**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF TUOLUMNE**

GLORIA HARVEY & YVONNE PETER, individually and on behalf of all others similarly situated,,

Plaintiff,

v.

CHARLES VARVAYANIS, JOHN TENBRINK, JESSE WORSHAM, LARRY VAUGHN, STEVE WALLACE, RUTH DARGITZ, FRED COLEMAN, MIKE FORD, AL ORTH, ANN RANKIN, ODD FELLOWS SIERRA HOMEOWNERS' ASSOCIATION, INC., and DOES 1 through 25, ,

Defendant.

Case No. CV58108

**JUDGMENT ~~[PROPOSED]~~**

The Demurrer of Defendants CHARLES VARVAYANIS, JOHN TENBRINK, LARRY VAUGHN, STEVE WALLACE, RUTH DARGITZ, FRED COLEMAN, MIKE FORD, AL ORTH, and ODD FELLOWS SIERRA HOMEOWNERS' ASSOCIATION, INC. (collectively, "Homeowner Defendants") to plaintiffs' Second Amended Complaint came on regularly for hearing on May 29, 2014, in Department 1 of the above-entitled court, the Honorable Donald Segerstrom, Judge Presiding.

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After full consideration of the evidence, defendants' moving papers, plaintiffs' opposition, defendants' replies, and all other documents and argument presented to the Court, the Court sustained the demurrer without leave to amend. The Court's July 31, 2014 Order sustaining the demurrer is attached hereto as Exhibit A.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Plaintiffs Gloria Harvey & Yvonne Peter take nothing on their complaint against Homeowner Defendants. Homeowner Defendants shall recover their costs against Plaintiffs Gloria Harvey & Yvonne Peter in the amount of $ 4545 00, according to the separately filed Memorandum of Costs.

IT IS SO ORDERED.

DATED: AUG 2 0 2014

Donald Segerstrom
Hon. Donald Segerstrom
Judge of the Superior Court

Submitted by:

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# *Exhibit "A"*

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF TUOLUMNE**

**41 W. Yaney Avenue**
**Sonora, CA 95370**

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| **Gloria Harvey, et al.**<br>Plaintiff/Petitioner,<br><br>vs.<br><br>**Charles Varvayanis, et al.**<br>Defendant/Respondent. | Superior Court Case No. **CV58108** |

**Clerk's Certificate of Service by Mail (CCP 1013a[4])**

I, a Clerk of the Superior Court of California, County of Tuolumne, do certify that I am not a party to the above-entitled cause. On the date shown below I served **Order on Motions to Strike and Demurrers to Second Amended Complaint, filed July 31, 2014,** by depositing a true copy thereof, enclosed in a separate, sealed envelope with postage thereon fully prepaid, in the United States Mail, addressed respectively to the person(s) as shown below.

Attorney for Plaintiffs: David J. Thelen, 3070 "M" St., Suite 10, Merced, CA 95348
Attorney for Defendant Rankin: Steven Piser, Law Offices of Steven B. Piser, 1300 Clay St., Suite 1050, Oakland, CA 94612
Attorney for Defendants Varvayanis, et al: Peter C. Catalanotti, Manning & Kass Ellrod, Ramirez, Trester LLP, 121 Spear St., Suite 200, San Francisco, CA 94105

Mailed at Sonora, California

Date: July 31, 2014

Superior Court of California, County of Tuolumne
Jeanine D. Tucker, Court Executive Officer

By: _____
Superior Court Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF TUOLUMNE

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|---|---|
| GLORIA HARVEY, et al.,<br><br>Plaintiffs,<br>vs.<br><br>CHARLES VARVAYANIS, et al.,<br><br>Defendants. | Case No.: CV58108<br><br>ORDER ON MOTIONS TO STRIKE AND DEMURRERS TO SECOND AMENDED COMPLAINT |

This matter came on regularly for hearing on defendants' Charles Varvayanis, John Tenbrink, Larry Vaughn, Steve Wallace, Ruth Gargitz,[1] Fred Coleman, Mike Ford, Al Orth and Odd Fellows Sierra Homeowners' Association, Inc., (hereafter collectively, "the Homeowner Defendants") motion to strike and demurrer to plaintiffs' second amended complaint and defendant Ann Rankin's (hereafter, "Rankin") motion to strike and demurrer to plaintiffs' second amended complaint on May 29, 2014, before the Honorable Donald Segerstrom, Judge, presiding. Plaintiffs, Gloria Harvey and Yvonne Peter, appeared through their attorney, David J. Thelen. The Homeowner Defendants appeared through their counsel, Peter Catalanotti. Defendant Rankin appeared through her attorney, Steven B. Piser.

