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10 FOUNDATION; SEMPRE AVANTI, LLC; JOSEPH DIMASSA; MARIA  
11 DIMASSA; CARA DIMASSA; GIANCARLO DIMASSA, M.D.; FAITH  
12 PORTER; DANIEL H. RAINEY; JOSEPH NATALIZIO; JOSEPH DIMASSA  
13 AND MARIA DIMASSA AS TRUSTEES OF THE DIMASSA FAMILY TRUST,  
14 TRUST DATED APRIL 9, 1981; NATALIE DEL CASTILLO

15  
16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA

18 ELENA MATYAS, individually and as  
19 Successor-in-Interest to ROXIE  
20 MIRABELLE FORBES; and DOUGLAS  
21 FORBES, individually and as Successor-  
22 in-interest to ROXIE MIRABELLE  
23 FORBES,

24 Plaintiff,

25 v.

26 SUMMERKIDS, INC., a California  
27 Corporation, et al.

28 Defendants.

Case No. 2:21-cv-04163 JAK (JDEx)

**REPLY BRIEF BY DEFENDANTS  
SUMMERKIDS, INC.  
(INDIVIDUALLY AND DBA  
ANGELUS MOUNTAIN CENTER),  
THE ENOTECA, LLC, DI MASSA  
FAMILY FOUNDATION, SEMPRE  
AVANTI, LLC, JOSEPH DIMASSA,  
MARIA DIMASSA, CARA  
DIMASSA, GIANCARLO  
DIMASSA, M.D., FAITH PORTER,  
DANIEL H. RAINEY, AND JOSEPH  
NATALIZIO IN SUPPORT OF  
THEIR MOTION TO DISMISS  
PLAINTIFFS' SECOND AMENDED  
COMPLAINT [FED. R. CIV. P.  
12(b)(6)]**

Date: October 25, 2021  
Time: 8:30 a.m.  
Courtroom: 10B

Honorable John A. Kronstadt

1 **I. INTRODUCTION**

2 Plaintiffs' opposition brief confirms that they improperly rely on conclusory  
3 statements and general allegations in their Second Amended Complaint ("SAC") to  
4 attempt to hold up their punitive damages claim. This Court should dismiss the  
5 punitive damages claim against each of these moving defendants for the following  
6 reasons:

7 *First*, plaintiffs' brief does not dispute and never addresses the defendants'  
8 argument that the SAC fails to comply with Rule 9(b) in that it fails to allege facts  
9 to support their punitive damages claims with particularity, and instead opting to  
10 make general claims against "defendants" as a whole. The law rejects such style of  
11 pleading.

12 *Second*, plaintiffs' brief reveals that the primary basis for their punitive  
13 damages claim against individual employee/lifeguard defendants Daniel Rainey,  
14 Joseph Natalizio, and Faith Porter is that these defendants allegedly misrepresented  
15 that they were certified as lifeguards by the American Red Cross. But the facts  
16 alleged in the SAC demonstrate that the plaintiffs are undoubtedly aware that the  
17 American Red Cross issued the certifications at the direction of lifeguard trainer  
18 defendant Andrew Cervantes. The SAC never mentions any actual statement or  
19 even communication to the plaintiffs by the employee/lifeguard defendants, and  
20 because of that, there is no alleged fraudulent misrepresentation by them. Without  
21 that, there can be no basis for their punitive damages claim against these  
22 defendants.

23 *Third*, plaintiffs' punitive damages claims against the shareholders of  
24 Summerkids, Inc. fail because plaintiffs only rely on the shareholders' relationship  
25 with Summerkids, Inc. as the basis for their punitive damages claim. Because  
26 liability of corporate officers does not derive from one's corporate position, but  
27 rather can only derive from their own individual tortuous conduct, and plaintiffs  
28 never allege any fraudulent, malicious or oppressive act by Joseph DiMassa, Maria

1 DiMassa, Giancarlo DiMassa, or Cara DiMassa as individuals, the claim for  
2 punitive damages must be dismissed against them as well.

3 *Finally*, as to the entity defendants, plaintiffs’ opposition brief completely  
4 omits any discussion as to plaintiffs’ obligations in pleading against a corporate  
5 entity. Because they clearly fail to meet the heightened pleading requirements  
6 required to maintain their claims against the entity defendants, this Court should  
7 grant the motion to dismiss.

8 On each of these bases, and as discussed more fully herein, this Court should  
9 grant the motion to dismiss in whole, without leave to amend, so that, almost two  
10 years after the initial complaint was filed, the parties can move beyond the  
11 pleadings stage.

