NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PETER HOLLAND, et al.,

Plaintiffs,

v.

THE RELATED COMPANIES, INC., et al.,

Defendants.

Case No. 15-cv-03220-JSW

ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION FOR SUMMARY ADJUDICATION OF ISSUE RE PUNITIVE DAMAGES; GRANTING DEFENDANTS MOTION IN LIMNINE NO. 1; AND GRANTING, IN PART, DEFENDANTS' MOTION IN LIMINE NO. 4.

Re: Dkt. Nos. 98, 196, 199

United States District Court
Northern District of California

On July 11, 2016, the Court granted, in part, the motion for partial summary judgment filed by Defendants, Related Management Company L.P. ("RMC") and Third and Mission Associates LLC ("TMA") (collectively "Defendants"). The Court deferred ruling on the issue of whether Plaintiffs are entitled to punitive damages, and it ordered supplemental briefing on the issue. The parties have made efforts to settle this matter short of trial but, to date, those efforts have not succeeded. For the following reasons, the Court GRANTS, IN PART, AND DENIES, IN PART, Defendants' motion for summary adjudication.

On July 17, 2017, Defendants filed a motion *in limine* to bifurcate the issue of punitive damages ("first motion *in limine*). Plaintiffs do not oppose that motion. In light of the Court's ruling on Defendants' motion for summary adjudication on punitive damages, the Court GRANTS Defendants' first motion *in limine*.

Defendants also filed a motion in limine to exclude, *inter alia*, evidence regarding a lawsuit filed in the United States District Court for the Southern District of New York and a

Consent Decree entered in that case ("fourth motion *in limine*). For the reasons set forth below, the Court GRANTS, IN PART, Defendants' fourth motion *in limine*. If the parties are unable to resolve this matter at the settlement conference scheduled for July 24, 2017, the Court will address the remaining issues in that motion at the pre-trial conference.

BACKGROUND

In November 2008, Plaintiffs, Peter Holland ("Mr. Holland") and Kristin Holland ("Mrs. Holland") (collectively "Plaintiffs") leased unit 7C in The Paramount apartment complex ("The Paramount"). Unit 7C is a 630 square foot studio apartment. (Declaration of Deborah Lunn ("Lunn Decl."), ¶ 3.) In December 2014, Plaintiffs renewed their lease for a period of one year. (*See* First Amended Complaint ("FAC"), ¶¶ 6, 9-10, 12; RMC Amended Answer to FAC ("RMC Answer") ¶¶ 1, 6, 9-10, 12; TMA Amended Answer to FAC ("TMA Answer") ¶¶ 1, 6, 9-10, 12; *see also* Lunn Decl., ¶ 3.) The Paramount is a residential apartment complex owned by TMA and operated by RMC. (FAC ¶¶ 6-7; RMC Answer ¶¶ 6-7; TMA Answer ¶¶ 6-7; Declaration of Warren Loy ("Loy Decl."), ¶ 2; *see also* Lunn Decl., ¶ 2.)

In January 2015, Defendants sent a notice to The Paramount's residents that the building's amenities space, which was located on the floor below Plaintiffs' apartment, would be renovated. That project commenced in March 2015. (RMC Answer ¶¶ 13, 15; TMA Answer ¶¶ 13, 15; Declaration of Connie Cortese ("Cortese Decl."), ¶ 2; Lunn Decl., ¶ 5.)

Mr. Holland suffers from Post-Traumatic Stress Disorder ("PTSD"). On March 12, 2015, Mr. Holland called Connie Cortese, one of The Paramount's leasing agents, to inquire how long the noise from construction would continue. (Cortese Decl., ¶ 3; Declaration Celia McGuinness ("McGuiness Decl."), ¶ 7, Ex. 5.) In an email to Jessie Leite ("Mr. Leite"), The Paramount's resident manager at the time, Ms. Cortese stated that "I know you have spoken with his wife numerous times about this remodel. … Their biggest issue is how long this noise is going to last. As you know he is a vet and a lawyer, he doesn't want to go there but will if needed." (Cortese Decl., ¶ 3, Ex. A.) Ms. Cortese attests that she directed Mr. Leite to provide Plaintiffs with information about the construction schedule and attests that Mr. Leite told her he complied with that request. (*Id.*, ¶ 3.)