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[1] The second amended complaint lists this defendant as "Ruth Dargitz." The demurrer lists her as "Ruth Gargitz," while the motion to strike lists her as "Dargitz" in the caption and "Gargitz" in the list of clients represented by counsel. The Court is confident that regardless of the spelling of the name, all parties are referring to the same person.

**FACTUAL AND PROCEDURAL BACKGROUND**

On January 30, 2014, this Court entered its order sustaining with leave to amend the demurrers of the Homeowner Defendants and Rankin to the plaintiffs' first amended complaint. The same order also granted without leave to amend a motion by the Homeowner Defendants to strike plaintiffs' claim for attorney fees from the first amended complaint. On February 19, 2014, plaintiffs filed their second amended complaint (hereafter, the "SAC") against the Homeowner Defendants and Rankin. The SAC was entitled a "Second Amended Class Action Complaint for Breach of Fiduciary Duty, Negligence, Constructive Fraud."

On April 1, 2014, the Homeowner Defendants filed a demurrer to the SAC. On the same date, the Homeowner Defendants filed a motion to strike those portions of the SAC which sought an award of punitive damages against the Homeowner Defendants. The demurrer and the motion to strike were accompanied by a request for judicial notice. The following day, April 2, 2014, Rankin filed her demurrer as well as a motion to strike the SAC. Rankin also filed a request for judicial notice.

Plaintiffs filed their opposition to the demurrers and motions to strike on May 15, 2014. Plaintiffs filed their own request for judicial notice, requesting that the Court judicially notice the second page of the original complaint in this matter, filed February 23, 2012. Both the Homeowner Defendants and Rankin filed their replies to plaintiffs' oppositions on May 21, 2014. The matter proceeded to hearing on May 29, 2014. The arguments of counsel consumed the better part of an afternoon, at which time the matter was deemed submitted.

A review of the SAC discloses a convoluted factual background which involves a land development of over 300 parcels known as the Odd Fellows Sierra Camp. There existed an entity known as the Odd Fellows Sierra Homeowner's Association, Inc., (hereafter, "the Homeowners Association") as well as an entity known as the Odd Fellows Recreation Association. (Hereafter, "the Recreation Association.") According to the SAC, to be a member of the Homeowners Association, a lot had to have the Covenants, Conditions and Restrictions of the Odd Fellows Sierra Camp (hereafter, "the CC&R's") recorded against that lot. The SAC alleges that none of the plaintiffs are members of the Homeowners Association. Further, that "almost no parcel owner of Odd Fellows Sierra Camp is a

member of" the Homeowners Association.[2] (SAC, p. 3.) Nevertheless, in 2011, each lot owner paid an "assessment" of $830 to the Homeowner Defendants and the Homeowners Association, which was in turn to be delivered to the Recreation Association "for water, roads, maintenance services and reserves for services to be provided to plaintiffs." (SAC, p. 4.) Later, the SAC conceded that these "assessments" were, in fact, voluntary. "Plaintiffs were under no obligation to pay any assessments under the CC&Rs because those restrictions or obligations were not recorded against their property. Assessment payments were voluntary. . . ."

The SAC alleged that the individual Homeowner Defendants were the former Board members of the Homeowners Association. (SAC, p. 19.) When the Recreation Association sued the Homeowners Association for breach of an undefined contract, and obtained a judgment against the Homeowners Association, the Homeowner Defendants "resigned from the Homeowner's Association and stated that the Odd Fellows Sierra Homeowners Association no longer existed. . . ." (SAC, p. 5.) Rankin was alleged to have been an attorney, employed by the Homeowners Association "to work for plaintiff's known benefit," in the dispute between the Homeowner's Association and Recreation Association, but who, instead, took the "assessment money" that was intended for the Recreation Association to pay her attorney's fees. (SAC, pp. 12, 17, 20-21.) In doing so, Rankin allegedly committed a constructive fraud against the plaintiffs.

