SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest a tentative ruling, you must call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below.
PLEASE NOTE: Sending an email to the department or Complex Coordinator will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

In the voicemail message, please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling.
(See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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DATE: NOVEMBER 14, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV416639	Teixeira v. Soleeva Energy Inc., et al. (PAGA)	See Line 1 for tentative ruling.
LINE 2	23CV417807	Cadence Design Systems, Inc. v. TCL Industrial Holdings, Co., Ltd., et al.	See Line 2 for tentative ruling.
LINE 3	24CV430061	Zoladz, et al. v. Google LLC	See Line 3 for tentative ruling.

LAW AND MOTION TENTATIVE RULINGS

LINE 4	22CV398848	Lane, et al. v. Universal Protection Service, LP, et al. (Consolidated INTO Lead Case No. 22CV399095)	The hearing on Universal's Motion to Stay was previously continued to February 27, 2025 at 1:30 p.m.
LINE 5	2015-1-CV-285065	Santos, et al. v. El Guapos Tacos, LLC, et al. (PAGA)	This matter has been continued to November 21, 2024 at 1:30 p.m. by stipulation and order.
LINE 6	23CV425686	Goldsberry v. Magnum Management Corporation, Inc., et al. (Class Action/PAGA)	The Court is not in receipt of a written response to the Order to Show Cause. Accordingly, the Court intends to dismiss this action without prejudice for the reasons previously stated.
LINE 7	22CV399095	Fritch, et al. v. Universal Protection L.P., et al. (Lead Case; Consolidated with 22CV398848, 22CV399418, 23CV413374, 22CV399096. 22CV400206).	See Line 7 for tentative ruling.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Travis Teixeira v. Soleeva Energy, Inc., et al.*
Case No.: 23CV416639

This is an action for various wage and hour violations and civil penalties under the Private Attorneys General Act ("PAGA"). Before the Court is Defendants Soleeva Energy Inc. ("Soleeva") and Khushnood Ahmad Qazi's (collectively, "Defendants") demurrer to the First Amended Complaint ("FAC") filed by Plaintiff Travis Teixeira. As discussed below, the Court OVERRULES the demurrer.

I. BACKGROUND

According to the operative FAC, Mr. Teixeira was employed by Soleeva from November 1, 2022 to December 15, 2022, as a non-exempt, hourly-paid employee whose job duties included electrical and roofing work, as well as installing solar panels. (FAC, ¶¶ 7-8.) Plaintiff alleges that Soleeva committed numerous Labor Code violations against him and other hourly, non-exempt employees, by failing to: compensate employees for all hours worked (including minimum and overtime wage); provide meal periods or compensation in lieu thereof; provide rest breaks or compensation in lieu thereof; reimburse employees for necessary business expenses incurred by them; provide itemized, accurate wage statements; and pay wages upon separation of employment. Plaintiff additionally alleges that he was retaliated against for engaging in whistleblowing- particularly, complaining about unsafe work conditions- and wrongfully terminated from his employment.

Based on the foregoing, the FAC asserts the following causes of action: (1) failure to compensate for all hours worked; (2) failure to pay minimum wages; (3) failure to pay overtime wages; (4) failure to provide itemized wage statements; (5) failure to pay wages when employment ends; (6) failure to pay wages owed every period; (7) failure to provide rest breaks; (8) failure to provide meal breaks; (9) penalties under PAGA; (10) failure to reimburse business expenses; (11) retaliation in violation of Labor Code § 1102.5; (12) retaliation in violation of Labor Code § 6310; (13) wrongful termination in violation of public policy; (14) violation of Business & Professions Code § 17200; (15) failure to provide personnel records; and (16) failure to provide pay records.

II. DEMURRER

Defendants demur to the FAC and each of the claims asserted therein on the ground that the FAC fails to state sufficient facts to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard

" 'The purpose of a demurrer is to test the sufficiency of a complaint by raising questions of law.' [Citation.]" (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1143.) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action . . . ." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) All material factual allegations in the complaint are assumed true and "the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof" is

not at issue. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Children's Television*).) Moreover, the court must "liberally construe the complaint 'with a view to substantial justice between the parties,' drawing 'all reasonable inferences in favor of the asserted claims.' [Citations.]" (*Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 919.) However, the court does not "assume the truth of 'contentions, deductions, or conclusions of law.' " (*Ibid*.)

