors upon the Trustee). The defendants contend this is an action with "respect to the Trust." (Motion To Strike, p. 4:20.) However, that ambiguous phrase is not expressly defined in the MTA, and the plaintiffs have not sued to enforce the terms of the trust or sued the trustee for any breach of the terms of the MTA. They have sued the defendants (1) for breach of fiduciary duties arising from a *de facto* fiduciary relationship that exists *independent of the MTA* (SAC, ¶ 172, pp. 29-30) and (2) for breach of a *de jure* fiduciary relationship arising from their conduct in soliciting joinders in the trust as agents for the trustee (SAC, ¶ 171, p. 29). Such charging allegations do not even implicate the ostensible purpose of Paragraph 11.1, which is to avoid unnecessary lawsuits to enforce the trust.

III. THE COURT SHOULD NOT STRIKE THE PLAINTIFFS' FRAUD ALLEGATIONS AS "IMPROPER."

The defendants move the court to strike certain fraud allegations "because they each are either a statement of opinion; a statement that is too vague to be actionable; or a promise of future conduct without any allegations of no intent to perform when the promise was made." (Motion To Strike, p. 7:10-12; *id.*, pp. 6-8.) Their motion should be denied because those are not grounds for a motion to strike. (Code Civ. Proc., § 436, subd. (a) ["irrelevant, false, or improper matter"].)

The defendants have not shown that the allegations in question are "improper," as that

term is used in section 436, subdivision (b), or that they are "irrelevant" to the plaintiffs' sufficiently alleged claims of fraud. "Irrelevant" matter, under that statute, refers to an "immaterial allegation," as defined in Code of Civil Procedure section 431.10, subdivision (b) (Code Civ. Proc., § 430.10, subd. (c).) Because the allegations in question are "pertinent to . . . otherwise sufficient claim[s]" (*Id.*, § 431.10, subd. (b)), they are not immaterial. (See Evid. Code, §§ 210 ["'[r]elevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"], 351 ["all relevant evidence is admissible"].)

In essence, the defendants are *abusing* the statutory motion to strike in an improper attempt to exclude admissible evidence or to demur to *portions* of a complaint. It is well settled that such a demurrer does not lie. Weil & Brown, Cal. Prac. Guide: Civil Proc. Before Trial (The Rutter Group 2007), p. 7-20, at ¶ 7:42.2 ["A general demurrer does not lie to only *part* of a cause of action. If there are sufficient allegations to entitle plaintiff to relief, other allegations cannot be challenged by demurrer"], citing *Kong v. City of Hawaiian Gardens Redevelop. Agency* (2003) 108 Cal.App.4th 1028, 1046.)

None of the cases relied upon by the defendants involved motions made pursuant to sections 435 and 436 of the Code of Civil Procedure to strike portions of complaints. (Motion To Strike, pp. 8-10.) They involved judgments entered after orders sustaining demurrers to an entire complaint without leave to amend (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824; *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 156); a summary judgment (*Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 206, disapproved in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251); and a judgment of nonsuit (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 480).

IV. THE COURT SHOULD NOT STRIKE ALLEGATIONS AS INSUFFICIENT TO SUPPORT A NEGLIGENT MISREPRESENTATION CLAIM.

Finally, the defendants move to strike certain "allegations of future promises" on the ground such allegations are insufficient "to support a negligent misrepresentation cause of

action." (Motion To Strike, p. 8:22-24, capitalization and boldface omitted; *id.*, pp. 8-10.) Their motion should be denied because that is not a ground for a motion to strike. (Code Civ. Proc., § 436, subd. (a) ["irrelevant, false, or improper matter"].)

The defendants have not shown that the allegations in question are "improper," as that term is used in section 436, subdivision (b), or that they are "irrelevant" to the plaintiffs' sufficiently alleged claims of negligent misrepresentation. (Evid. Code, §§ 210, 351.)

In essence, the defendants are *abusing* the statutory motion to strike in an improper attempt to exclude admissible evidence or to demur to *portions* of a complaint. It is well settled that such a demurrer does not lie. (Weil & Brown, *supra*, p. 7-20, at ¶ 7:42.2.)

