Proposed Tentative

On November 11, 2024, plaintiff Duane Jones (plaintiff) filed a verified complaint against defendants Goodwill Custodial Services and Goodwill Industries of Southern California for negligence (collectively, defendants) "negligence per se," strict liability (ultra-hazardous activity), and negligent infliction of emotional distress. Plaintiff alleges that on September 11, 2023, while working as contractor at Vandenberg Air Force Base, he "noticed a strong and unusual odor permeating" in his work area. Plaintiff learned that the odor was "caused by hazardous chemicals improperly used by a janitor employed" by Goodwill Custodial Services. According to plaintiff, the janitor mixed chemicals that "resulted in the production of mustard gas." Plaintiff was "suddenly and severely injured by the toxic fumes," experienced extreme difficulty breathing and dizziness, requiring evacuation. Plaintiff's condition after the event deteriorated, and he has since been diagnosed with "persistent respiratory issues, including decreased oxygen intake in his lungs." Plaintiff has been forced to forego many favorite activities, has developed heightened sensitivity to odors, and continues to experience chest pains. Plaintiff alleges that the defendants were agents of one another.

Defendants have filed a joint demurrer and motion to strike. As for the demurrer, defendants contend that plaintiff has failed to provide sufficient facts to support the second cause of action (negligence per se), third cause of action (strict liability), and fourth causes of action (negligent infliction of emotional distress). Defendants also claim that the three causes of action are fatally uncertain. As for the motion to strike, defendants ask the court to strike all claims for punitive damages, claiming plaintiff has failed to allege sufficient facts in support. They also ask the court to strike the request for attorney's fees because there is no basis for such a request. *No opposition has been filed as of this writing.*

The court will first address the meet and confer efforts and defendants' request for judicial notice. It will then address the merits of the demurrer and motions to strike separately. As for the demurrer, it will explore the merits of defendants' special demurrer to all three causes of action based on uncertainty. It will then examine the merits of defendant's general demurrer to second, third, and fourth causes of actions separately. The court will then downshift to thee motion to strike and the requests for punitive damages and attorney's fees. The court will finish with a summary of its conclusions.

A) Meet and Confer

Attached to both motions is a declaration from attorney Naijia Yin, who details the meet and confer efforts for both the demurrer and the motion to strike. She sent a meet and confer letter on January 2, 2025, with attempts to set up telephonic conferences on numerous dates thereafter. On January 13, 2025, defense counsel filed a declaration for a 30-day extension, but defense counsel has not responded. These efforts seem reasonable.

B) Defendants' Request for Judicial Notice

Defendants ask the court to take judicial notice of the following documents from this court's case file: 1) the verified complaint filed by plaintiff at issue in the two motions on calendar; and 2) the meet and confer declaration supporting the 30-day extension. Although judicial notice is not required in order for the court to examine documents in its own case file that are critical in assessing a demurrer and motion to strike, such as the operative pleading, the court will follow its past practice of granting the request for judicial notice when the request is unopposed.

C) Demurrer

1) Special Demurrer for Uncertainty as to all Three Challenged Causes of Action

Defendants contend collectively that the second, third, and fourth causes of action are fatally uncertain. The court rejects this claim. Demurrers for uncertainty are "disfavored" and "strictly construe[d] . . . because ambiguities can reasonably be clarified under modern rules of discovery." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135; see also *Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 292 [" ' "demurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond" ' "].) The complaint is not so incomprehensible that defendants cannot reasonably respond. The special demurrer for uncertainty is overruled.

2) General Demurrer to Second Cause of Action – Negligence Per Se

Plaintiff alleges common law negligence in the first cause of action. He alleges that alleges that on September 11, 2023, he was exposed to hazardous chemicals mixed by an defendants' employee, causing serious physical injuries through inhalation. The employee allegedly mixed dangerous chemicals, making "mustard gas." Plaintiff alleges that defendants owed plaintiff a duty of care, as a worker at the site, that hazardous chemicals were handled safely, and that duty of care was breached by mixing the chemicals, failing to warn of the danger, or by taking other necessary safety precautions to prevent exposure to plaintiff. The breach caused significant physical injury. Defendants do not challenge the pleading sufficiency of the first cause of action.