Usually, "[a] demurrer can be used only to challenge defects that appear on the face of the pleading under attack . . . ." (*Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 229.) But courts may also consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

In demurring to the FAC and the sixteen causes of action asserted therein, Defendants maintain that Plaintiff fails to plead any "viable" facts to support his claims. More specifically, they assert that the FAC is just a "regurgitation of case law and Labor Code sections" that is devoid of facts concerning the violations purportedly suffered by other employees (to the extent Plaintiff is attempting to state a representative PAGA claim) as well as himself. Defendants contend that there are no specific facts alleging when Plaintiff was not paid his full wages or not provided with meal or rest breaks, when he purportedly volunteered to purchase necessary safety equipment as he maintains was the case, or what type of discrimination he suffered from. Given that his tenure under their employ was only five weeks, Defendants proffer, Plaintiff should be able to recall the facts necessary to state his claims.

As a general matter, statutory claims must be pleaded with specificity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771,790.) This specificity requirement has been held to apply to causes of action predicated on violations of the Labor Code. (See *Hawkins v. TACA International Airlines, S.A.* (2014) 223 Cal.App.4th 466, 477-478 (*Hawkins*).) "Pleading in the language of statute is acceptable provided that sufficient facts are pleaded to support the allegations." (*Blegen v. Superior Court* (1981) 125 Cal.App.3d 959, 963.) In contrast, "simply parroting the language" of a statute will not suffice. (*Hawkins*, *supra*, 223 Cal.App.4th at p. 478.)

Liberally construing the FAC and keeping in mind that a complaint need only contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language (Code Civ. Proc., § 425.10, subd. (a)(1)), the Court is not persuaded that the FAC is "simply parroting" statutory language or lacks the requisite level of specificity necessary to sufficiently state the various statutory claims asserted therein. While the FAC is not necessarily overflowing with facts, Plaintiff has pleaded more than just the bare elements of each claim in the most general of terms. For example, in alleging that he was not paid for all hours worked and performed off-the-clock work, Plaintiff specifically pleads that he was not paid for travel time to job sites and would perform work before and after clocking in, including cleaning his truck, preparing his materials, and attempting to make repairs to the work truck. (FAC, ¶ 12.) Plaintiff also specifies that he was discriminated against as a result of informing Defendants of unsafe working conditions in violation of Labor Code section 6310, and describes voicing his concerns to Mr. Qazi, the managing agent and owner of Soleeva, in November 2022. (FAC, ¶ 22.) To the extent Defendants have questions about when certain alleged violations occurred, the answer is alleged in the FAC: between November 1, 2022 and December 15, 2022.

The higher level of factual particularity sought by Defendants, such as the specific timing of certain alleged violations, is not supported by the authorities they cite. Furthermore, more detail concerning the alleged violations can be ascertained through discovery; indeed, that is the purpose of of that process. (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 281 ["Discovery necessarily serves the function of 'testing the pleadings,' i.e., enabling a party to determine what his opponent's contentions are and what facts he relies upon to support his contentions."].) Although there are some inconsistencies in the FAC (for example, Plaintiff refers to Defendants' purported failure to reimburse him for business expenses as beginning *three* years before filing the FAC despite also alleging that he only worked for Defendants for five weeks), they do not, by themselves, render the claims pleaded defective. And while Defendants also refer to a lack of "clear proof and evidence" in the FAC, Plaintiff is not obligated to provide either in his complaint. (See *Children's Television, supra,* 35 Cal.3d at pp. 213-214.)

All told, the Court does not find the arguments asserted by Defendants in support of their demurrer persuasive. Accordingly, Defendants' demurrer to the FAC and the claims asserted therein on the ground of failure to state facts sufficient to constitute a cause of action is OVERRULED.

III. CONCLUSION

Defendants' demurrer to the FAC and the claims asserted therein on the ground of failure to state facts sufficient to constitute a cause of action is OVERRULED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 2

Case Name: *Cadence Design Systems, Inc. v. TCL Industrial Holdings, Co., Ltd., et al.*
Case Nos.: 23CV417807

This is an action for breach of contract and unfair competition arising out of Defendants TCL Industrial Holdings, Co., Ltd., et al.[1] (collectively, "TCL" or "Defendants") alleged piracy of Plaintiff Cadence Design Systems, Inc.'s ("Cadence" or "Plaintiff") electronic design automation software.