On April 1, 2015, Mr. Holland spoke with Tanya Noeggerath Brown by telephone about the construction noise. (Declaration of Lyn Agre dated June 17, 2016 ("6/17/16 Agre Decl."), ¶ 6, Ex. E (Email String at Related 000139).) On that same day, Ms. Brown sent an email to Richard Crane, an RMC District Manager, and Tom Kearns, an RMC Vice President of Leasing, and reported that Mr. Holland offered three options to address the noise issue, which he stated was triggering his PTSD: "(1) Rent concession; (2) Move to comparable apartment with the same rent that he is paying now; or (3) Seek legal counsel." (6/17/16 Agre Decl., ¶ 3, Ex. D; *see also id.*, Ex. B (Deposition of Tanya Noeggerath Brown ("Brown Depo.") at 50:24-52:14, 125:23-172:1).)

In the email to Mr. Crane and Mr. Kearns, Ms. Brown stated that she advised Mr. Holland that

> we do not have a comparable apartment to move him and his family into. He said that was unacceptable. I asked him to come up with a number for rent concession. He said he needed to think about it. … I will follow up tomorrow. He kept saying how unfortunate this was and that it was the landlord's responsibility to provide the right of quiet enjoyment to the residents and this was not happening. This may need to go further than me. Let me know what you think. I will circle back when I get a number from him.

(6/17/16 Agre Decl., ¶ 5, Ex. D.) Ms. Brown testified that she believed she reviewed the inventory of available apartments at the time she was speaking with Mr. Holland, and that she believed when she said "comparable" she meant similar square footage to their current unit. (6/17/16 Agre Decl., Ex. B (Brown Depo. at 128:19-130:10).)

Ms. Brown testified that Mr. Holland told her the noise was causing him pain and stated she believed him. (McGuiness Decl., Ex. A (Brown Depo. at 84:2-14).) Ms. Brown testified Defendants did not offer a rent concession, because they "were trying to find a solution to get him away from the noise." (6/17/16 Agre Decl., Ex. B (Brown Depo. at 51:20-52:22).) There is evidence in the record that suggests the noise from the construction could be heard on the upper floors of The Paramount. (*See* 6/17/16 Agre Decl., Ex. E (Email string at Related 000138), Ex. F (Deposition of Deborah Lunn ("Lunn Depo.") at 253:18-25.)

On April 8, 2015, Mr. Holland sent an email to Ms. Brown and stated:

> Essentially, I offered to move my family within the building to another unit of comparable square footage, paying our current rate of rent, for a time and on terms to be further negotiated. We would then agree to hold Related harmless for all damages. You informed me that Related corporation rejected this offer. You also informed me of their unacceptable accord and satisfaction counter-offer. … I must now revoke any and all offers, stated or implied, made to resolve this situation. Please let me know if you are prepared to accept service of process on behalf of Related [C]orporation.

(6/17/16 Agre Decl., Ex. C; McGuiness Decl, Ex. 8.) On April 10, 2015, in response to Ms. Brown's offer to put him in touch with their legal counsel, Mr. Holland sent an email and stated he could "think of no good reason to speak to opposing counsel now. … I made you a good-faith offer of compromise that was both fair and reasonable. Your employer immediately rejected it out of hand[.] … Negotiations have, therefore, concluded." (6/17/16 Agre Decl., Ex. C.)

On April 10, 2015, Ms. Lunn sent an email to Leslie Torres in RMC's New York compliance office and notified Sherry Scurfeld, RMC's Fair Housing officer, of Plaintiffs' complaints. (Lunn Decl., ¶ 6, Ex. A; *see also* McGuinness Decl., Ex. 11.) Ms. Torres forwarded the email to Ms. Scurfeld. (McGuiness Decl., Ex. 11.) Ms. Lunn advised Ms. Torres that they offered Plaintiffs: a $2000.00 rent concession; release from their lease with no-penalty and up to $2,000.00 in moving expenses; and provision of a hotel room in the vicinity from Monday through Friday "until the end of April when the demo will be complete that he could work from and bring his daughter with him." (Lunn Decl., ¶ 6, Ex. A.)[1] Ms. Lunn stated that Plaintiffs wanted "a comparable apartment for the same [rental] rate ... (large studio for $2,795)," and she advised Ms. Torres that "there are only 1BRs available starting at $3,825." (*Id.*) Ms. Lunn then asked: "Please advise if there is anything else that you feel we should be offering him?" (*Id.*)