The SAC went on to allege that despite not being members of the Homeowners Association, the bylaws of the Homeowners Association gave the lot owners the right to vote on all matters pertaining to "any water use or licensing agreement." Apparently in reliance on this voting right, at an "annual meeting in May of 2011, the authorized voters approved a budget that generated approximately $295,000 in revenue for water, maintenance, reserves and other services." (SAC, p. 7.) The identified budget was set forth on page 8 of the SAC.[3] Plaintiffs alleged that the "assessment money" was delivered to the defendants to be used "in keeping with the vote and budget approved at

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[2] At the hearing on May 29, 2014, counsel for plaintiff indicated that only two lots in the entire development had the CC&R's recorded against them and were therefore members of the Homeowner's Association. One was owned by defendant Varvayanis and the other was owned by the Recreation Association.

[3] At the hearing on May 29, 2014, counsel for plaintiffs was never able to identify for which entity this budget was allegedly adopted. Further, the only portion of the "budget" set forth in the SAC was a list of expenditures totaling $324,362. (SAC, p. 8.)

the May 2011 annual meeting." The defendants then allegedly diverted some $90,000 of these funds "to other than budget and voter-approved purposes and amounts," including the payment of $47,000 for attorney's fees, apparently to Rankin. (SAC, p. 10.) Plaintiffs arrived at the alleged $90,000 diversion based on an allegation that "[o]nly $205,206 of the approximate $295,000 collected in assessments for budget year May 2011-12 were returned to lot owners or paid by defendants as per the budget. . . ."[4] Based on these facts, the SAC alleged: 1) All defendants had breached their fiduciary duty to the plaintiffs; 2) The Homeowner Defendants had negligently breached their duty of care owed to the plaintiffs under the bylaws of the Homeowners Association and the CC&R's, and 3) All defendants committed constructive fraud in diverting the "assessment money" to purposes other than had been approved by the lot owners.

The Homeowner Defendants demurred to the SAC on several grounds. They argued that the individual Homeowner Defendants could not, as Board members, be liable for the acts of the Homeowners Association. Further, they argued that to the extent plaintiffs were asserting the "assessment money" should have been paid to the Recreation Association to pay for the provision of services to the lot owners, the Recreation Association had already obtained that result by successfully suing the Homeowners Association for any unpaid fees. They also generally argued that the SAC failed to state facts sufficient to show that the Homeowner Defendants owed any duty, fiduciary or otherwise, to the lot owners and that, in any event, the plaintiffs had failed to state facts sufficient to show that they had been damaged in any way by the Homeowner Defendants' conduct. Finally, they alleged generally that the SAC was ambiguous and unintelligible. The Homeowner Defendants' motion to strike was aimed at plaintiffs' claim for punitive damages. They argued the SAC failed to state facts sufficient to show any malice, fraud or oppression that would justify an award of exemplary damages.

Rankin's demurrer shared one significant argument with that of the Homeowner Defendants. She alleged that plaintiffs had failed to state facts sufficient to show that she owed any fiduciary duty to the plaintiffs. She also argued, both in her demurrer and her motion to strike, that plaintiffs had

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[4] The Court notes parenthetically that nothing in the "budget" appearing on page 8 of the SAC indicates that any funds were to be "returned to lot owners."

failed to obtain a pre-filing order pursuant to Code of Civil Procedure section 1714.10 and this omission required the rejection of the SAC.

Plaintiffs opposed the demurrers and motions to strike on numerous grounds. Plaintiffs took the position that Rankin, who was concededly the attorney for the Homeowners Association, owed the lot owners (plaintiffs) a fiduciary duty as third party beneficiaries of the contract between Rankin and the Homeowner's Association. Further, that Rankin had actually undertaken to give legal advice to plaintiffs. Plaintiffs took the position that the individual Homeowner Defendants owed plaintiffs a duty of care because, by accepting plaintiffs' "assessment money," the Homeowner defendants had become the agents of the lot owners. Finally, plaintiffs concluded that they had suffered damage because the $90,000 that had not been forwarded to the Recreation Association, or spent according to the "budget," had not been accumulated as reserves to pay for the cost of future services.

**DISCUSSION**

It is well settled that a "demurrer tests the sufficiency of the plaintiff's complaint, i.e., whether it states facts sufficient to constitute a cause of action upon which relief may be based. In determining whether the complaint states facts sufficient to constitute a cause of action, the trial court may consider all material facts pleaded in the complaint and those arising by reasonable implication therefrom; it may not consider contentions, deductions or conclusions of fact or law. The trial court also may consider matters of which it may take judicial notice. A demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment." (*Young* v. *Gannon* (2002) 97 Cal.App.4th 209, 220.) [Internal citations omitted.] Put somewhat more succinctly, "a demurrer accepts as true all well pleaded facts and those facts of which the court can take judicial notice but not deductions, contentions, or conclusions of law or fact." (*Fox* v. *JAMDAT Mobile, Inc.* (2010) 185 Cal.App.4th 1068, 1078.)