Before the Court is Defendants' demurrer to the First Amended Complaint ("FAC") which is opposed by TCL. As discussed below, the Court SUSTAINS the demurrer WITHOUT LEAVE TO AMEND.

IV. BACKGROUND

A. Factual

According to the allegations of the FAC, Cadence is a worldwide leader in Electronic Design Automation ("EDA"), as well as semiconductor intellectual property, whose custom and analog tools help engineers design the transistors, standard cells, and IP blocks that make up systems on chips, integrated circuits and printed circuit boards. (FAC, ¶ 90.) Cadence licenses its propriety software throughout the world. (*Id*., ¶ 92.)

Plaintiff alleges that TCL "repeatedly and extensively copied, reproduced, distributed, and used Cadence Software without authorization from Cadence." (FAC, ¶ 95.) Cadence has identified at least 370,000 instances of infringement of its "cracked," i.e., pirated, software on at least 1,827 machines, a significant portion of which were provisioned by TCL. (*Id*., ¶¶ 96-97.) Plaintiff alleges that it and TCL are parties to "binding, enforceable and subsisting agreements," namely, various Software License and Maintenance Agreements ("SLMAs") used in connection with Cadence software programs installed by TCL. (*Id*., ¶¶ 108-1022.) Plaintiff further pleads that TCL was presented with the terms the SMLAs when they installed pirated Cadence software on their computers and assented to their terms by selecting "I accept the terms of the license agreement" and clicking "Next" during the installation of Cadence Software." (*Id*., ¶ 125.) TCL breached the terms of the SMLAs by

> copying, sharing and using the Cadence Software without authorization from Cadence, by continuing to use the Cadence [S]oftware for commercial purposes without any valid license allowing the Cadence Software to be used or copied by unlicensed persons, failing to take reasonable steps and exercise due diligence to protect the Cadence Software from unauthorized reproduction, publication, or distribution, and by installing and using Cadence Software on its computers without authorization, and by not paying a licensing fee.

[1] Named as defendants in this action are 12 different entities (corporations or LLCs) that are represented by the same counsel. Plaintiff alleges that Defendants are alter egos of one another and hold themselves out as a single enterprise known as "TCL." (Complaint, ¶¶25-26.)

(FAC, ¶ 137.)

TCL's actions have deprived Cadence of "substantial" license fees and "irreparably harm[] Cadence's long-term market share and reputation by "creat[ing] competitive pressure and market incentives for other market players to employ pirated versions of Cadence Software." (FAC, ¶¶ 140-141.)

B. Procedural

Based on the foregoing, Plaintiff initiated this action with the filing of the Complaint on June 15, 2023, asserting the following causes of action: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; and (3) unfair competition (violation of Business & Professions Code § 17200 ("UCL")).

In March 2024, TCL demurred to the Complaint and each of the claims asserted therein on the grounds of failure to state facts sufficient to constitute a cause of action and uncertainty, which was opposed by Cadence. On April 10, 2024, the Court issued an order overruling the demurrer on the ground of uncertainty and sustaining it on the ground of failure to state sufficient facts with leave to amend. Plaintiff filed the operative FAC on April 30, 2024; it asserts the same three claims as the Complaint. TCL now demurs again to the FAC, this timely solely on the ground of failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

V. DEMURRER

A. Legal Standard

" 'The purpose of a demurrer is to test the sufficiency of a complaint by raising questions of law.' [Citation.]" (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1143.) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action . . . ." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) All material factual allegations in the complaint are assumed true and "the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof" is not at issue. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Children's Television*).) Moreover, the court must "liberally construe the complaint 'with a view to substantial justice between the parties,' drawing 'all reasonable inferences in favor of the asserted claims.' [Citations.]" (*Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 919.) However, the court does not "assume the truth of 'contentions, deductions, or conclusions of law.' " (*Ibid*.)

Usually, "[a] demurrer can be used only to challenge defects that appear on the face of the pleading under attack . . . ." (*Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 229.) But courts may also consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

In support of their demurrer, TCL makes the following arguments: (1) Cadence fails to plead all the necessary components of an enforceable agreement; (2) even if Cadence pleaded the existence of a valid contract, a claim for breach of that agreement is not pleaded with sufficient particularity; (3) the claim for breach of the implied covenant fails as a matter of law because there was no valid contract between the parties is duplicative of the preceding claim; (4) Cadence fails to sufficiently plead a claim for violation of the UCL; and (5) any claims predicated on domestic actions are preempted by federal copyright law.

