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| FOX HILLS AT ROCKAWAY CONDOMINIUM ASSOCIATION, INC.<br><br>Plaintiff,<br><br>v.<br><br>BARBARA APPELBAUM, PAUL KARDOS, and ALAN ROTHSTEIN,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION: MORRIS COUNTY<br><br>DOCKET NO.: MRS-C-130-17<br><br>*Civil Action* |

**DEFENDANT ALAN B. ROTHSTEIN'S MEMORANDUM OF LAW IN SUPPORT OF HIS RULE 4:6-2(e) MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM**

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## INTRODUCTION

Defendant Alan B. Rothstein ("Rothstein") moves to dismiss the Verified Complaint, pursuant to Rule 4:6-2(e), on the basis that the single-count allegation that plaintiff Fox Hills at Rockaway Condominium Association, Inc. (the "Association") leveled against Mr. Rothstein does not, and never could, constitute a breach of the "nuisance" provision of the Master Deed as a matter of law. Although the Complaint contends that Mr. Rothstein's private emails with other unit owners allegedly threatening bodily harm to the Association's president constitutes a "nuisance," such a threat, even if true, cannot, as a matter of law, qualify as "nuisance" of the Association's Master Deed or By-Laws.

More specifically, a cause of action for private nuisance, when it pertains to property, as it does here, "derives from the defendant's unreasonable interference with the use and enjoyment of the plaintiff's property." Ross v. Lowitz, 222 N.J. 494, 505 (2015). "Noises, vibrations, dust, dirt, and offensive odors have all been declared nuisances". Kosich v. Poultrymen's Serv. Corp., 136 N.J. Eq. 571, 577 (Ch. 1945). Condominium "nuisance" provisions target activities of the same character. See, e.g., 4215 Harding Rd. Homeowners Ass'n v. Harris, 354 S.W.3d 296, 298 (Tenn. Ct. App. 2011) (finding violation of condominium nuisance provision for "grossly unsanitary conditions in the defendant's unit and extremely offensive odors that emanated from her unit into common areas").

As a matter of law, it is evident that the conduct alleged against Mr. Rothstein (which he vigorously denies) and his co-defendants has nothing whatsoever to do with his use of his condominium unit or his use of the condominium's common elements in a way that could even theoretically constitute a "nuisance" to the Association.

For this reason alone, the court should grant Mr. Rothstein's motion to dismiss the single-count Complaint.

## STATEMENT OF FACTS

The following "facts" are taken from the allegations in the Verified Complaint, as well as from the Master Deed and Bylaws attached hereto. Because the allegations are founded on one email conversation, the facts therein that contradict the Complaint's allegations control and are likewise set forth below, as governing law dictates.[1]

### A. The Complaint's Allegations

The Defendants each own and live in separate a condominium unit at Fox Hills. *See* the accompanying Certification of Michael A. Saffer ("*Saffer* Cert."), Exhibit A, ¶2 (the "Verified Complaint"). By owning a condominium unit, the Defendants are part of the Association. *Ibid.* The Association was created under the Condominium Act and is governed by its Master Deed and Bylaws. *Id.* ¶¶1, 11-12.

On December 6, 2017, Defendants "engaged in an online, email communication, involving at least 25 other Association residents and/or owners, regarding the results of the Association's recent annual meeting and Board of Directors (the "Board") election." *Id.* ¶3.

The Association alleges that, in that email conversation, Defendants conspired to shoot Gloria Stahl, the recently elected Board president. *Id.* ¶4. Defendant Paul. Kardos ("Kardos") is

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[1]"In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir. 2004)). "The purpose of this rule is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing to attach the relied upon document." Lum, 361 F.3d at 222 n.3. Therefore, consideration of "documents specifically referenced in the complaint" will not "convert[ ] the motion into one for summary judgment." Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015), appeal dismissed, 224 N.J. 524 (2016). Crucially, the Appellate Division logically holds that if "'**allegations contained in a complaint are contradicted by the document it cites, the document controls.**'" Ibid. (quoting Jeffrey Rapaport M.D., P.A. v. Robin S. Weingast & Assocs., Inc., 859 F. Supp. 2d 706, 714 (D.N.J. 2012)).

alleged to have "assembled" Defendants and other unit owners in this email conversation that he thought might be willing to participate in the conspiracy. *Ibid.* The actual email text, however, flatly contradicts these allegations. In Mr. Kardos' opening email to the group, which included Mr. Rothstein and defendant Barbara Appelbaum ("Applebaum"), he sent the Board election results and noted that it was odd that the lowest vote recipient is the president of the Board, further querying if any of the unit owners had "[a]ny ideas on how to correct this problem." *See* the accompanying Certification of Alan B. Rothstein ("*Rothstein* Cert."), Exhibit A at 4.