Defendants have a written policy entitled "Processing Requests for Reasonable Accommodations and Modifications Under the Fair Housing Act" (hereinafter "FHA Policy").

[1] It is undisputed that an offer for a hotel room was made, but the terms of this option are not clear. Further, the record suggests that Mr. Holland did not consider it a viable option. (*See, e.g.*, 6/17/16 Agre Decl., ¶ 2, Ex. A (Deposition of Peter Holland at 287:10-288:5, 297:8-299:24; 6/17/16 Agre Decl., Ex. B (Brown Depo. at 56:8-59:25).)

(Loy Decl., ¶ 6, Ex. A (excerpt of FHA Policy); McGuinness Decl., ¶ 13, Ex. 12.)[2] Defendants' FHA Policy states:

> An understanding of the scope of the Act is necessary to assure compliance, particularly in the area of reasonable accommodations and modifications. The following procedures have been developed to facilitate the handling of requests. Following these procedures consistently is imperative to assure our compliance with the regulations and to avoid any potentially discriminatory actions. Each employee is required to be familiar with the procedures and to understand and carry out his/her responsibility in the process, whether by directing residents/applications or employees to the appropriate resource on staff or by carrying out the process.

(FHA Policy at 1.) Based on the terms of the FHA Policy, it appears that site and regional staff would have authority to grant some requests for accommodations. However, "[s]ite and regional staff are **not** authorized to deny or modify **any** request. All recommendations to deny or to modify requests must be forwarded for review by Compliance and/or the Fair Housing Office or a designee." (*Id.* at 2 (emphasis in original); *see also id.* at 5, 7.)

In May 2015, the parties exchanged demand letters. (Lunn Decl., ¶¶ 8-9, Exs. B-C.) On July 10, 2015, Plaintiffs filed their complaint and alleged Defendants violated, *inter alia*: (1) the Fair Housing Amendments Act, 42 U.S.C. sections 3601, *et seq.* (the "FHAA Claim"); (2) California's Fair Employment and Housing Act, Government Code sections 12926, *et seq.* (the "FEHA Claim"); and (3) California's Disabled Persons Act, Civil Code sections 54, *et seq.*.

Plaintiffs also filed a motion for a preliminary injunction. (Docket No. 4.) On July 23, 2015, the Court granted Plaintiffs' motion for a preliminary injunction, and it ordered Defendants to "make a reasonable accommodation to Plaintiffs by moving them to an upper apartment in their building, free of construction noise, for the duration of their lease at their current rental rate." The Court also ordered Defendants to pay "the reasonable costs of such relocation." (Docket No. 31, Order Granting Motion for Preliminary Injunction at 5:25-6:2.) Defendants moved Plaintiffs, in compliance with the Court's Order, and Plaintiffs moved out of The Paramount in December 2015. (Lunn Decl., ¶ 3.)

[2] Further citations to the FHA Policy are from the copy attached to the McGuiness Declaration.

The Court will address additional facts as necessary in its analysis.

ANALYSIS

A. Legal Standards Applicable to Motions for Summary Judgment.

A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986). Summary judgment, or partial summary judgment, is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323; *see also* Fed. R. Civ. P. 56(c). An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248. If the party moving for summary judgment does not have the ultimate burden of persuasion at trial, that party must produce evidence which either negates an essential element of the non-moving party's claims or that party must show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

Once the moving party meets its initial burden, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996); *see also* Fed. R. Civ. 56(e). In addition, the party seeking to establish a genuine issue of material fact must take care to point a court to the evidence precluding summary judgment. A court is "'not required to comb the record to find some reason to deny a motion for summary judgment.'" *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (quoting *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409,

1418 (9th Cir. 1988)). If the non-moving party fails to point to evidence precluding summary judgment, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. The Parties' Requests for Judicial Notice and Evidentiary Issues.