With regard to the motions to strike, Code of Civil Procedure section 436 provides: "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a

court rule, or an order of the court." For example, "when a substantive defect is clear from the face of a complaint, such as a violation of the applicable statute of limitations or a purported claim of right which is legally invalid, a defendant may attack that portion of the cause of action by filing a motion to strike. The motion to strike is widely used to challenge portions of causes of action seeking punitive damages. Its use has also been approved in a case where the face of the complaint failed to state facts showing a primary right of the plaintiff and a primary duty of, or wrong committed by, the defendant." (*PH II, Inc.* v. *Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.) [Internal quotations and citations omitted.]

Addressing Rankin's pleadings first, where the first amended complaint artfully avoided alleging that Rankin was an attorney, the SAC makes clear that Rankin was an attorney who entered into an employment agreement with the Homeowners Association. (SAC, p. 12.) Plaintiffs alleged that Rankin breached her fiduciary duty to the lot owners in that she "was paid with plaintiff's misdirected assessment money with Rankin's full knowledge that no such money was to be directed to her." (SAC, p. 12.) In other words, plaintiffs essentially allege that the Homeowner's Association improperly paid Rankin, for legal services rendered to that Association, with money that was intended to be paid to the Recreation Association to provide services to the lot owners. Rankin argues that these facts do not give rise to any fiduciary duty on her part to the lot owners and, in any event, plaintiffs failed to obtain a pre-filing order allowing such a claim to be made.

Civil Code section 1714.10, subdivision (a) provides, in relevant part: "No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action." "Section 1714.10 was intended to weed out the harassing claim of conspiracy that is so lacking in reasonable foundation as to verge on the frivolous." (*Central Concrete Supply Co., Inc.* v. *Bursak* (2010) 182 Cal.App.4th 1092, 1098-1099.)

The SAC alleges the "assessment money was channeled to Ann Rankin's office with Ann

Rankin's knowledge and direction." (SAC, p. 22.) The money was paid to Rankin as attorney fees for representing the Homeowners' Association in its dispute with the Recreation Association. (SAC, pp. 12, 14, 17, 20.) Essentially, the SAC alleges that the Homeowner Defendants and Rankin agreed to pay Rankin's fees with money that was intended to be used for providing services to the lot owners. Plaintiff protests that these allegations do not constitute a "conspiracy" within the meaning of Civil Code section 1714.10. The Court finds that the case of *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, conclusively answers plaintiffs' protest. In *Berg, supra*, a real estate developer brought an action against the assignee of a debtor which allegedly owed the developer significant sums of money. The developer then attempted to name as a co-defendant the law firm representing the assignee without first obtaining an order pursuant to Code of Civil Procedure section 1714.10. In defining "conspiracy," for purposes of Code of Civil Procedure section 1714.10, the *Berg* court stated: "In order to maintain an action for conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage." (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc., supra,* 131 Cal.App.4th at p. 823.)

That is exactly what plaintiffs alleged in the instant case; that the homeowner defendants and Rankin had knowledge of and agreed to pay Rankin's attorney fees out of funds intended for the Recreation Association. Whether plaintiffs expressly called this conduct a "conspiracy" or not, the Court finds the SAC alleged an agreement between the Homeowner Defendants and Rankin to misdirect plaintiffs' "assessment money" to Rankin; that the defendants allegedly committed a wrongful act when the money was paid to Rankin, as all defendants knew the money was not intended for her; and that the plaintiffs thereby suffered damage. (Whether plaintiffs actually suffered any damage will be discussed *infra*.) The conduct alleged falls squarely within the reach of Code of Civil Procedure section 1714.10. Before bringing such a claim against an attorney like Rankin, plaintiffs were required to obtain a pre-filing order. Their failure to do so is fatal to their complaint against Rankin.

Moreover, it is highly unlikely that plaintiffs could have obtained such an order, as the

allegations of the SAC fail to set forth facts sufficient to establish that Rankin owed any fiduciary duty to plaintiffs. Plaintiffs' argument that Rankin owed them a fiduciary duty rests on the theory that the plaintiffs were the third party beneficiaries of the attorney-client contract between the Homeowners Association and Rankin.