The Association alleges that, once Defendants and fellow unit owners were engaged in the email conversation, Ms. Appelbaum sent an email suggesting that someone shoot Ms. Stahl. Verified Complaint ¶5. The email text shows that Ms. Appelbaum responded to Mr. Kardos' email (via reply all) with the question, "shoot her?" *Rothstein* Cert., Exhibit A at 4.

Mr. Rothstein is alleged to have agreed that Ms. Stahl should be shot and to have solicited volunteers to travel to Virginia to procure a gun to use in the shooting. Verified Complaint ¶6. The email text shows that, after Mr. Rothstein replied (via reply all) that he agreed and asked who would drive to Virginia, he immediately followed with: "However, we should all write the b[oar]d that the least vote winner should not be president" and that "a Petition would even be a better way since it would send a clear message." *Rothstein* Cert., Exhibit A at 3.

Shortly thereafter, another unit owner, Dave Solomon, replied to the group that he thought it unwise to be talking about buying guns and killing someone even though he knew that Mr. Rothstein and Ms. Appelbaum were "not serious," and further added additional comments that he heard that there may be a change in Board leadership. *Ibid.*

In response to Mr. Solomon's email, Ms. Appelbaum sent (via reply all) the following: "**Sorry if I offended anyone. It was just a smart _ _ _ remark on my part. Of course I don't**

**mean it.**" *Ibid.* (Emphasis supplied). She also immediately explained her belief that the Board "can elect whomever they want to be the leader" and that she did not believe it meant much to the unit owners. *Ibid.*

The Association alleges that Mr. Rothstein replied characterizing Ms. Appelbaum's suggestion as a "smart" one and stating that Ms. Stahl is arrogant, nasty, and did not deserve respect. Verified Complaint ¶7. In his email, Mr. Rothstein also alleged to have advised the email recipients that, if he thought he could get away with it, he would buy a gun and pull the trigger. *Id.* ¶7.

The actual email text shows that, the next morning, Mr. Rothstein replied (via reply all) to Ms. Appelbaum first that he disagreed with her sentiment that the Board should elect whoever it wants and that it does not mean much to the unit owners. *Rothstein* Cert., Exhibit A at 2. He further expressed that he did not know how anybody could respect an "arrogant and nasty" person, that a Board position should not be "a second career," and this was "why a Petition is very applicable." *Ibid.* Following these comments, Mr. Rothstein also said Ms. Appelbaum's "remark may have been a smart ___ one," but "if [he] could get away with it [he]'d buy a gun and pull the trigger." *Ibid.* Mr. Rothstein asked Mr. Kardos his "opinion." *Ibid.*

Mr. Kardos replied (via reply all) to Mr. Rothstein: "**I agree with Dave [Solomon] – 'we should not be talking about killing anyone or buying guns, even though you are not serious.'"** *Ibid.* (quoting Dave Solomon's email) (emphasis supplied). Mr. Kardos then suggested to change the Board through "persuasion and, if necessary, litigation" and suggested "chang[ing] the bylaws so that the president is elected directly by the homeowners" by "popular vote." *Ibid.*

Following Mr. Kardos' reply, Ms. Appelbaum and Mr. Kardos exchanged four more group emails between December 7 and 8 about the job and powers of the president and where those

powers were located in the Bylaws. *See id.* at 1-2. The email conversation ended on December 8. *See id.* at 1.

The Association alleges that, "[a]s a long-time licensed attorney, Mr. Rothstein has the knowledge and skill to plan a murder in such a way as to avoid being thwarted prior to the murder and/or avoid arrest after the murder." Verified Complaint ¶8. Plaintiff further all that Defendants "conspiracy-related communications and efforts continued after the end of that particular online communication." *Id.* ¶9.