1. *Copyright Preemption*

As it did in its prior demurrer to the Complaint, TCL argues that, to the extent Plaintiff's claims are predicated on conduct that occurred domestically, they are preempted by the federal Copyright Act of 1976 (17 U.S.C., § 101, et seq.) (the "Copyright Act" or the "Act"). The Court explained in the order on TCL's first demurrer that the Copyright Act protects "original works of authorship," including software programs (17 U.S.C. §§ 101-103), and grants the copyright owner exclusive rights to reproduce, adapt, distribute, perform, and display the copyrighted work (17 U.S.C. §§ 106). Section 301, subdivision (a), of the Act expressly preempts state laws that protect "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope as specified by [section 106]." (*Kabehie v. Zoland* (2002) 102 Cal.App.4th 513, 520, internal citations and quotations omitted (*Kabehie*).) The Act does not preempt all state common law affecting copyright material. (See Section 301, subd. (b).)[2] In order to ascertain whether a state law claim is preempted, courts have fashioned a "two-part test," and a claim is preempted when both parts are satisfied. (*Laws v. Sony Music Entm't, Inc.* (9th Cir. 2006) 448 F.3d 1134, 1137.) This test includes the following conditions: "first, the subject of the claim must be fixed in a tangible medium of expression and come within the subject matter or scope of copyright protection …, and second, the right asserted under state law must be equivalent to the exclusive rights contained in section 106." (*Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1918-1919.)

The first step merely requires a determination of whether the "subject matter" of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. sections 102 and 103. (*Maloney v. T3Media, Inc*. (9th Cir. 2017) 853 F.3d 1004, 1010.) As for the second step, in determining whether the rights asserted through a state law claim are "equivalent" to the exclusive rights of copyright holders, a court must (1) engage in a "fact-specific analysis" of the "nature" of the state law claim as alleged by the plaintiff in that case; and (2) determine whether that state law claim, as alleged, "protects rights which are qualitatively" the same as "the [exclusive] rights" conferred by the Act. (*Id*. at p. 1019.) If the state law claim has an "extra element" that "changes the nature of the action so that it is qualitatively different from a copyright infringement claim" that claim is not preempted. (*Kabehie, supra*, 102 Cal.App.4th at 520-521.) When assessing the "nature" of the state law claim, what matters is the "right sued upon and not the form of action" (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1153), as

[2] This subsection represents the reverse of the preceding subsection, permitting states to regulate "activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by [section 106]." (17 U.S.C. § 301, subd. (b).)

holding otherwise could allow plaintiffs to avoid the Act's preemptive effect through "artful pleading" (*Kabehie, supra,* 102 Cal.App.4th at p. 526.)

California courts have applied the so-called "extra element" test in the context of a breach of contract cause of action. In *Kabehie, supra,* the first published decision to do so, the court rejected the approach of some courts that hold that breach of contract actions are never preempted because the cause of action includes a promise and the existence of the promise as the "extra element" avoiding preemption, instead concluding that in order to determine if the breach claim is preempted, one must undertake a "fact-specific analysis of the particular promise alleged to have been breached and the particular right alleged to have been violated." (*Kabehie, supra,* 102 Cal.App.4th at p. 521.) The court reached this conclusion based on "the language of the [Copyright Act], the legislative history of the Act, and the opinions of the majority of courts that have considered the issue." (*Id*.)

TCL previously argued that Plaintiff's claims were preempted because they did not involve the protection of rights that are "qualitatively different" from copyright infringement and thus did not provide the "extra element" necessary to escape the scope of federal preemption. The Court ultimately did not sustain the demurrer on preemption grounds because it determined that it was "not completely clear from the allegations of the Complaint exactly where the alleged piracy and infringement took place with respect to every defendant." The lack of clarity in this regard was critical because "federal copyright law does not apply to extraterritorial acts of infringement" and thus "does not preempt causes of action premised upon [such] infringement." (*Allarcom Pay TV, Ltd. v. General Instrument Corp.* (9th Cir. 1995) 69 F.3d 381, 387.) The Court could not discern whether Cadence's claims were predicated on domestic conduct (if at all), extraterritorial conduct, or both, and because a demurrer does not lie to part of a cause of action (see *PH II, Inc. Superior Court* (1995) 33 Cal.App.4th 1680, 1682), reasoned that it could not sustain the demurrer on preemption grounds.