"An attorney generally will not be held liable to a third person not in privity of contract with him since he owes no duty to anyone other than his client. The question of whether an attorney may, under certain circumstances, owe a duty to some third party is essentially one of law and, as such, involves a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances." (*Skarbrevik* v. *Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 701.) The factors to be considered in such a situation include the "extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the attorney's conduct and the injury, and the policy of preventing future harm." (*Ibid.*) The general rule is that for one to succeed on a claim as a third party beneficiary, the contract must be "expressly for the benefit of a third party. Hence, a person only remotely benefited, or a mere incidental beneficiary cannot enforce it." (*Thayer* v. *Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 160; citing 1Witkin, Summary Cal. Law (10th ed. 2005) Contracts, § 689, p. 776.) It is for these reasons that courts have always been "wary about extending an attorney's duty to persons who have not come to the attorney seeking legal advice and whom the attorney has never met." (*Thayer* v. *Kabateck Brown Kellner LLP, supra,* 207 Cal.App.4th at p. 160.)

The Court finds that plaintiffs were <u>not</u> the intended third-party beneficiaries of the employment agreement between the Homeowners Association and Rankin so as to create a fiduciary duty running from Rankin to the plaintiffs. Rankin was hired by the Homeowners Association to assist in resolving a dispute between the Homeowners Association and the Recreation Association. The mere fact Rankin may have written a letter or letters to the lot owners concerning those negotiations does not mean she was expressly working for the benefit of the lot owners. The letter itself makes

clear that Rankin was working for the Homeowners Association and not the individual lot owners.[5] That the lot owners may have been incidental beneficiaries of Rankin's efforts on behalf of the Homeowners Association does not create a fiduciary duty from Rankin to those lot owners. Moreover, there is no allegation in the SAC that Rankin's conduct led to any injury to the lot owners other than the fact she was paid for her efforts. This is not a situation where the law imposed a fiduciary duty on Rankin to people with whom she was not in privity of contract and had never met. The Court therefore concludes that Rankin had no fiduciary duty to the plaintiffs and, accordingly, cannot be liable to them for breach of that duty. The cause of action for breach of a fiduciary duty against Rankin must necessarily fail.

Similarly, the cause of action for constructive fraud against Rankin requires the existence of a fiduciary duty. "Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship." (*Horiike* v. *Coldwell Banker Residential Brokerage Company* (2014) 225 Cal.App.4th 427, 436.) Plaintiffs attempted to argue the existence of a "confidential relationship" between the lot owners and Rankin based on the letter or letters sent to notify them of the negotiations between the Homeowners Association and Recreation Association. Just as the letters did not create any fiduciary duty, nor did they create any confidential relationship. The October 10, 2011, letter specifically told the recipients that Rankin did not represent them. It further told them not to contact Rankin because she would not respond to their inquiries. This clearly does not qualify as a "confidential relationship." The absence of a fiduciary duty between Rankin and the plaintiffs is likewise fatal to the cause of action for constructive fraud. For the foregoing reasons, Rankin's demurrer to the SAC will be sustained and her motion to strike the SAC will be granted.

Turning to the demurrer of the Homeowner Defendants, all three causes of action against the

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[5] Rankin requested that the Court take judicial notice of a letter from Rankin to the lot owners dated October 10, 2011. It is true that a court may judicially notice discovery responses when ruling on a demurrer. (*Hawkins* v. *TACA International Airlines, S.A* (2014) 223 Cal.App.4th 466, 477, fn. 7.) Such a situation usually obtains where sworn responses to interrogatories or answers to requests for admission contradict the allegations of the complaint. (See, e.g., *Del E. Webb Corp.* v. *Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) In this case, Rankin requests that this Court judicially notice a letter which was produced in response to a request for production of documents. The reason for the request is apparent, however, from the fact that plaintiffs extensively referenced that letter in the SAC and selectively quoted from it. (See, SAC, p.13.) Rankin sought judicial notice of the letter not to prove the truth of the matters asserted therein, but rather to provide the Court with the statements that were actually made in the letter. Moreover, at the hearing on May 29, counsel for plaintiffs expressly stated he did not oppose the request for judicial notice of the letter. Accordingly, for the purpose of showing the exact contents of the letter, the Court grants the request for judicial notice.