**B. The Master Deed and Bylaws Provisions**

The Association alleges that Defendants' conduct, as set forth above, violated Paragraph 8(12) of the Master Deed and, derivatively, Article X of the Bylaws. Verified Complaint ¶¶10-12. The "nuisance" provision of the Master Deed reads, in full:

> (8) Restrictions. This Master Deed is subject to all covenants, restrictions, and easements of record including the following:
>
> . . . .
>
> 12. Nuisance. No noxious, hazardous, or offensive activities shall be carried on, in or upon the Common Elements or in any Unit nor shall anything be done therein either willfully or negligently which may be or become an annoyance or nuisance to the other residents or which interferes with the peaceful possession and proper use of the Units or the Common Elements by the other Owners. All valid laws, zoning ordinances and regulations of all governmental bodies having jurisdiction over the Development shall be observed.
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> [Verified Complaint ¶10 & Exhibit A ¶8(12).]

Paragraph 11 of the Master Deed further provides that each unit owner "shall be governed by and shall comply with" the terms of the Master Deed and "its exhibits including the Bylaws." *Saffer* Cert., Exhibit A ¶11; Verified Complaint, Exhibit A ¶11.

Article X of the Bylaws provides that unit owners must "strictly" comply with the "covenants and restrictions in the Master Deed." *Saffer* Cert., Exhibit A ¶12; Verified Complaint, Exhibit B at 19. Article X further provides that if a court adjudges a unit owner to have violated the Master Deed or Bylaws, the unit owner is responsible for paying the Association's "reasonable attorneys' fees and such other costs as shall be established by the court." *Saffer* Cert., Exhibit A ¶13; Verified Complaint, Exhibit B at 19.

## LEGAL ARGUMENT

1. **The Association's allegation that Rothstein breached the "nuisance" provision of the Master Deed by engaging in a private email conversation with other unit owners is patently unsustainable as a matter of law and requires the court to dismiss the Verified Complaint with prejudice.**

By pre-Answer motion, a defendant may move to dismiss a Complaint "failure to state a claim upon which relief can be granted." R. 4:6-2(e). A court reviews a motion to dismiss by "examining the legal sufficiency of the facts alleged on the face of the complaint", Green v. Morgan Props., 215 N.J. 431, 451 (2013), and "should assume that the nonmovant's allegations are true and give that party the benefit of all reasonable inferences." NCP Litig. Trust v. KPMG LLP, 187 N.J. 353, 365 (2006). Nonetheless, "[d]ismissal of a complaint . . . is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Borough of Seaside Park v. Comm'r of New Jersey Dep't of Educ., 432 N.J. Super. 167, 200 (App. Div.), certif. denied, 216 N.J. 367 (2013); see also Rezem Family Assocs,. LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div.) ("A pleading should be dismissed if it states no basis for relief and discovery would not provide one."), certif. denied, 208 N.J. 368 (2011).

Here, even assuming that the Association's contention is true that the Defendants conspired in an email conversation to shoot the Association's president (which, of course, the email text

reveals to be preposterous), that contention does not give rise to a legally cognizable claim because Mr. Rothstein's private group emails cannot, as a matter of law, constitute a "nuisance" under the applicable provision of the Master Deed. Moreover, Mr. Rothstein's actual comments are constitutionally protected and, therefore, the Association's effort to chill his free speech cannot, a matter of law, serve as a basis for liability.

Consequently, the court should grant Mr. Rothstein's motion to dismiss the Complaint, **with** prejudice.

## A. The Master Deed "nuisance" provision is strictly and realistically construed in favor of Mr. Rothstein.

The "nuisance" provision of the Master Deed must be strictly and realistically construed in favor of Mr. Rothstein and cannot be used to chill his freedom of speech. "The provisions of a master deed are of paramount importance when defining the rights and obligations of condominium unit owners." Shadow Lake Vill. Condo. Ass'n, Inc. v. Zampella, 238 N.J. Super. 132, 139 (App. Div. 1990). "A restrictive covenant is a contract." Homann v. Torchinsky, 296 N.J. Super. 326, 334 (App. Div.), certif. denied, 149 N.J. 141 (1997). It is well-established that "covenant language must be construed strictly, and in favor of the owner's unrestricted use." Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 112 (2006); Shadow Lake, 238 N.J. Super. at 139. As such, "all doubts and ambiguities must be resolved in favor of the owner's unrestricted use." Freedman v. Sufrin, 443 N.J. Super. 128, 131 (App. Div. 2015).