This still remains true for the FAC. That is, because it is not entirely clear that each cause of action asserted in the FAC is predicated solely on actions occurring in the United States, the Court is not able to sustain the demurrer even if it agrees that liability for domestic infringement is preempted by the Copyright Act. TCL's effort to distinguish the authority cited by the Court for the proposition that a demurrer does not lie to only part of a cause of action is unavailing; this well-settled proposition is not limited by the type of claim being asserted. (See, e.g., *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal App 4th 265, 274; *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002)108 Cal.App.4th 1028, 1037.) Thus, the Court will not sustain the demurrer on this basis.

2. *Breach of Contract*

The Court previously sustained the demurrer to the breach of contract claim as alleged in the Complaint after agreeing with TCL that Cadence failed to adequately plead the mutual assent necessary to plead the existence of an enforceable agreement. TCL assert that Plaintiff has not corrected this deficiency in the FAC. The Court agrees.

As explained previously, in order to state a claim for breach of contract, a plaintiff must allege (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921.) Mutual assent or consent is necessary for the formation of a contract. (Civ. Code, §§ 1550, 1565.) For a meeting of the minds to exist, parties must agree on all material contract terms. (*Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1430.) Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 119, p. 144.)

TCL asserts that Plaintiff has not sufficiently pleaded that the parties mutually assented to the terms of the SMLAs because it repeatedly alleges that they did "not have a valid license to use Cadence Software" and that TCL breached the SLMAs "by copying, sharing, and using the Cadence Software without authorization from Cadence, by continuing to use the Cadence software for commercial purposes without any valid license…, and by installing and using Cadence Software on its computers without authorization, and by not paying a licensing fee." (FAC, ¶¶ 95, 133, 137.) Such allegations, they argue, are entirely in contravention of one another. The Court must concur. The whole theory behind Plaintiff's claim for breach of contract is that TCL utilized Cadence software *without authorization*, using "cracked" and "tampered" software. If Plaintiff did not authorize TCL to use its software, it logically follows that Plaintiff did not mutually assent to the agreement that was required to be executed to validly use that software. It cannot be true that Cadence assented to a software licensing agreement with TCL pertaining to the use of the very software that Cadence alleges TCL never had permission to use. In other words, what *facts* alleged in the FAC demonstrate that Cadence assented to the SMLA when Cadence also alleges it did not authorize TCL to use the pirated or "cracked" software? This is not just a matter of inconsistent, contradictory facts or theories, which Plaintiff emphasizes it is allowed to plead; it is a logical and legal fallacy and failure to plead a critical fact that has not been, and indeed cannot be corrected, and the Court is not required to accept the truth of legal conclusions, e.g., that the parties mutually assented to the terms of the SMLAs. (See *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96, 105 [overruled on other grounds].)

Further evidencing this fallacy is Cadence's claim that Defendants agreed to the SLMAs, which promised a software license, yet were never provided with a license despite their supposed assent to the terms. (See Ex, 1 to FAC, § 1, "GRANT OF LICENSE FOR CADENCE SOFTWARE.") As TCL argues, by this logic, a breach of the SMLAs could have occurred the moment Defendants clicked "agree." In contrast to what it argued previously, Cadence now claims the existence of a SLMA is not tied to Cadence's grant or conditions of the license. (Opp. at 5.) This argument is confusing because Cadence fails to explain how the two are separate, and the allegations of the FAC establish that the SLMA and license to use Cadence's software cannot exist without one another.[3] (See FAC, ¶¶ 110, 123, Exhibit 1 ["If

[3] In the Complaint, no distinction was made between those with or without a valid license who was presented with the SLMA made by Cadence. Cadence emphasized in that pleading that a License Manager was used as a mechanism to protect its software against unauthorized use, and its allegations suggested that only users with a *valid* license were prompted to accept the terms of the SLMAs. (See Complaint, ¶ 95 ["Cadence Software will not operate unless a user first installs the Cadence License Manager]; ¶ 96 ["The Cadence

you do not want to be bound by the terms of this agreement, Cadence is unwilling to license the software to you …"].) Thus, if TCL agreed to the SLMA terms, their software use was authorized, and there was no breach, but if Defendants accepted the SLMA but never received a license, then either Cadence breached the SLMA or the transaction fails for lack of consideration because there is nothing to suggest any benefit for the user (TCL) other than a license to use Cadence software.