Plaintiff instead challenges "negligence per se" as a second freestanding cause of action, resting exclusively on the same facts and elements involved in the first cause of action. Plaintiff rests the negligence per se "cause of action" based on violations of key safety regulations designed to protect individuals like plaintiff from exposure to hazardous chemicals in the workplace, all contained in California Code of Regulations, title 8: 1) section 5194 ; 2) section 5155; and section 5189. Plaintiff argues that violations of these regulations (i.e., their breach) was reason for his injuries.

Negligence per se is an evidentiary doctrine, rather than an independent cause of action. (*Quiroz v. Seventh Ave. Ctr.* (2006) 140 Cal.App.4th 1256, 1285–1286.) It can be applied generally to establish a breach of due care under any negligence-related cause of action. (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1248.) That is, the doctrine of negligence per se is within the scope of pleadings that allege general negligence, as proof of a breach of duty is not limited to common law standards of care. (*Brooks v. E.J. Willig Truck Transp. Co.* (1953) 40 Cal.2d 669, 680; see *Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1210–1211; see also *Quiroz, supra*, at p. 1285 [the doctrine of negligence per se does not provide a private right of action for violation of a statute; instead, it operates to establish a presumption of negligence for which the statute serves the subsidiary function of providing evidence of an element of a preexisting common law cause of action].) For this reason, plaintiff should assert the doctrine of negligence per se cause of action as a basis to establish negligence in the first cause action by resort to Evidence Code section 669, not a separately articulated cause of action as done here. Put another way, plaintiff may pursue a negligence per se as a theory of negligence, rather than state an independent claim separate from general negligence. (*Doe v. Johnson* (E.D. Cal., Oct. 7, 2024, No. 2:24-CV-1542 DJC AC P) 2024 WL 4437817, at *5; *In re Accellion, Inc. Data Breach Litigation* (N.D. Cal. 2024) 713 F.Supp.3d 623, 639, *reconsideration denied* (N.D. Cal., Oct. 28, 2024, No. 21-CV-01155-EJD) 2024 WL 4592367 [the court agrees that under California law that Plaintiffs may not maintain "negligence per se" as a standalone claim alongside their negligence claim, which Plaintiffs themselves do not appear to contes]; *West American Insurance Company v. ADT Commercial LLC* (C.D. Cal., Mar. 18, 2021, No. CV 20-6849-RSWL-RAOX) 2021 WL 1060228, at *2, fn.1 [complaint asserts two causes of action: negligence and negligence per se. But negligence per se is an evidentiary doctrine—not a cause of action—that a plaintiff may use to establish a duty, as well as a breach of that duty, beyond the limited common law standards of care].)

The court sustains defendant's demurrer to the second cause of action without leave to amend, allowing plaintiff to incorporate a theory of negligence per se into the first cause of action for negligence, not as freestanding cause of action on its own, not as a freestanding cause of action.

3) General Demurrer to Third Cause of Action - Strict Liability (Ultra Hazardous Activity)

Plaintiff alleges with regard to the third cause of action for strict liability based on an ultra-hazardous activity as follows: "Defendants engaged in an ultrahazardous activity by allowing their employees to mix chemicals that resulted in mustard gas, a highly dangerous and toxic substance. . . . The process of handing and mixing these chemicals is not a matter of common usage, and the nature of the risk associated with the mixing these chemicals is extremely high." (¶ 42.) "The release of mustard gas created a high degree of risk to those present, including Plaintiff. . . ." "The mixing ad release of mustard gas at Vandenberg Air Force Base, a location not typically associated with the use or release of such hazardous substances, was entirely inappropriate for the facility and greatly outweighed any potential benefit of the community or those present. The Defendants' actions in this regard are subject to strict liability, as their ultrahazardous activities directly resulted in Plaintiff's injuries."

Defendants contend that plaintiff has failed to show the use of chemicals as pleaded was an ultrahazardous activity. They observe that whether an activity is ultrahazardous is a question of law to be determined by the court (*Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134, 1142-1143), and the doctrine assumes that reasonable care cannot eliminate the risk. The court must scrutinize not the accident but "upon the activity intentionally undertaken by the defendant, which by its nature is very dangerous." (*Pierce v. Pacific Gas & Electric Co*. (1985) 168 Cal.App.3d 68, 85.) According to defendants, plaintiff alleges that defendants used solvents during the cleaning process, which is a commonplace activity and does not constitute an ultrahazardous activity as a matter of law.