Plaintiffs rely, in part, on a lawsuit filed in the United States District Court for the Southern District of New York, *United States of America v. Related Companies, et al.*, No. 14-CV-1826, and a Consent Decree entered in that lawsuit, to support their argument that punitive damages are warranted (the "SDNY Lawsuit"). (Plaintiffs' Request for Judicial Notice, Exs. A ("SDNY Complaint"), B (Consent Decree).) Although TMA and RMC are not specifically named in the SDNY Lawsuit, it was brought against "Related Companies and its subsidiaries and affiliates." (SDNY Complaint, ¶¶ 1, 12.)

The United States alleged that the defendants in that case violated the FHA "by failing to design and construct covered multi-family dwellings and associated places of public accommodations, so as to be accessible to persons with disabilities." The buildings at issue are located in New York. (SDNY Compl., ¶¶ 1, 16-29; Consent Decree, Appendix E.) The Consent Decree contains the following provisions:

> The Settling Defendants shall also ensure that they and their employees and agents who have supervisory authority over the design and/or construction of Covered Multifamily Dwellings have a copy of, are familiar with, and personally have reviewed the Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (1991), and the United States Department of Housing and Urban Development, Fair Housing Act Design Manual, A Manual to Assist Builders in Meeting the Accessibility Requirements of the Fair Housing Act (August 1996, Rev. April 1998). The Settling Defendants and their employees and agents whose duties, in whole or in part, involve the management, sale and/or rental of multifamily dwellings *at issue in this case* shall be informed of those portions of the FHA that relate to accessibility requirements, reasonable accommodations and reasonable modifications.
>
> Within ninety (90) days of the date of entry of this Consent Decree, the Settling Defendants and all employees and agents whose duties, in whole or in part, involve or will involve supervision over the development, design and/or construction of multifamily dwellings of the type at issue in this case shall undergo training on the design requirements of the FHA. [Footnote: The educational program provided to employees not engaged in design, construction, or maintenance, such as sales and rental employees, may focus on the portions of the law that relate generally to accessibility requirements as opposed to technical design and construction requirements.]…

(Consent Decree, ¶¶ 74-75 (emphasis added).)

Plaintiffs argue that "Defendants were charged under the Consent Decree with training their sales and leasing employees on" their FHA Policy "and the fair housing law, including reasonable accommodations. … Nonetheless the [FHA Policy] was never followed in this case." (Opp. Br. at 17:6-8.) Defendants argue these documents are not relevant and object to them on that basis.

The Court concludes the SDNY Lawsuit and the Consent Decree are not relevant to the issue of whether punitive damages are warranted in this case. Based on a review of the record, the only employee who was subject to the requirements of the training program is Warren Loy, and he has testified he completed the training program and certified that he had done so. (Declaration of Lyn R. Agre dated 8/5/16 ("8/5/16 Agre Decl."), ¶ 18, Ex. 11 (Deposition of Warren Loy, Vol. II ("Loy Depo. Vol. II") at 480:2-13); Supplemental Declaration of Warren Loy, ¶ 3.) The Court SUSTAINS Defendants' objections to those documents and will not consider them for purposes of this motion.[3]

Defendants also object to an exhibit attached to the Supplemental Declaration of Steven L. Derby ("Supp. Derby Decl."), which is a copy of a "Tenant Vacancy spreadsheet" prepared by Mr. Derby. That spreadsheet purports to show "the apartments in [T]he Paramount that were available to rent in April and May, 2015." (Supp. Derby Decl., ¶ 2, Ex. 1.) According to Mr. Derby, he prepared the spreadsheet from vacancy reports produced by the Defendants, which also are attached to his declaration. (*Id.*, ¶ 2, Ex. 2.) The Court OVERRULES, AS MOOT, Defendants' objection, because the Court did not rely on Exhibit 1 to resolve the motion.

Defendants filed a Supplemental Request for Judicial Notice with their supplemental reply brief. The Court did not rely on any of the documents attached to that request. Accordingly, the Court DENIES, AS MOOT, the request to take judicial notice of those documents.