Homeowner Defendants require the existence of some sort of duty to the plaintiffs and resulting damage from a breach of that duty. "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." (*Gutierrez* v. *Girardi* (2011) 194 Cal.App.4th 925, 932.) "The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the plaintiff's injury." (*Phillips* v. *TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139.) The elements of a constructive fraud cause of action are "(1) a fiduciary or confidential relationship; (2) nondisclosure; (3) intent to deceive, and (4) reliance and resulting injury (causation)." (*Prakashpalan* v. *Engstrom, Lipscomb and Lack* (2014) 223 Cal.App.4th 1105, 1131.) Accordingly, the demurrer of the Homeowner Defendants focuses on the issues of duty and damages.

Plaintiffs cite *Frances T.* v. *Village Green Owners Assn.* (1986) 42 Cal.3d 490, for the proposition that the Homeowners Association and the individual Homeowner Association defendants owed them a fiduciary duty. *Frances T.*, however, stands for exactly the opposite proposition. In that case, a member of a condominium owners association sued the association and its individual directors for injuries she suffered from a physical assault and rape at the hands of an intruder. The plaintiff's claim was based on the theory that the owners association had failed to remedy a problem with insufficient exterior lighting in the common area of the facility near her unit. (*Frances T., supra,* 42 Cal.3d at p. 496.) The Supreme Court specifically held that the directors of the condominium owners association did not owe the plaintiff a fiduciary duty arising from their status as corporate directors. (*Id.*, at pp. 513-514.) Rather, the court held that because the owners association was responsible for maintenance and control of the common areas of the development, the owners association essentially functioned in the role of a landlord in relation to the unit owner. (*Id.*, at p. 499.) Based on what the court viewed as the functional equivalent of a landlord-tenant relationship, the court held the plaintiff could state a cause of action against the individual directors of the condominium owners association for breach of their "duty to exercise due care for the residents' safety in those areas under their control." (*Ibid.*) As noted above, however, the plaintiff's cause of action for breach of fiduciary duty was rejected because a landlord does not stand in a fiduciary relationship with his or her tenant. (*Id.*, at

p. 512.)

Thus, *Frances T.* provides no solace to the plaintiffs in this case. Here, the plaintiffs were neither members of, nor shareholders in, the Homeowners Association. As corporate directors, any fiduciary obligations the Homeowner Defendants owed were to the Homeowners Association and its shareholders, not the plaintiffs. (*Berg & Berg Enterprises, LLC* v. *Boyle* (2009) 178 Cal.App.4th 1020, 1036.) For that reason, the First and Third causes of action of the SAC, which both require a fiduciary duty, are barred by "the traditional rule that directors are not personally liable to third persons for negligence amounting merely to a breach of duty the officer owes to the corporation alone." (*Frances T., supra,* 42 Cal.3d at p. 505.)

In response, the plaintiffs argue that by accepting their "assessment money" for the past 25 years, and passing it on to the Recreation Association, the Homeowner Defendants became the agents of the plaintiffs. This agency relationship, the plaintiffs contend, gives rise to the required fiduciary relationship.

"An agent is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and on account of the latter, and to render an account of such transactions. The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties. The significant test of an agency relationship is the principal's right to control the activities of the agent. It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent; the existence of the right establishes the relationship." (*Violette* v. *Shoup* (1993) 16 Cal.App.4th 611, 620.) [Internal quotations and citations omitted.]

In the instant case, the plaintiffs concede they voluntarily gave their $830 per year to the Homeowner Defendants. Although the SAC alleges that the plaintiffs "were entitled to vote to approve all matters pertaining to any water use or licensing agreement," (SAC, p. 7.) that does not mean the plaintiffs were entitled to control the activities of the Homeowners Defendants in the disposition of those funds. Plaintiffs' allegation that the homeowner defendants were "bound to use the assessment money in keeping with the vote and budget approved at the May 2011 annual meeting," is nothing more than an unsupported conclusion. (SAC, p. 9.) There are no facts alleged in the SAC

that would explain why the homeowner defendants were so bound. In fact, the SAC acknowledges "[p]laintiffs were under no obligation to pay any assessments under the CC&Rs because those restrictions or obligations were not recorded against their property. Assessment payments were voluntary and plaintiffs made such payments based on the representations of the approved budget to procure services for themselves." (SAC, p. 11.) The SAC also alleges, however, that it was the plaintiffs who approved this "budget." (SAC, p. 7.) Left unanswered is the question of how the Homeowner Defendants could be bound by representations the plaintiffs themselves had made?