CACI No. 460 delineates the elements of a cause of action for strict liability based on an ultrahazardous activity. Plaintiff must show that defendant was engaged in an ultrahazardous activity, that plaintiff was harmed, that plaintiff's harm was the kind of harm that would be anticipated as a result of the risk carted by the ultrahazardous activity; and that defendant's ultrahazardous activity was a substantial factor in causing plaintiff's harm. The first requirement is at issue in this demurrer. Whether an activity is ultrahazardous is question of law to be determined by the court. (*Luthringer v. Moore* (1948) 31 Cal.2d 489, 496.) The Restatement of Torts Second, section 519, which California courts rely upon to define the doctrine (*Ahrens v. Superior Court*, *supra*, 197 Cal.App.3d at p. 1143, fn. 6 [may courts have treated the Restatement factors as relevant to a finding that an activity is ultrahazardous]), provides that one who "carries on an abnormally dangerous activity is subject to liability for harm to the person,. . . resulting from the activity, although he has exercised the utmost care to prevent the harm. [] This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." Section 520 of the Restatement of Torts Second provides that in determining whether an activity is abnormally dangerous (and thus an ultrahazard), courts should

determine whether there is a high degree of risk of some harm to the person, the likelihood of harm that results from it will be great, an inability to eliminate the risk by the exercise of reasonable care, the extent to which the activity is not a matter of common usage, the inappropriateness of the activity to the place where it is caried on, and the extent to which its value to the community is outweighed by its dangerous attributes.

The determination of whether an activity is ultrahazardous is nevertheless heavily fact-based. In *Edwards v. Post Transportation Co*. (1991) 228 Cal.App.3d 980, for example, the court looked to the factors in Restatement Torts, Second, section 519 and 520 to determine, ***after trial***, whether defendant's use of sulfuric acid was ultrahazardous. Specifically, defendant manufactured zinc-plated cartridge cases, a process which required two types of emulsions – sodium bisulfite and sulfuric acid. Because of their different natures, two storage tanks were required (one for each solvent). The pipe leading to the tank for sodium bisulfite was plastic, while the pipe leading to the tank for sulfuric acid was stainless steel. Through error in construction, the pipes were switched. To remedy the problem, defendant changed the identity of the tanks, as the tanks themselves were interchangeable. Unfortunately, once done, the tanks were inadequately labelled. As a result, a driver, when delivering a tank truck of sulfuric acid, pumped the acid into the wrong tank, causing a severe and immediate chemical reaction, resulting in a toxic gas release. Plaintiff was overcome with the fumes. The appellate court determined the trial court did not err in concluding this was not an ultrahazardous activity; while many of the factors in Restatement Second, Torts, section 520, detailed above, supported an ultrahazardous determination, factor (c) – "inability to eliminate the risk by exercise of reasonable care – did not, and was dispositive. This conclusion was reached only after evidence at trial showed that the sulfuric acid used at issue would not be dangerous if handled in a proper fashion. (*Id.* at p. 986.)

The court details the facts of *Edwards*, and the methodology utilized, based on the following statements in *Aherns v. Superior Court , supra*, 197 Cal.App.3d 1134, in turn relying on *SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, which have particular relevance here. The *Ahern* made the following pertinent observations: "We note that determination of whether an activity is abnormally dangerous or ultrahazardous is a legal one. [Citation.] However, such a determination involves consideration of the Restatement factors, including an evaluation of whether the dangerous of the activity are inappropriate for the locality, the magnitude of the risks, and the ultimate policy issue whether the dangers and inappropriateness pf the activity are so great as to require the enterprise engaged in the activity to pay for any harm it causes, despite any usefulness to the community. [] For these reasons, ***the issue of ultrahazardous activity may not be determined by demurrer***. [Citation.] The issue might properly be reached on summary judgment, but only where the moving party is able to nullify the existence of a material factual issue." (*Aherns, supra*, at p. 1145-1146, fn. 9, emphasis added.); see *also SKF Farms, supra*, at p. 906, fn. 2 ["petitioner are entitled to plead both negligence and strict liability. The court must determine, ***upon hearing***, the evidence and