Moreover, "restrictive covenants will be realistically construed in furtherance of their obvious purpose." Barr & Sons, Inc. of Cherry Hill, N. J. v. Cherry Hill Ctr., Inc., 90 N.J. Super. 358, 372 (App. Div. 1966). Unless the "right to restrict is made manifest and clear in the restrictive covenant," the court will not aid a plaintiff. Freedman, 443 N.J. Super. at 131; see also

Paff v. Margerum, 103 N.J. Eq. 74, 76 (E. & A. 1928) (holding that "when there is doubt as to the right, equitable relief will be denied").

The Association has not identified **any** provision in the Master Deed or By-Laws that would entitle the Association to sustain a breach of Master Deed action for Mr. Rothstein's conduct. The so-called "nuisance" provision in Section 8(12) of the Master Deed, Db5, supra, that the Association relies upon does not, by any stretch of the imagination, as set forth below, enable the Association to sustain a breach of contract claim against Mr. Rothstein.

**B. The "nuisance" provision of the Master Deed cannot be weaponized to chill Mr. Rothstein's state and federal freedoms of speech.**

It is clear that "restrictive covenants that unreasonably restrict speech—a right most substantial in our constitutional scheme—may be declared unenforceable as a matter of public policy." See Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 507 (2012); see also Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 73-74, 89 (2014) (holding co-op board rule restricting "resident who was a regular critic of the building's Board of Directors" from distributing board campaign material in co-op under guise of preserving "residents' quiet enjoyment" violated State constitutional rights).

Even further, long ago in Watts v. United States, 394 U.S. 705, 706-08 (1969), the Supreme Court held that only "true threats" are not protected by the First Amendment to the Constitution, reversing a man's conviction for threatening to kill the President, where he stated: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." The Court observed that his speech was "political hyperbole" and "that his only offense here was a kind of very crude offensive

method of stating a political opposition to the President." Id. at 708. The Court further noted the "conditional nature of the statement" and the listeners' reaction of laughter. Id. at 707-08.

Here, the actual, text of the email conversation on which the allegations are founded demonstrates that Mr. Rothstein engaged in constitutionally protected speech, as a matter of law. Like those that participated in the email conversation expressly recognized, no reasonable person could conclude anything other than that Mr. Rothstein's email comments were "venting" and protected hyperbole.

### C. Mr. Rothstein's private online email conversation does not, and could never, constitute a breach of the "nuisance" provision of the Master Deed.

The "nuisance" provision of the Master Deed does not, by any stretch of the imagination, proscribe or otherwise regulate Mr. Rothstein's private group email conversations in cyberspace, whether those emails criticize the Board or otherwise. The "nuisance" provision reads, in full:

> (8) Restrictions. This Master Deed is subject to all covenants, restrictions, and easements of record including the following:
>
> . . . .
>
> 12. Nuisance. No noxious, hazardous, or offensive activities shall be carried on, in or upon the Common Elements or in any Unit nor shall anything be done therein either willfully or negligently which may be or become an annoyance or nuisance to the other residents or which interferes with the peaceful possession and proper use of the Units or the Common Elements by the other Owners. All valid laws, zoning ordinances and regulations of all governmental bodies having jurisdiction over the Development shall be observed.
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> [Verified Complaint, Exhibit A ¶8(12).]

Broken down, Paragraph 8(12) specifically prohibits "noxious, hazardous, or offensive activities" that occur "on, in or upon the Common Elements or in any Unit," and activities done "therein" that constitute an "annoyance or nuisance to the other residents or which interferes with

the peaceful possession and proper use of the Units or the Common Elements by the other Owners." *Ibid.* As its title and text indicates, this is a standard-form provision that prohibits "nuisance" in units and the common areas. See 3 N.J. Forms Legal & Bus. § 4B:34.50 (substantially same master deed provision); 2B Nichols Cyc. Legal Forms § 44:28 (same).