In essence, the SAC alleges the plaintiffs voluntarily gave their money to the Homeowner Defendants and didn't like what the Homeowner Defendants did with it. These facts do not in any way establish an agency. "A person does not become the agent of another simply by offering help or making a suggestion. As the court stated in *Edwards* v. *Freeman* (1949) 34 Cal.2d 589, 591-592: 'To permit a finding of agency upon this evidence would be, in effect, to hold that one who performs a mere favor for another, without being subject to any legal duty of service and without assenting to any right of control, can be an agent. This is not the law.'" (*Violette* v. *Shoup, supra*, 16 Cal.App.4th at p. 620.) The allegations of the SAC fail to set forth facts sufficient to establish an agency relationship between the plaintiffs and the Homeowner Defendants.

Similarly, the SAC fails to set forth any facts sufficient to establish a duty that the Homeowner Defendants owed to the plaintiffs based on the bylaws of the Homeowners Association or the CC&R's. On the one hand, plaintiffs acknowledged they were neither members of, nor shareholders in, the Homeowners Association. They further acknowledged that the CC&R's were not recorded against their property. On the other hand, they then allege in the second cause of action that the Homeowner Defendants "breached the duty of care owed to plaintiffs under the Bylaws and CC&Rs named herein. . . ." (SAC, p. 19.) Because the plaintiffs were not obligated to pay any "assessment money" under either the bylaws or the CC&R's, their voluntary tender of that money to the Homeowner Defendants did not create any duty under the bylaws or the CC&R's that did not otherwise exist.

Even assuming, arguendo, that plaintiffs had alleged facts sufficient to establish some sort of duty running from the Homeowner Defendants to the plaintiffs, the SAC fails to allege in what way plaintiffs were damaged by the alleged diversion of the "assessment money." The money was intended

to be forwarded to the Recreation Association to provide for "water, roads, maintenance services expenses and reserves for services to be provided to plaintiffs." (SAC, p. 4.) There was no allegation whatever in the SAC that plaintiffs were not provided the enumerated services. When pressed at oral argument on May 29, 2014, counsel for plaintiffs eventually argued that the damage to plaintiffs was the failure of some undisclosed entity to maintain "reserves" for the future cost of those services. In other words, plaintiffs conceded they had been provided the services they paid for. Their alleged damage consisted of the possibility they might be required to make additional payments at some time in the future. "Generally speaking, to be actionable, harm must constitute something more than nominal damages, speculative harm, or the threat of future harm - not yet realized. . . ." (*Philipson & Simon* v. *Gulsvig* (2007) 154 Cal.App.4th 347, 364.) "Damages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable." (*Ferguson* v. *Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal .4th 1037, 1048.) The SAC fails to set forth facts showing how the plaintiffs were damaged by the conduct of the Homeowner Defendants. The failure to allege facts in support of a necessary element of all three causes of action in the SAC is a fatal defect. The demurrer of the Homeowner Defendants must therefore be sustained.[6]

The question remains whether plaintiffs should be given leave to amend the SAC. In their opposition to the demurrer, and at the hearing, plaintiffs requested that they be allowed leave to amend. They did not, however, indicate what additional facts could be alleged so as to remedy the deficiencies of the SAC on the issues of duty and damages.[7] A plaintiff seeking leave to amend after a demurrer has been sustained bears the burden of showing that an amendment would cure the defects in their pleading. (*Schifando* v. *City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "A plaintiff seeking to satisfy that burden must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. The assertion of an abstract right to amend does not satisfy

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[6] The Court's conclusion that plaintiffs have failed to state facts sufficient to constitute a cause of action on any of the three theories of liability set forth in the SAC renders it unnecessary to address the Homeowner Defendants' motion to strike plaintiffs' allegations seeking punitive damages.

[7] The oppositions of the plaintiffs to the demurrers conclude with the following, identical language: "In the event that the court finds that the demurrer should be sustained in any manner, plaintiffs seek leave to amend." Plaintiffs do not indicate in what manner they would amend the SAC.

this burden. The plaintiff must clearly and specifically state the legal basis for amendment, i.e., the elements of the cause of action, as well as the factual allegations that sufficiently state all required elements of that cause of action." (*Maxton* v. *Western States Metals* (2012) 203 Cal.App.4th 81, 95.) [Internal quotations and citations omitted.]