weighing the various listed in section 520, whether the jury should be instructed that crop dusting is an ultrahazardous activity"]; *Travelers Indemnity Co. v. City of Redondo Beach* (1994) 28 Cal.App.4th 1432, 1444 [when plaintiff claims oil drilling is an ultrahazardous activity, the issue cannot be decided by demurrer, given the location of the drilling activity, the importance of breakwater safety]; see also *Frye v. Martinez Refining Company LLC* (N.D. Cal., Dec. 16, 2024, No. 24-CV-04506-RFL) 2024 WL 5119227, at *3 [where plaintiff has plausibly alleged the claim is ultrahazardous, and as the determination of whether an activity is ultrahazardous is heavily fact-based and not suitable for determination at the pretrial stage, a motion to dismiss, the functional equivalent of a demurrer, is inappropriate]; *Grey Fox, LLC v. Plains All American Pipeline, L.P.* (C.D. Cal., Apr. 8, 2019, No. CV 16-3157 PSG (JEMX)) 2019 WL 4196066, at *16 [court concludes that ultrahazardous liability is more appropriately resolved at summary judgment, where the court will have sufficient information to assess, for example, whether transporting oil is a matter of common usage along the California coastline, and whether the activity can be made safe with due care]; *Goldstein v. ExxonMobil Corp.* (C.D. Cal., May 30, 2017, No. CV 17-2477 DSF (SKX)) 2017 WL 10591597, at *2 [whether an activity is so dangerous and unique as to be classified as "ultrahazardous" is a fact sensitive inquiry that typically cannot be determined on a motion to dismiss, citing *SKF Farms, supra*].)

The court cannot determine at this stage whether the "mustard gas" mix as pleaded was an ultrahazardous act or not. Plaintiff has made a plausible case that the mustard gas mix under the circumstances as pleaded is abnormally dangerous, meaning resolution should follow the course dictated by *Aherns, SKF Farms, Travelers Indemnity Co*., and the federal cases cited above. Simply put, the court can only apply the factors detailed in the Restatement of Torts, Second, section 520 after a more protracted evidentiary hearing, including summary adjudication. The section 520 factors at issue in the Restatement Second of Torts, relied upon by defendant, are not pleading requirements per *Aherns, SKF Farms,* and *Travelers Indemnity Co*., as defendants seem to think, but factors the court takes into consideration in resolving the issue after evidence has been introduced at a hearing.

This case -- and more specifically, the use of mustard gas as alleged by plaintiff under the circumstances pleaded -- is decidedly ***unlike*** the situation in *Goodwin v. Reilly* (1985) 176 Cal.App.3d 86, in which plaintiff pleaded that defendant's driving while intoxicated was an ultrahazardous activity, and thus could not be determined by demurrer. The court determined that the issue could be determined by demurrer, and as a matter of law, because "the act of driving a motor vehicle under the influence of alcohol, although unquestionably dangerous and hazardous-in-fact, does not come withing the rubric of an ultrahazardous or abnormally dangerous activity for purposes of tort liability, and to hold defendant strictly liable for the consequences of his driving would not, in any event, extend his liability beyond that imposed for negligence." (*Id.* at 377.)

The court also finds defendants reliance on *In re Burbank Environmental Litigation* (C.D. Cal. 1998) 42 F.Supp.2d 976, and *Greenfield MHP Associates, L.P. v. Ametek* (S.D. Cal. 2015) 145 F.Supp.3d 1000 is misplaced. In *In re Burbank Environmental Litigation,* plaintiff claimed that defendant, who operated aircraft manufacturing facilities at its Burbank facility, used chemicals TCE and PCE through the 1970's and part of the 1980's, and this use was the basis for the ultrahazardous activity determination. The federal district court noted, however, that other courts had previously concluded that use, storage, and disposal of industrial solvents such as TCE and PCE could be avoided through exercise of reasonable case, citing *Schwartman, Inc. v. General Elec. Co*. (D.N.M. 1983) 848 F.Supp.942, 945 [] and *Greene Product Mfg. Corp.* (D.Kan. 1993) 842 F.Supp.1321, 1326-1327 []. The court in *In re Burbank Environmental Litigation* observed that "in both cases, the courts relied primarily on this consideration in holding strict liability did not apply. [Citations] Defendant engaged in the same activities as the defendants in *Schwartzman* and *Greene,*" using the chemicals to clean metal parts, and thus if they had been aware of the proper storage and disposal process for this chemicals, the alleged injuries would not have happened. In light of this prior litigation, "the act of using solvents to clean metal parts in an industrial site was not an ultrahazardous activity. Many industries use or have used TCE, PCE and hexavalent chromium, including other industrial plants and dry cleaners. These chemicals are used widely as solvents. ***It is not the use of these chemicals that is likely to cause harm. Rather, it is Lockheed's alleged behavior in using and disposing of the chemicals that created hazards***. Moreover, Lockheed's activities benefitted the community by employing over 100,000 people, providing a tax revenue for Burbank, providing airplanes, and supporting the national defense." The court dismissed the cause of action.