An understanding of common law private nuisance illuminates the type of activities that the Master Deed "nuisance" provision proscribes. "A cause of action for private nuisance derives from the defendant's unreasonable interference with the use and enjoyment of the plaintiff's property." Ross, 222 N.J. at 505. "Noises, vibrations, dust, dirt, and offensive odors have all been declared nuisances," for example. Kosich, 136 N.J. Eq. at 577 (collecting cases); see also Friedman v. Keil, 113 N.J. Eq. 37, 40 (E. & A. 1933); Associated Metals & Minerals Corp. v. Dixon Chem. & Research, Inc., 82 N.J. Super. 281, 287-89, 301-03 (App. Div. 1963), certif. denied, 42 N.J. 501 (1964). Condominium "nuisance" provisions target activities of the same character. See, e.g., 4215 Harding Rd. Homeowners Ass'n, 354 S.W.3d at 298 (finding violation of condominium nuisance provision for "grossly unsanitary conditions in the defendant's unit and extremely offensive odors that emanated from her unit into common areas"); Zipper v. Haroldon Court Condo., 835 N.Y.S.2d 43, 44 (App. Div. 2007) (similar). It is clear that nuisance litigation "usually deals with the conflicting interests of property owners and the question of the reasonableness of the defendant's mode of use of his land." Smith v. Jersey Cent. Power & Light Co., 421 N.J. Super. 374, 391 (App. Div.) (citation and quotations omitted), certif. denied, 209 N.J. 96 (2011).

Here, the Association manifestly fails to state a cause of action for breach of the "nuisance" provision of the Master Deed, requiring this court to dismiss the Verified Complaint, **with** prejudice. The Association alleges that Mr. Rothstein, as well as co-defendants, Mr. Kardos and

Ms. Appelbaum, breached this provision by engaging in an online email conversation, wherein they allegedly conspired to commit murder. Verified Complaint ¶¶3-7. Even if this court were to accept all of the Association's allegations—without reference to the email text directly contradicting those allegations—that Defendants conspired to murder Ms. Stahl by way of group email communication, those allegations in no way constitute a "nuisance" regulated by Paragraph 8(12) of the Master Deed. Mr. Rothstein's group email communication in cyberspace was not an activity "on, in or upon the Common Elements or in any Unit" and in no way interfered with the "peaceful possession or proper use" by other unit owners' of their units or the common areas. Verified Complaint, Exhibit A ¶8(12).

Any ambiguity that could conceivably stretch the terms of the "nuisance" provision to encompass Mr. Rothstein's private emails is strictly construed in Mr. Rothstein's favor and against the Association. Highland Lakes, 186 N.J. at 112; Freedman, 443 N.J. Super. at 131. The court must "realistically construe[ ]" the provision to further its "obvious purpose" to regulate activity commonly understood to constitute common law nuisance, Barr & Sons, 90 N.J. Super. at 372, such as "[n]oises, vibrations, dust, dirt, and offensive odors." Kosich, 136 N.J. Eq. at 577; accord Harding Rd. Homeowners Ass'n,, 354 S.W.3d at 298 (offensive odor in condominium); Zipper, 835 N.Y.S.2d at 44 (same). Mr. Rothstein's emails are not alleged, and could never be alleged, to have interfered with "the use and enjoyment of the [Association's] property." Ross, 222 N.J. at 505.

That the "nuisance" provision does not reach Mr. Rothstein's emails is further confirmed by his State constitutional free speech rights in the private community context to voice displeasure with Ms. Stahl's leadership -- tasteless or not. See Dublirer, 220 N.J. at 73-74, 89. Even further, while the situation here is not (and could never be) a criminal case involving state action, it is

analogous to Watts, 394 U.S. at 706-08, which made clear long ago in 1969 that Mr. Rothstein's speech is constitutionally protected. Here, in an email conversation among 25 people, Mr. Rothstein voiced his displeasure with the Board president, *asked* who would buy a gun in Virginia, and stated he'd do it "*if* he could get away with it." Rothstein Cert., Exhibit A at 2-3. The readers of the emails had to know that his remarks were "not serious" and the surrounding comments were completely benign and expressly indicated a desire to resort to legal methods. Id. at 1-4.