12 **II. ARGUMENT**

13 **A. The Motion to Dismiss Should be Granted Because Plaintiffs Do**  
14 **Not Dispute that their SAC Fails to Comply with Rule 9(b)**

15 Although framed as defendants’ primary argument in the moving papers<sup>1</sup>,  
16 plaintiffs’ opposition brief wholly ignores the defendants’ contention that the  
17 punitive damages claim against all of the defendants should be dismissed because  
18 their SAC fails to comply with Rule 9(b), which requires allegations to be made  
19 with particularity. In fact, within the 23-pages of the opposition brief, Rule 9(b) is  
20 not referenced even once. But a review of plaintiffs’ SAC reveals that it is  
21 unnecessarily voluminous, redundant, and rife with impertinent inflammatory  
22 allegations and legal conclusions against unspecified “defendants” as if all twenty  
23 defendants acted in concert although no actual interaction or nexus between all of  
24 the parties is ever stated. Because Rule 9(b) requires that allegations of fraud are  
25 made with particularity and plaintiffs’ SAC does not comply (even after having  
26  
27

28 <sup>1</sup> See Motion to Dismiss, pg. 10:2-16.

1 | previously being granted leave to amend), this Court should grant the motion to  
2 | dismiss in whole.

3 |       **B. Plaintiffs’ Punitive Damages Claims Against the Lifeguards –**  
4 |       **Daniel Rainey, Joseph Natalizio, and Faith Porter - Should be**  
5 |       **Dismissed as a Matter of Law**

6 |       Drastically pivoting from the language in the SAC, plaintiffs’ opposition  
7 | brief contends that the Court should allow them to continue to pursue to a punitive  
8 | damages claim against camp lifeguard/employee defendants Daniel Rainey, Joseph  
9 | Natalizio, and Faith Porter because they each “concealed from Plaintiffs that [they]  
10 | did not have legitimate ARC Certification[.]” [Opposition, pg. 17:5-7 (re Daniel  
11 | Rainey), pg. 18:23-25 (re Joseph Natalizio), pg. 21:1-3 (re Faith Porter).] But the  
12 | SAC never alleges that. Instead, the SAC alleges that it was not these defendants  
13 | who “concealed” anything, but rather that defendant Andrew Cervantes fraudulently  
14 | certified them as lifeguards after Cervantes did not follow American Red Cross  
15 | protocols. [SAC, ¶ 18.] To be sure, these lifeguards were issued American Red  
16 | Cross certifications as lifeguards. That their training is alleged to have been not up  
17 | to the standard of care does not fall on them, but instead, as alleged in the SAC, on  
18 | the trainer, who allegedly “wrongfully certified” the lifeguards. [SAC, ¶ 30.]

19 |       Reviewing the actual language of the SAC, which the moving papers  
20 | identified and the opposition brief wholly ignores, the allegations against these  
21 | lifeguard defendants amount to, at best, a claim for negligence, and not any actions  
22 | that were performed with the requisite malice, oppression, or fraud to maintain a  
23 | prayer for punitive damages. Further, plaintiffs’ repetitive use of buzzwords, like  
24 | that the lifeguards’ actions were “despicable,” should be ignored as conclusory and  
25 | not entitled to the assumption of truth. *See Sprewell v. Golden State Warriors*, 266  
26 | F.3d 979, 988 (9th Cir. 2001). Because routine negligence does not justify an award  
27 | of punitive damages, and because the SAC fails to comply with Rule 9, this Court  
28 | should grant the motion to dismiss. *See Taylor v. Superior Court*, 24 Cal.3d 890,

1 900 (1979) (“[R]outine neglig[en]ce . . . would not justify an award of punitive  
2 damages.”); *see also* Fed. R. Civ. Pro. 9(b).

3 **C. Plaintiffs’ Punitive Damages Claims Against the Shareholders of**  
4 **Summerkids, Inc. – Joseph DiMassa, Maria DiMassa, Cara**  
5 **DiMassa, and Giancarlo DiMassa - Should be Dismissed as a**  
6 **Matter of Law**

7 Interestingly, plaintiffs’ argument in their opposition brief never mentions  
8 these individually named defendants by name. Instead, lumping them together with  
9 the entities to which they are shareholders, plaintiffs claim wholesale that each of  
10 these defendants acted with malice, oppression, and fraud without a single alleged  
11 fact tying them to these serious claim. This is a critical omission as liability of  
12 corporate officers does not derive from their corporate positions, but rather can only  
13 derive from their own individual tortuous conduct, which plaintiffs never allege  
14 with any specificity. *See Frances T. v. Village Green Owners Ass’n*, 42 Cal.3d 490,  
15 503 (1986).

16 For example, defendant Giancarlo DiMassa is never alleged to have made  
17 any affirmative statements to the plaintiffs and is not alleged to have been present at  
18 camp on the date of the incident or any other date. The same is true as to defendants  
19 Joseph DiMassa and Maria DiMassa. Accordingly, no facts are alleged that could  
20 rise to the level of liability as an individual, let alone for a finding of punitive  
21 damages against them. And, while Cara DiMassa was alleged to have been at camp  
22 on the date of the incident, the SAC is clear that this defendant is also alleged to be  
23 liable to the plaintiffs as a result of her position as a shareholder and employee of  
24 Summerkids, Inc., and not as a result of any action outside of her employment. On  
25 those grounds, plaintiffs’ SAC does not contain sufficient allegations to maintain a  
26 punitive damages claim against any of the shareholder defendants in their capacity  
27 as individuals.