This case is not similarly situated to *In re Burbank Environmental Litigation*, at least as pleaded. Unlike the plaintiff in *In re Burbank Litigation*, plaintiff here claims it is the very use of the chemicals that produced the "mustard gas," and that this ordinary use was abnormally dangerous, for (according to plaintiff) even when exercising some level of care, defendants could not have eliminated the inherent risks present in handling these hazardous chemicals. (¶43.) Further, *In re Burbank Environmental Litigation*, the trial court could draw from prior cases determining the same issue about the same solvents used in the same way. That is not true here. Plaintiff's claims here by contrast are plausibly pleaded, and the merits cannot be equally resolved on the face of the pleading.[1]

Greenfield MHP Associates, L.P v. Ametek, Inc. supra, is distinguishable for the same reason. There, plaintiff alleged defendants dumped toxic waste into a temporary storage tank, which consisted or spent acid and alkaline solutions, industrial solvents, TCA, PCE, oils, paint thinner, and process sludge. This waste breached the sump and percolated into the surrounding

[1] It may ultimately be true, as defendants claim, that the solvents or chemicals here used were simply improperly mixed, meaning the ingredients used to make "mustard gas" – when properly handled – would not be ultrahazardous. The court cannot make that determination at this time, as this is a factual determination requiring a more robust record outside the purview of a demurrer.

soil, and ultimately into the groundwater. The waste discharge created a plume. The federal district court, relying on *In re Burbank Environmental Litigation*, observed in assessing defendant's motion to dismiss that a "number of courts have determined that under the [Restatement of Torts test], the act of using solvents such as TCE and PCE to clean metal parts in an industrial site is not an ultrahazardous activity . . . . Plaintiffs cite no cases supporting the proposition that the use, storage, and/or disposal of such solvents is considering an ultrahazardous activity." Accordingly, the court dismissed the ultrahazardous strict liability cause of action.

The allegations here (and the context in which they are raised) are different from those in *Greenfield*. The court cannot say as a matter of law here, as the court could in either *In re Burbank Litigation and Greenfield*, that the "mustard gas" mix as alleged is not an ultrahazardous activity as matter of law. Defendant assumes without citation to any case that the mustard gas mix is similarly situated to the TCE or PCE solvents at issue in those two cases. It may be – but all we have to make that determination are the allegations from the face of the pleading at the demurrer stage. There was a long history of litigation involving the two solvents at issue in both *In re Burbank Litigation* and *Greenfield* from which both courts reach legal conclusions. (See also *O'Connor v. Boeing North American, Inc.* (C.D. Cal., Aug. 18, 2005, No. CV 00-0186 DT RCX) 2005 WL 6035255, at *18.) That is simply not the case here. As factual disputes remain, it would be inappropriate to dispose of the case without further factual development. (See, e.g., *Trust v. Torres* (N.D. Cal., Aug. 23, 2018, No. 15-CV-01648-HSG) 2018 WL 4042784, at *6.)

The court overrules defendants' demurrer to the third cause of action.

4) General Demurrer to Fourth Cause of Action - Negligent Infliction of Emotional Distress

Plaintiff alleges in the operative pleading that as a direct victim, defendant breached a duty of care as to plaintiff's emotional welfare, with plaintiff suffering severe emotional distress. Plaintiff frames the issue as follows: Defendants owed "Plaintiff . . . a duty to ensure his safety and protection from harmful substances in the workplace . . . . Defendants breached this duty when they negligently allowed the improper mixing of chemicals that resulted in the creation of mustard gas," and which caused defendant physical injury and resultant emotional distress. Defendants observe that negligent infliction of emotional distress is not an independent tort, and there was no special relationship between the parties. Additionally (and somewhat cursorily), defendants argue that this cause of action (but no other) is barred under the rules associated with worker's compensation exclusivity rules. In making this contention, defendant relies exclusively on *Yau v. Allen* (2014) 229 Cal.App.4th 144, in which plaintiff sued his former employer, former coworkers, and former supervisors, for (inter alia) intentional infliction of emotional distress. The appellate court upheld the trial court's decision to sustain the demurrer without leave to

amend as to this cause of action, concluding that physical and emotional injuries sustained in the course of employment are preempted by the workers' compensation scheme (Lab. Code, § 3600, et seq.) and generally will not support an independent cause of action. (*Id.* at p. 161.)