Furthermore, "[c]ertain broken promises of future conduct may . . . be actionable." (*Tarman*, *supra*, 2 Cal.App.4th at p. 158.) "Civil Code section 1710, subdivision (4) defines one type of deceit as 'A promise, made without any intention of performing it.'" (*Ibid.*) "As Witkin explains, 'A false promise is actionable on the theory that a promise implies an intention to perform, that *intention to perform or not to perform* is a state of mind, and that misrepresentation of such a state of mind is a misrepresentation of *fact* The allegation of a *promise* (which implies a representation of intention to perform) is the equivalent of the ordinary allegation of a representation of fact.'" (*Id.*, at pp. 158-158, citing 5 Witkin, Cal. Proc (3d ed. 1985) Pleading, § 670, p. 120, emphasis in original.) "[A]n action based on false promise is simply a type of *intentional* misrepresentation, i.e., actual fraud." (*Tarman*, *supra*, 2 Cal.App.4th at p. 159.)

Here, the plaintiffs have stated a claim for intentional misrepresentation (SAC, ¶¶ 97-120) and included allegations that defendants made promises with no intention of performing

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them. For example, the defendants seek to strike paragraphs 100[2] and 102,[3] without referring this Court to plaintiffs' allegation that Ms. Leary's representation was false when made:

> "Unknown to residents, on April 28, 1998, the very same day the defendants delivered a memorandum encouraging residents not to leave, stating "[p]lease rest assured that we will work diligently to manage expenses and that, as an affiliate of Hyatt Corporation, La Jolla Village Towers will reap the benefits of group purchasing volume discounts," the defendants entered into a sweetheart 50-year contract with a Hyatt affiliate which effectively allows the defendants' owners to funnel residents' cash to themselves under the guise of "necessary operating expenses." (SAC, ¶ 73.)
>
> "For more than nine years, the defendants have charged residents—and paid themselves—management, marketing, and administrative fees and costs in excess of the prevailing market rates." (SAC, ¶ 74.)

Because defendants had entered into a long-term, 50 year contract with themselves for management, marketing and administrative charge at exorbitant rates, and because those contracts existed at the time defendants made contrary representations, plaintiffs false promise allegations are both relevant and sufficiently supported and should not be stricken.

V. CONCLUSION

After interposing *general demurrers* to the plaintiffs' *first* amended complaint on the ground that the pleading *lacked specific allegations of fraud*, the defendants' have *moved to strike* as "irrelevant," "false," or "improper" the *specific allegations of fraud* alleged the *second* amended complaint.

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[2] Paragraph 100 states:

> "One such representation was made on April 28, 1998, by Mary G. Leary in her capacity as chief operating officer for one or more of the defendants. In a memorandum addressed to all residents she wrote that the monthly fees charged to residents would only increase if necessary to pay for operating expenses and that residents should 'rest assured that [defendants will] work diligently to manage expenses [and keep operating expenses down].' (Exhibit 1 ('Exh. 1').)"

[3] Paragraph 102 states:

> "Another representation was made on December 26, 2001, in a letter to all residents written by James H. Hayes, in his capacity as executive director for one or more of the defendants. In announcing a six percent increase in monthly fees paid by residents, Mr. Hayes informed the residents that '[p]lease be assured that we are looking at all our expenses and systems to find ways of reducing the impact of such increases . . . .' (Exh. 3.)"

The defendants' motion is an abuse of the statutory motion to strike. The proper procedure for ascertaining the *legal sufficiency* of the plaintiffs' allegations of fraud is a *demurrer*, not a motion to strike. (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 342.) The proper procedure for testing the sufficiency of the *plaintiffs' proof* of their allegations of fraud is a *motion for summary judgment* (Code Civ. Proc., § 437c, subd. (a) [requiring 75-days notice]), not a motion to strike. The proper procedure for ascertaining the *relevance and truth* of the plaintiffs' allegations of fraud is a *jury trial*, not a motion to strike.

For all the above reasons, the defendants' unmeritorious and wasteful motion to strike should be denied.

Dated: August 6, 2007

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By: Michael A. Conger

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