In sum, Cadence still fails to plead the existence of the mutual assent necessary to establish the existence of a valid, enforceable agreement with TCL. Consequently, no claim for breach of contract has been stated and TCL's demurrer to the first cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

3. *Breach of Implied Covenant*

The Court previously sustained the demurrer to this claim after concluding, as TCL argued, that because Cadence failed to state a claim for breach of contract, its implied covenant claim necessarily failed. (See *Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 433 ["[t]he prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied terms in the contract."].) As the Court has concluded that Cadence still has not pleaded the existence of a valid agreement due to the lack of mutual assent, it follows that no claim for breach of the implied covenant has been stated in the FAC. Therefore, TCL's demurrer to the second cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

4. *UCL Claim*

The Court previously sustained the demurrer to the UCL claim as pleaded in the Complaint after finding persuasive TCL's contention that Cadence failed to plead conduct by TCL that qualified as "unfair" under the UCL. TCL argues that this is still the case in the FAC, and their demurrer to this claim should also be sustained because Plaintiff has not pleaded facts necessary to establish that it engaged in any unlawful or fraudulent business practice and the claim is duplicative of the breach of contract cause of action.

As the Court explained previously, the UCL prohibits "unfair competition," which is broadly defined to include any unlawful, unfair, or fraudulent act or practice. (Bus. & Prof. Code, § 17200.) "Because the UCL is written in the disjunctive, it establishes three varieties of unfair competition- acts or practices which are unlawful, or unfair, or fraudulent. An act can be alleged to violate any or all of the three prongs of the UCL- unlawful, unfair, or fraudulent."

License Manager cannot be installed unless a user first executes [the SLMA] with Cadence"]; ¶¶ 112-113 [After the user installs the License Manager, the user may then install the Cadence Software …. When the user installs the Cadence software, the user must again accept the terms of the SLMAs by selecting the "I accept" option …. [] if the user does not … [he] cannot proceed with installation of the Cadence Software."].) These allegations notably do not appear in the FAC, and in the absence of an explanation from Cadence for their omission, would appear to implicate the sham pleading doctrine. However, given the Court's conclusions concerning a lack of mutual assent, it need not address this issue further.

(*Berryman v. Merit Prop. Mgm't, Inc.* (2007) 152 Cal.App.4th 1544, 1554.) The UCL "borrows" violations of other laws and treats them as unlawful practices independently actionable under the act. (*Gafcon, Inc. v. Ponsor & Assocs.* (2002) 98 Cal.App.4th 1388, 1425, fn. 15.) In the FAC, Cadence alleges that TCL violated the UCL by engaging in "unfair, fraudulent, and/or unlawful business practices … by using 'cracked' (i.e., pirated or stolen) or otherwise unauthorized versions of Cadence Software without paying the required license fees. (FAC, ¶ 183.) While Cadence uses the terms "unlawful and fraudulent" to describe TCL's actions, this claim in actuality appears, as it did in the Complaint, to be based solely on "unfair" conduct. Cadence concedes this in its opposition. (Opp. at 11.)

There are different tests for determining whether a practice is "unfair" within the meaning of the UCL depending on if the claim is being asserted in a "consumer" action or a "competitor" action. Given the allegations of the FAC, i.e., that Defendants' actions are harming the software, electronics and technology industries, TCL contends that Plaintiff is attempting to state a competitor UCL action, as it did in the Complaint. (FAC, ¶¶ 190, 204, 208, 210, 212.) However, Plaintiff responds that its claim survives under a competitor *or* consumer theory.

In a competitor action, the effect on competition determines unfairness, with the determinative inquiry being whether the act or practice threatens "an incipient violation of an antitrust law, or violates the policy or spirit of one of the antitrust laws because its effects are comparable to, or are the same as, a violation of the law." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 187.) In its order on the demurrer to the Complaint, the Court explained that the foregoing test is only applicable to actions between *direct* competitors (see *Watson Labs, Inc. v. Rhone-Poulenc Rorer, Inc.* (C.D. Cal. 2001) 178 F.Supp.2d 1099, 1118, fn. 13), and because TCL was not alleged to be a direct competitor of Cadence, to the extent Cadence was attempting to state a UCL based on unfair practices by a competitor, they had not done so.