Preliminarily, defendants' reliance on the exclusivity of the workers' compensation law as z basis for its demurrer is misplaced. Initially, the court observes that defendants are challenging only this cause of action on this ground, creating an obvious anomaly as to the other causes of action, for if the worker's compensation exclusivity rules do apply, they would apply to all causes of action. In any event, and more substantively, the doctrine does not apply. Plaintiff is not suing his employer for negligent infliction nation of emotional distress, but what appears to be a third-party vendor hired to perform janitorial work. The worker's compensation exclusivity rules do not bar such action. (See, e.g., *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 598 ["Of course, an employer cannot be sued from the work-related injury of an employee," as the employer's sole liability is for the benefits payable, regardless of fault, under the worker's compensation law. "On the other hand, the employee may sue any other responsible person for 'all damages proximately resulting' from the injury',' citing to Lab. Code § 3852[2]; see *Moreci v. Scaffold Solutions, Inc*. (2021) 70 Cal.App.5th 425, 426 [worker's compensation exclusivity rules do not preclude suit by the employee against a negligent third party, per Lab. Code § 3852].)[3]

Nevertheless, the court sustains the demurrer as to this cause of action, for as pleaded it is superfluous, for two separate albeit related reasons. First, plaintiff predicates this cause of action on a direct victim theory. In its decisions addressing the direct victim theory, the California Supreme Court has emphasized that **"**there is no independent tort of negligent infliction of emotional distress.**"** (*Potter v. Firestone tire & Rubber Co*. (1993) 6 Cal.4th 965, 984.) Plaintiff has already alleged negligence in the first cause of action.

Second, it is settled in California that ordinary negligence actions for physical injury allow for recovery of emotional distress damages caused by that injury as an item of parasitic damages. In fact, where a plaintiff can demonstrate a physical injury caused by the defendant's negligence, anxiety specifically due to a reasonable fear of future harm attributable to the injury may also constitute a proper element of damages. (*Potter, supra*, 6 Cal.4th at p. 981; see, e.g., , *Jones v. United Railroads of San Francisco* (1921) 54 Cal.App. 744 [affirming damages for emotional distress endured up to time of trial where plaintiff reasonably feared permanent

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[2] Labor Code section 3852 provides in relevant part as follows: "The claim of an employee . . ., for compensation does not affect his or her claim of right of action for all damages proximately resulting from the injury or death against any person other than the employer . . . ."

[3] Of course, an employee who sues a third party is required to notify the other forthwith by personal service or certified mail and file proof of service in the action, pursuant to Labor Code section 3853. The court directs plaintiff to address whether he was required to serve his employer per Labor Code section 3853, in order to allow the employer to act as intervenor or to secure a lien against any judgment, as there is no proof of service in the register of actions that this was accomplished.

disability in the future as direct and proximate result from physical injury received in accident].) Plaintiff has alleged physical injury as a result of defendants' negligence in the first cause of action, from which emotional distress damages (as parasitic damages) can be sought. The negligence cause of action is unchallenged. Accordingly, there is no need for plaintiff to advance negligent infliction of emotional distress as a separate cause of action. It is superfluous. (See, e.g., *Mendia v. Garcia* (N.D. 2016) 165 F.Supp.3d 861, 879 ["As Plaintiff brings a separate claim for negligence, it would be redundant to allow him to also bring a claim for negligent infliction of emotional distress"]; see also *Rodriguez v. County of Los Angeles* (C.D. Cal., Oct. 22, 2021, No. 221CV06574VAPAFMX) 2021 WL 6496745, at *6 [California law only allows a negligent infliction of emotional distress cause of action in the absence of a physical injury – when a plaintiff suffers both physical and emotional harm, "recovery for emotional distress caused by that injury is available as an item of parasitic damages" in an ordinary negligence claim, and there is no need to bring a negligent infliction of emotional distress cause of action, as it is duplicative].)