In short, it is self-evident that no rational argument can be made that the Master Deed provision applies in any way to a unit owner's online email communications. Comprehensive research did not locate even a single case or other legal authority that applied or even considered that application of a Master Deed or Bylaws "nuisance" or other provision to a unit owners' private email communications. The very thought of such an application is simply absurd.

Further, the Association's allegations in the Verified Complaint are flatly contradicted and undermined by the sole document on which they are premised, the email conversation—which the Association purposely did not attach to the Verified Complaint or the Order to Show Cause papers. See *Rothstein* Cert., Exhibit A. The email conversation is appropriately considered and controls here. Banco Popular N. Am., 184 N.J. at 183; Myska, 440 N.J. Super. at 482. Setting aside the fact that an email conversation could never breach the "nuisance" provision as explained above, the email conversation demonstrates that the "verified" allegations in the "Verified" Complaint are objectively false or egregiously out-of-context. There was no assemblage of unit owners via online group email conversation for the purpose of conspiring to shoot or kill Ms. Stahl. *See Rothstein* Cert, Exhibit A at 4. Nobody agreed and conspired to shoot Ms. Stahl. *See id.* at 1-4.

To the contrary, Ms. Appelbaum apologized if she "offended anyone" and clarified that it was a "smart ___ remark on [her] part" and that "[o]f course [she] d[i]dn't mean it." *Id.* at 3. She

further expressed that she did not even care about who the Board elected and only inquired about the president's powers under the Bylaws. *Id.* at 1-3. Mr. Kardos, agreeing with another unit owner in the conversation, expressly agreed that nobody should be talking about guns or killing anyone, even though he knew Mr. Rothstein was "not serious" in his remarks. *Id.* at 2. He further explained that the appropriate means for any leadership change would be "persuasion and, if necessary, litigation" or a change to the Bylaws. *Id.* at 2. While Mr. Rothstein made two in artful comments, the balance of his comments clearly concerned his desire to implement change with a "petition" that was "very applicable" to change how the president is elected. *Id.* at 2-3. Consequently, the text of the email conversation, which controls over the allegations, in no way, shape, or form constitutes a conspiracy or "nuisance." Unit owners can privately criticize Ms. Stahl, whether she likes it or not. See Dublirer, 220 N.J. at 73-74; Watts, 394 U.S. at 706-08.

In view of the foregoing, there is no question that the Association patently fails to state a cause of action against Mr. Rothstein and his co-defendants for breach of the "nuisance" provision of the Master Deed. Dismissal here "is mandated" because "the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Borough of Seaside Park, 432 N.J. Super. at 200; Rezem Family Assocs,, 423 N.J. Super. at 113. But dismissal without prejudice is not appropriate.

Although a "motion to dismiss pursuant to Rule 4:6-2(e) ordinarily is granted without prejudice," Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009), a court should dismiss a Complaint with prejudice where if the allegations do not and could never form the basis for a viable cause of action. See Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989); Sickles v. Cabot Corp., 379 N.J. Super. 100, 117 (App. Div.) (reversing and granting motion to dismiss with prejudice where no legal basis for claim), certif. denied, 185 N.J.

27 (2005); DeBenedetto v. Denny's, Inc., 421 N.J. Super. 312, 328 (Law. Div. 2010) (granting motion to dismiss with prejudice where no legal basis for claim), aff'd, A-4135-09T1, 2011 WL 67258 (N.J. Super. Ct. App. Div.), certif. denied, 205 N.J. 519 (2011). It is inescapable here that the Association could never plead facts sufficient to state a claim for breach of the Master Deed, based on an email conversation. Consequently, the court should dismiss the Verified Complaint, **with** prejudice. See Sickles, 379 N.J. Super. at 117; DeBenedetto, 421 N.J. Super. at 328.

## CONCLUSION

For the foregoing reasons, the Court should grant Mr. Rothstein's motion to dismiss the Verified Complaint with prejudice. The Association does not state a cause of action for breach of the Master Deed and could never do so on the pleaded facts.

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By: _____
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Dated: January 30, 2018
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