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[3] The Court GRANTS, IN PART, Defendants' fourth motion *in limine* for the reasons set forth above. The Court also concludes that any probative value that this evidence may have is "substantially outweighed by a danger of … unfair prejudice [and] confusing the issues." Fed. R. Evid. 403.

C. Legal Standards for An Award of Punitive Damages.

Plaintiffs ask for punitive damages on their FHAA and FEHA claims. "[I]f the court finds that a discriminatory housing practice has occurred …, the court may award to the plaintiff actual and punitive damages[.]" 42 U.S.C. § 3613(c)(1). In order to obtain punitive damages, a plaintiff must show that "a defendant's conduct is shown to be motivated by evil motive or intent, or [that] it involves reckless or callous indifference to the federally protected rights of others." *Fair Housing of Marin v. Coombs*, 285 F.3d 899, 906 (9th Cir. 2002) (citing *Smith v. Wade*, 461 U.S. 30, 56 (1983)); *see also Kolstad v. American Dental Association*, 527 U.S. 526, 529-30 (1999) (under Title VII of Civil Rights Act and the Americans with Disabilities Act, punitive damages are "limited … to cases in which the employer has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual") (internal quotations and citations omitted). Plaintiffs must prove they are entitled to punitive damages by a preponderance of the evidence. *See, e.g., In Re Exxon Valdez*, 270 F.3d 1215, 1232 (9th Cir. 1999); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 324 (N.D. Cal. 1992).

As set forth in *Kolstad*, the focus for punitive damages is on a defendant's state of mind. *See, e.g., Kolstad*, 527 U.S. at 533, 535. "The terms 'malice' or 'reckless indifference' pertain to the [defendant's] knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad*, 528 U.S. at 535. "[E]gregious or outrageous acts may serve as evidence of the requisite mental state," but that type of conduct is not required to support an award of punitive damages. *Id.* A plaintiff may also be awarded punitive damages, based on a showing that a defendant was recklessly or callously indifferent to his or her rights. Thus, a plaintiff may obtain punitive damages if he or she can demonstrate the defendant "discriminate[d] in the face of a perceived risk that its actions [would] violate federal law[.]" *Id.* at 536. Punitive damages would not appropriate if a defendant is "unaware of the relevant federal law" or "discriminates with the distinct belief that [the] discrimination is lawful." *Id.* at 536-37.

Under California law, a plaintiff may obtain punitive damages if he or she can prove "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or

malice[.]" Cal. Civ. Code § 3294(a). The "clear and convincing" standard means "a finding of high probability … so clear as to leave no substantial doubt; sufficiently strong to commend that unhesitating assent of every reasonable mind." *Scott v. Phoenix Sch., Inc.*, 175 Cal. App. 4th 702, 715 (2009) (internal quotations and citations omitted).

> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Cal. Civ. Code § 3294(c).

D. The Court Grants, in Part, and Denies, in Part, Defendants' Motion.

1. Liability of Corporate Defendants.

Plaintiffs seek to hold corporate defendants liable for punitive damages. In *Kolstad*, the Supreme Court noted that, with an exception discussed below, general principles of agency would apply to determine if a principal could be held liable for punitive damages. *Kolstad*, 527 U.S. at 540-46; *see also California Housing Rights Center v. Krug,* 564 F. Supp. 2d 1138, 1153 (C.D. Cal. 2007) (when a defendant's employees are allegedly responsible for the discrimination under the FHA, "[t]he owner's direct participation in the discriminatory practice is not necessary; punitive damages may be awarded where the owner ignored its duties under the law or otherwise engaged in knowledgeable inaction").