Initially, the Court notes the original complaint in this action was filed on March 27, 2013. The defendants filed demurrers to that complaint in June and July of 2013. In response, the plaintiffs filed the first amended complaint on July 25, 2013, thereby rendering the demurrers moot. As noted above, the Court ultimately ruled on the demurrers to the first amended complaint on January 30, 2014, sustaining those demurrers with leave to amend. This led to the SAC that is presently before the Court. In other words, the SAC represents the plaintiffs' third attempt to state a cause of action against the defendants. All three versions of the complaint have relied on the same basic set of facts, that plaintiffs voluntarily tendered their "assessment money" to the defendants who misdirected a portion of the funds to purposes other than those for which the funds were allegedly intended. The relationships of the parties to one another have not changed. Plaintiffs are not, and never were, members or shareholders in the Homeowners Association. The individual Homeowner Defendants have no relation to the plaintiffs other than as former directors of the Homeowners Association. Rankin has no connection to the plaintiffs other than having sent them correspondence in connection with her representation of the Homeowners Association. These facts have not changed through the various incarnations of the complaint.

In addition, other than the alleged "diversion" of funds to Rankin for attorney's fees, plaintiffs have not added any facts concerning how they suffered economic damage as a result of the actions of the defendants. The SAC flatly concedes: "To this day, plaintiffs do not know where all the money was spent." (SAC, p. 7.) Plaintiffs have never alleged, however, that they did not receive the services for which they paid. The only fact plaintiffs allege in the nature of damages is that funds were not kept in reserve for the cost of future services.[8] This essentially constitutes an admission that plaintiffs have suffered no present loss. Moreover, plaintiffs have failed to explain how the defendants could have

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[8] The SAC alleges as follows: "There is a loss of water, maintenance and service reserves because the defendants diverted money from the assessments. The reserve accounts for services to plaintiff are not funded due to defendant diverting plaintiff's assessment funds that were paid, in part, for readily available reserves." (SAC, p. 4.)

been compelled to hold funds in reserve when the funds were voluntarily contributed by plaintiffs. The assertion that the Homeowner Defendants were bound by the vote on the "budget" is a conclusion that is unsupported by any factual allegations. In the evolution of the complaint, culminating in the SAC, the underlying facts have not changed. Rather, what changed were the theories the plaintiffs advanced, based on those same facts.

To obtain leave to amend, plaintiffs must show there is a reasonable possibility that an amendment could cure the defects in the SAC on the issues of duty and damages. (*Rakestraw* v. *California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) "The assertion of an abstract right to amend does not satisfy this burden. The plaintiff must clearly and specifically set forth the applicable substantive law and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. Allegations must be factual and specific, not vague or conclusionary." (*Ibid.*) [Internal quotations and citations omitted.]

On the issues of duty and damages, plaintiffs have failed to meet this burden. They have not set forth any additional factual allegations they could make that would establish any duty, fiduciary or otherwise, on the part of the defendants to the plaintiffs. Further, they have been unable to show how they have suffered any present, economic damage. The theoretical possibility that plaintiffs might suffer damage in the future is not sufficient to support a complaint against the defendants at this time. The Court finds that plaintiffs have failed to set forth any facts they could allege which would state the required elements of a breach of duty by the defendants with resulting damage to the plaintiffs. For those reasons, the Court concludes that leave to amend should be denied.

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## CONCLUSION

The respective demurrers of the Homeowner Defendants and defendant Rankin to the SAC are sustained without leave to amend. The motion of the Homeowner Defendants to strike those portions of the SAC seeking exemplary damages is thereby rendered moot. The motion of defendant Rankin to strike the SAC for failure to comply with Code of Civil Procedure section 1714.10 is granted without leave to amend. The defendants are directed to prepare a form of judgment dismissing the SAC in its entirety as to the Homeowner Defendants and defendant Rankin.

The matter is set for a case management conference on September 19, 2014, at 1:15 p.m. in Department One of this Court for receipt of the dismissal. The hearing will be vacated if the judgment of dismissal is on file prior to the date of the hearing.

IT IS SO ORDERED.

Date: JUL 31 2014

**Donald Segerstrom**
JUDGE OF THE SUPERIOR COURT

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 121 Spear Street, Suite 200, San Francisco, CA 94105-1582.

On August 5, 2014, I served true copies of the following document(s) described as **JUDGMENT [PROPOSED]** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Manning & Kass, Ellrod, Ramirez, Trester LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 5, 2014, at San Francisco, California.

Jorie Prat

MANNING & KASS ELLROD, RAMIREZ, TRESTER LLP Attorneys at Law

**SERVICE LIST**
**Gloria Harvey, et al. v. Charles Varvayanis, et al.**
**CV58108**

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