The court sustains the demurrer to the fourth cause of action without leave to amend, directing plaintiff to allege emotional distress damages as part of the first cause of action for negligence based on any alleged physical injury.

D) Motion to Strike

Plaintiff seeks punitive damages as to the first cause of action for negligence against both defendants, and separately seeks attorney's fees (and costs, as well as other relief deemed just) in Item 4 of the prayer for relief. Defendants ask the court to strike each request, as plaintiff has failed in the first instance to provide sufficient facts to support punitive damages, and in the second instance has failed to offer either a contractual or statutory basis to support requests for attorney's fees. Each challenge will be addressed separately.

Civil Code section 3294, subdivision (b) provides that an "employer shall not be liable for damages pursuant to subdivision (a) [punitive damages] upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness if the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which 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."

Plaintiff claims that defendant Goodwill Industries of Southern California is a nonprofit corporation. This means it is a corporate employer. Plaintiff has failed to allege **any** facts to show that a corporate officer or director knew of, or authorized, the offending employee's

conduct; nor has plaintiff alleged that that any "managing agent" pursuant to the standards enunciated in *White v. Ultramar, Inc.* (1999) 21 Cla.4th 563, 577 authorized or ratified the conduct, as required by Civil Code section 3294, subdivision (b). More must be pleaded.

As to defendant Goodwill Custodial Services, plaintiff contends that it is an "unknown business entity." This allegation is inadequate for purposes of punitive damages. Plaintiff has to explain either what business form it is or why plaintiff has not been able to find out, for purposes of pleading punitive damages. If it was a corporate employer, the same rules discussed above apply here.

Additionally, plaintiff has failed to adequately allege with specific facts any malice, oppression or fraud. Plaintiff in fact frames the request for punitive damages "based on "gross negligence standards, given Defendants' willful disregard of safety, to deter such reckless behavior in the future." (¶ 27.) While negligent conduct amounting to wanton and reckless misconduct by a business entity will support punitive damages, plaintiff has failed to allege any specific facts to support malice, oppression or fraud as to any of the named defendants. (*Today's I, Inc. v. Los Angeles County Metropolitan Transportation Authority* (2022) 83 Cal.App.5th 1137, 1193 [a pleading must contain specific factual allegations showing that defendant's conduct was oppressive, fraudulent, or malicious to support a claim for punitive damages].) Plaintiff has pleaded punitive damages generally, which is inadequate. (*Ibid*.)

The court grants defendants' motion to strike all requests for punitive damages, with leave to amend.

The court also strikes plaintiff's request for attorney's fees. While plaintiff need not plead attorney's fees as a condition precedent to receiving them in post-judgment context (see generally *Faton v. Ahmedo* (2015) 236 Cal.App.4th 1160, 1169), if plaintiff does asks for them in the pleading, there must appear to be authorized in some way. Plaintiff advances tort causes of action only, and as a result the American rule applies – each side bears its own attorney fee costs. Plaintiff has failed to identify a statutory or contractual basis for the fees (there is no opposition), and none appears; accordingly, the court grants defendants motion to strike them. Unless plaintiff can identify a basis for attorney's fees at the hearing, the court will grant the motion to strike without leave to amend.

Summary:

- Plaintiff is directed at the hearing to address whether he was required to serve the present lawsuit on an employer pursuant to Labor Code section 3853, as discussed in footnote 2, *ante.*
- The court grants defendants' request for judicial notice.
- The court overrules the special demurrer for uncertainty. It also overrules the general demurrer to the third cause of action for strict liability based on an ultrahazardous activity, as factual issues remain.
- The court sustains the demurrer to the second cause of action for negligence per se, without leave to amend, permitting plaintiff to plead such a theory within the contours of the negligence cause of action.
- The court also sustains the demurrer to the fourth cause of action as to the negligent infliction of emotional distress cause of action, without leave to amend, permitting plaintiff to allege parasitic damages in association with the first cause of action.
- The court grants defendants' motion to strike plaintiff's request for punitive damages with leave to amend.
- The court grants defendants' motion to strike plaintiff's request for attorney's fees, and unless plaintiff convinces the court at the hearing that there is a basis for such a request (statutorily or contractually), he court will grant without leave to amend.
- The parties are directed to appear at the hearing either by Zoom or in person.