Under California law,

> An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer … authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act

> of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

Cal. Civ. Code § 3294(b); *see also Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1151 (1998).[4]

It is undisputed that the employees involved in the decision making process in response to Plaintiffs' request for accommodation were Ms. Lunn, Ms. Torres, Mr. Crane, Ms. Scurfeld, Tami Veikos, Ms. Brown, Mr. Kearns and Mr. Loy, all of whom are, or were, employees of RMC. In addition, Ms. Cortese, and Mr. Leite are, or were, employees of RMC. (*See* Loy Decl., ¶¶ 3-4; Lunn Decl., ¶ 1; Cortese Decl., ¶ 1; Supp. Derby Decl., ¶ 9, Ex. 9 (Defendants' Supplemental Response to Plaintiffs' Interrogatory No. 5).) It is undisputed that TMA has no employees.

Plaintiffs argue both TMA and RMC are liable for punitive damages. Neither Plaintiffs nor Defendants distinguish between the two entities in their briefs. "Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations." *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 538 (2000). TMA has not argued it could not be subject to punitive damages based on the conduct of RMC employees and officers. Therefore, the Court concludes it has not met its burden to show it cannot be held vicariously liable for punitive damages.

Although Ms. Cortese, Mr. Leite, and Ms. Lunn are not officers, directors or managing agents of RMC, it is undisputed that Ms. Scurfeld, who made the final decision on Plaintiffs' request for accommodation, is an officer of RMC. It also is undisputed that Mr. Kearns and Mr. Crane, who were involved in the decision making process, are officers of RMC. In addition, there is evidence that Ms. Scurfeld was aware of the discussions between Plaintiffs, Mr. Kearns, Mr. Crane, and other employees at The Paramount. (*See, e.g.*, Supp. Derby Decl., Exs. 3, 5.)

Accordingly, the Court finds that Plaintiffs have put forth sufficient evidence for a

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[4] The term "managing agent," means a corporate employee who "exercises substantial independent authority and judgment in [his or her] corporate decisionmaking so that [his or her] decisions ultimately determine corporate policy." *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 566-67 (1999).

reasonable jury to conclude the Defendants could be held liable for punitive damages, if there is sufficient evidence for a reasonable jury to conclude that the individuals at issue acted with the requisite state of mind.

2. The FHAA Claim.

Plaintiffs argue that there is sufficient evidence in the record to show Defendants either acted egregiously or with reckless disregard that their conduct would violate the FHAA. Defendants, in turn, argue that the evidence demonstrates they did not act with the requisite state of mind. Defendants also argue that the FHA Policy and the efforts to comply with that policy would preclude an award of punitive damages.

Under *Kolstad,* if a defendant discriminates "in the face of a perceived risk that its actions will violate federal law" it may be held liable for punitive damages." *Kolstad,* 527 U.S. at 536. The Ninth Circuit has interpreted *Kolstad* to allow for punitive damages upon a showing of intentional discrimination. *See Passantino v. Johnson & Johnson, Co.*, 212 F.3d 493, 515 (9th Cir. 2000).[5] However, there are some "instances in which intentional discrimination d[oes] not give rise to punitive damages liability." *Passantino,* 212 F.3d at 515. For example, as set forth in *Kolstad,* a defendant "may not be vicariously liable for the discriminatory … decisions of managerial agents where those decisions are contrary to the [corporate defendant's] good-faith efforts to comply with" federal law. *Kolstad,* 527 U.S. at 545 (internal quotations and citation omitted); *see also id.* at 544 ("Where an employer has undertaken … good faith efforts at Title VII compliance, it demonstrates that it never acted in reckless disregard of federally protected rights") (internal quotations, citations, and brackets omitted).

By virtue of their FHA Policy, it is undisputed that Defendants were aware of the FHAA's legal requirements. Defendants argue that the FHA Policy demonstrates that they did not act in reckless disregard of Plaintiffs' rights under the FHAA. "[I]t is well-established that it is

[5] Defendants argue that a showing of intentional discrimination is not sufficient, citing *Elsayed Mukhtar v. California State University Hayward,* 299 F.3d 1053, 1068 n.15 (9th Cir. 2002), *overruled on other grounds by Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 467 (9th Cir. 2014). This Court does not find a conflict between *Passantino* and *Elsayed Mukhtar,* because both rely on *Kolstad*'s reckless indifference standard, which requires an inquiry into a defendant's awareness that it may be acting in violation of federal law.