28 ///

**D. Plaintiffs' Punitive Damages Claims Against the Entity Defendants  
Should be Dismissed as a Matter of Law**

Plaintiffs' opposition brief lumps all of the entity defendants together with their shareholders in an attempt to argue that they committed malice, oppression or fraud such that punitive damages may be warranted. However, by tangling the allegations against nine defendants (Summerkids, Inc., Angelus Mountain Center, The Enoteca, Sempre Avanti, the DiMassa Family Foundation, Joseph DiMassa, Maria DiMassa, Giancarlo DiMassa, and Cara DiMassa) together, the plaintiffs explicitly demonstrate that they have failed to comply with Rule 9(b), which requires the plaintiffs to state "with particularity the circumstances constituting fraud[.]" Fed. R. Civ. P. 9(b). Emphasizing this, the argument section of their opposition brief never even references any of these entity defendants except for Summerkids, Inc. by name. In doing so, plaintiffs reveal that there is no basis at all to continue to allege punitive damages against entity defendants Angelus Mountain Center, The Enoteca, Sempre Avanti, and the DiMassa Family Foundation. That is consistent with the allegations made in their SAC, which similarly are bereft of any actual facts that relate to those entities.

As to Summerkids, Inc., plaintiffs ignore the heightened pleading requirement for pleading punitive damages against an entity. *See* Cal. Civ. Code § 3294 (stating "An employer *shall not be liable* for [punitive] damages pursuant to subdivision (a), based upon the acts of an employee of the employer, *unless the employer had advance knowledge of the unfitness of the employee and employed him or her with conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice.*" [emphasis added]) In other words, plaintiffs are required to plead both advanced knowledge of the outrageous conduct and corporate ratification of the bad act. No such allegations are made here, and certainly none with any particularity. Instead, plaintiffs rely on conclusory

1 buzzwords and inflammatory statements to appeal to the reader's sense of outrage  
2 as to plaintiffs' loss. The law requires more for an actual finding of liability or  
3 punitive damages. *See Sprewell*, 266 F.3d at 988 (holding that a court need not  
4 accept as true unreasonable inferences or conclusory legal allegations cast in the  
5 form of factual allegations).

6 Beyond that, plaintiffs' opposition brief concentrates on false representations  
7 surrounding lifeguard certifications as the basis for their punitive damages claim.  
8 The SAC itself alleges that it was American Red Cross trainer defendant Andrew  
9 Cervantes who failed to complete the lifeguard training instruction and then  
10 subsequently represented to the American Red Cross and Summerkids, Inc. that the  
11 lifeguards were properly trained such that lifeguard certifications were issued by  
12 American Red Cross. Cervantes' actions were not done in concert with any other  
13 defendants, and thus the outrage and any alleged corresponding basis for a finding  
14 of fraud, malice, or oppression is misplaced. When the SAC and plaintiffs'  
15 opposition brief are stripped of the conclusory and inflammatory language, what  
16 becomes clear is that there is no basis for an allegation of punitive damages against  
17 any of these moving defendants.

18 **III. PLAINTIFFS' REQUEST FOR LEAVE TO AMEND SHOULD BE**  
19 **DENIED**

20 While defendant recognizes the Court's liberality in permitting leave to  
21 amend, the Court should refrain from doing so here for the following reasons: First,  
22 by the time that this motion is heard, plaintiffs' lawsuit will have been pending for  
23 nearly two years. Second, this is the Second Amended Complaint. Plaintiffs have  
24 already amended their complaint several times, once already to address deficiencies  
25 in their punitive damages claim. Third, plaintiffs took many of these defendants'  
26 deposition months before they filed their SAC, and so they had all facts available to  
27 them when drafting this iteration of the complaint. The Court and parties should be  
28 able to rely on the premise that all facts available were included in the SAC.

1 Accordingly, it is reasonable to assume that plaintiffs do not possess any facts that  
2 could cure the deficiencies noted throughout this motion, and on that basis, this  
3 Court should deny plaintiffs’ request for leave to amend as to the claims against this  
4 defendant, and allow the parties to move the matter further in the litigation process.  
5 *See Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th  
6 Cir. 1986) (finding that while leave to amend may be freely granted, leave to amend  
7 is properly denied when “the court determines that the allegation of other facts  
8 consistent with the challenged pleading could not possibly cure the deficiency.”)

9 **IV. CONCLUSION**

10 For each of the reasons articulated herein, defendants respectfully requests  
11 that this Court grant this motion to dismiss. In the event that the Court does not do  
12 so in full, these moving defendants additionally request that the Court deny  
13 plaintiffs’ request for leave to amend.

14  
15 Dated: September 3, 2021 TYSON & MENDES, LLP

16  
17 By: /s/ Margaret M. Holm

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19 Sheryl M. Rosenberg  
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26 CARA DIMASSA; GIANCARLO  
27 DIMASSA, M.D.; FAITH PORTER;  
28 DANIEL H. RAINEY; JOSEPH  
NATALIZIO; JOSEPH DIMASSA AND  
MARIA DIMASSA AS TRUSTEES OF  
THE DIMASSA FAMILY TRUST, TRUST  
DATED APRIL 9, 1981; NATALIE DEL  
CASTILLO