insufficient for a [defendant] simply to have in place [anti-discrimination] policies; it must also implement them." *Swinton v. Potomac Corp.*, 270 F.3d 794, 811 (9th Cir. 2001). Defendants' FHA Policy sets forth the procedures that are to be followed and forms that should be used when a resident or applicant makes a request for accommodation and states that "following these procedures consistently is imperative[.]" (FHA Policy at 2-6; *see also* Supp. Derby Decl., ¶ 12, Ex. 12 (FHA Policy and forms).) It is undisputed that Defendants did not provide Plaintiffs either a copy of the "Fair Housing Accommodation Request Form" at the time they made their requests. It also is undisputed that Defendants did not provide Plaintiffs with the "Resident Grievance Procedure – Fair Housing" form once Defendants denied the request. (*See* Supp. Derby Decl., Ex. 12 at ECF pp. 15, 25.)[6] The record suggests that Defendants did not use many of the other forms referenced in the FHA Policy in response to Plaintiffs' requests. (Supp. Derby Decl., Ex. 13 (Deposition of Warren Loy, Vol. II ("Loy Depo. Vol. II") at 414:4-417:13, 421:16-19, 422:4-425:15).)

However, Mr. Loy testified that Defendants may not use the forms in situations where it could be construed as a "burden or harassment to the person asking to go back and say, 'Can you complete this form? Can we verify this?'" Mr. Loy also testified that Plaintiffs' situation presented one of those circumstances. He also acknowledged that some of the forms were internal and would not require further information from Plaintiffs. (*Id.*, Loy Depo. Vol. II at 425:16-426:11, 427:2-20, 430:17-433:14; *see also* Declaration of Lyn Agre in Support of Reply ("Agre Reply Decl."), ¶ 3, Ex. 2 (Loy Depo. Vol. II at 425:16-426:11).) It is not this Court's task to evaluate the credibility Mr. Loy's testimony on this point.

Defendants did not offer to move Plaintiffs to a different apartment at their current rental rate, as Plaintiffs requested.[7] In his deposition, Mr. Loy testified that Defendants were concerned that if they offered that as a solution and then raised the rent at the end of the lease term, the rent

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[6] The Court finds no evidence in the existing record to support Plaintiffs' assertion that Defendants "concealed" the grievance procedure from Plaintiffs.

[7] The Court also concludes that there are genuine disputes about whether there were "comparable" apartments available.

increase could be viewed as retaliatory. (Supp. Derby Decl., Ex. 6 (Loy Depo Vol. I at 349:6-25).) Mr. Loy also testified, in his opinion, it would not have posed an undue financial burden to move Plaintiffs to a higher floor and absorb a $600 rent differential for their lease term. (*Id.* 387:13-25.) During her deposition, Ms. Brown testified that she could not think of a reason not to offer Plaintiffs a one bedroom. However, she also consistently testified that the decision was not hers to make. (Derby Supp. Decl., Ex. 7 (Brown Depo. at 213:5-218:10).)

There is evidence to suggest that RMC employees took the situation seriously and, in their view, were going "out of [their] way" to get Plaintiffs away from the construction noise. (*See, e.g.*, 6/17/16 Agre Decl., Ex. B, (Brown Depo. at 50:11-51:3, 86:19-87:18; 144:13-145:21, 182:2-24); McGuiness Decl., Ex. 1 (Brown Depo. at 40:20-21).) However, in early April, Mr. Kearns sent an email that said "Tell Peter we stopped for him;)." (McGuiness Decl., Ex. 10.) That statement was in a response to an email from Mr. Crane alerting Mr. Kearns to the fact that construction had stopped for the day and that Mr. Leite was going to be contacting nearby hotels to "work on a monthly rate for Mr. Holland." (*Id.*) Although a reasonable jury might find this statement was an isolated, off-hand comment made amidst good faith efforts to accommodate Plaintiffs' needs, that jury also could find the statement supports a conclusion that Defendants were aware of but acted with "callous indifference" to Plaintiffs' rights under the FHAA.

In the *Passantino* case, there was evidence presented at trial that the defendant downgraded the plaintiff's "promotability status" and demoted her after she complained about gender discrimination. There also was evidence that the defendants' employees misrepresented the classification of certain jobs and lied about their actions to cover up a campaign against plaintiff. *Passantino*, 212 F.3d at 516. The court concluded that "[t]hese actions," as well as similar actions against one of the plaintiff's co-workers, "are sufficient to permit a jury to conclude that [defendant] could not have reasonably believed that its conduct was lawful," and supported punitive damages. *Id.*

In *Fair Housing of Marin*, the court also considered whether there was sufficient evidence to uphold an award of punitive damages. In that case, the plaintiff sent African-American and Caucasian "testers" to try and lease apartments from the defendant and found the defendant treated

the African-American testers less favorably. 285 F.3d at 902, 907. There was also evidence that the defendant knew it was illegal to discriminate on the basis of race but stated that he wanted an all-white building, used "offensive and racially derogatory language when telling several tenants he did not want to rent to African-Americans," and stated that "he could use the pretext of bad credit to refuse to rent to African-Americans." *Id.* at 907. The court found that evidence "met at least the reckless or callous indifference standard for punitive damages[.]" *Id.*; *see also Swinton*, 270 F.3d at 811 (concluding defendant could not rely on "good faith" defense to avoid punitive damages where "employee … charged with carrying" out the policy "laughed along with" racially disparaging jokes and did nothing to stop them).

In contrast, in *Kirbyson v. Tesoro Refining and Marketing Co.*, the court found that an email which included an instruction to "find out … how best to move [the plaintiff] out of [defendant's] organization" was not sufficient to get the issue of punitive damages to a jury. 795 F. Supp. 2d 930, 947 (N.D. Cal. 2011). However, the email at issue was the only specific evidence the plaintiff cited to support the claim for punitive damages, and the court noted that when the email exchange was considered in its entirety, it suggested that the defendant was "actively considering whether [it] could accommodate [p]laintiff's disability." *Id.* Thus, the court concluded the email was not sufficient to "support a reasonable inference that [defendant was] acting with knowledge that [it might] be violating federal law." *Id.*

The Court cannot place the facts of this case in the same category as the facts presented in the *Fair Housing of Marin* or the *Swinton* cases. However, there is more evidence to support a claim for punitive damages than was at issue in the *Kirbyson* case. Furthermore, some of that evidence will require the jury to evaluate defense witnesses' explanation for their conduct and, accordingly, their states of mind. The Court cannot "weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to" Plaintiffs. Applying that standard, the Court concludes Plaintiffs have put forth sufficient evidence from a which a reasonable jury could conclude that Defendants, at the very least, acted "in the face of a perceived risk that [their] actions [would] violate federal law[.]" *Id.*

Accordingly, the Court DENIES, IN PART, Defendants' motion for summary

adjudication.

3. The FEHA Claim.

Plaintiffs rely on the same evidence to show that, under California law, Defendants' conduct was malicious, oppressive, and/or fraudulent. "[A]bsent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." *College Hosp. Inc. v. Superior Court*, 8 Cal. 4th 704, 725 (1994); *cf.* Cal. Civ. Code § 3294(c)(2) (definition of oppression also requires "despicable conduct"). The California Supreme Court interprets the term "despicable" to mean "circumstances that are 'base,' 'vile,' or 'contemptible.'" *Id.*

For purposes of this claim, the Court "must view the evidence presented through the prism of the [Plaintiffs'] substantive evidentiary burden," *i.e.* the clear and convincing standard. *Anderson*, 477 U.S. at 254. The Court concludes that the evidence described in the preceding section does not satisfy that standard. Accordingly, the Court GRANTS, IN PART, Defendants' motion for summary adjudication. Plaintiffs will not be entitled to seek punitive damages on the FEHA claim.

CONCLUSION

For the foregoing reasons, the Court GRANTS, IN PART, and DENIES, IN PART, Defendants' motion for summary adjudication of the issue of punitive damages. The Court's ruling is without prejudice to Defendants arguing, after the evidence has been presented, that Plaintiffs have not put forth sufficient evidence to warrant punitive damages on the FHAA claim.

IT IS SO ORDERED.

Dated: July 20, 2017

JEFFREY S. WHITE
United States District Judge