TCL urges that this defect has not been corrected in the FAC because it generally references their "competitors in California (and elsewhere) who use lawfully licensed software" but does not specify that Cadence is among these competitors, that Cadence is a direct competitor, or that TCL's business practices impact Cadence's software. (FAC, ¶ 209.) The Court agrees and thus concludes that Cadence again fails to state a UCL claim based on unfair practices by a competitor.

In "consumer" category of cases, a split of authority exists with regard to the proper test for determining whether a business practice is unfair under the statute, with the California Courts of Appeal adopting three different tests for determining unfairness in the consumer context. (See, e.g., *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380, fn. 9.) These tests consist of the following:

- An act or practice is unfair "if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." (*Daughtery v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 700, 710.)
- "'[A]n "unfair" business practice occurs when that practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or

substantially injurious to consumers." (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 719, internal citations omitted.)

- An unfair business practice means " 'the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions.' " (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940.)

TCL maintains that Cadence has not met any of the foregoing standards despite introducing new allegations pertaining to the California Comprehensive Computer Data Access and Fraud Act ("CCDAFA"), as they have not alleged that any defendant violated or offended the CCDAFA or any other specific legislation, only broadly pleading that TCL's purported software piracy "offend[s] established public policy." They continue that the FAC does not allege that any of their alleged piracy is "tethered" to any underlying constitutional, statutory, or regulatory provision or that it threatens an "incipient violation of [an] antitrust law, or violates the policy or spirit of an antitrust law." Finally, TCL assert, Plaintiff does not identify what injury is suffered by consumers as a result of piracy, focusing instead on the injury it suffered due to the alleged unfair competition.

Regardless of the test utilized, the Court is not persuaded that Cadence has a stated a consumer UCL claim based on unfair practices. This because is it still not clear from the allegations of the FAC how TCL's alleged "unfair practices" are injurious to consumers on the whole, rather than simply Cadence, who is *not* a consumer. General allegations of harm to various industries are insufficient to establish this component of the claim.

Additionally, Plaintiff's reliance on the CCDAFA also does not aide its effort to state a UCL claim, as it fails to articulate how the alleged piracy offends the policy purportedly enumerated in that act. As TCL explains, the CCDAFA was enacted to protect "the integrity of all types and forms of lawfully created computers, computer systems, and computer data." (Penal Code, § 502, subd. (a).) To protect the "privacy of individuals … the well-being of financial institutions, business concerns, governmental agencies and others … [that] lawfully utilize those computers, computer systems, and data," the statute criminalizes "tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems." (*Id*.) The foregoing describes cybercrimes and not piracy, and the former is not alleged to have happened here.

Regardless of the category of UCL "unfairness" claim or the test applied, the Court finds that Cadence has not state a claim for violation of the UCL. Accordingly, TCL's demurrer to the third cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

VI. CONCLUSION

TCL's demurrer to the FAC is SUSTAINED WITHOUT LEAVE TO AMEND.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 3

Case Name: *Jason Zoladz, et al. v. Google LLC*
Case No.: 24CV430061

This is an action for negligence arising out of a carjacking in Cape Town, South Africa. Plaintiffs Jason Zoladz and Katharine Zoladz (collectively, "Plaintiffs") allege that they utilized Google Maps for driving directions from their Airbnb to Cape Town International Airport and while driving through a high-crime neighborhood, were the victims of a carjacking. Plaintiffs allege that Defendant Google LLC ("Google" or "Defendant") had a legal duty to warn users about high-crime areas and route them so as to avoid those areas. Plaitiffs allege that by failing to do so, Google breached that duty, resulting in their carjacking.

Before the Court is Google's demurrer to the FAC and each of the four causes of action asserted therein. Plaintiffs oppose the motion. As discussed below, the Court SUSTAINS the demurrer without leave to amend.

VII. BACKGROUND

According to the allegations of the FAC, Plaintiffs took an international vacation to South Africa in October 2023. (FAC, ¶¶ 30-31.) On the morning of October 24th, Plaintiffs drove from their rental Airbnb toward Cape Town International Airport, where they intended to trade their rental car for a different vehicle. (*Id*., ¶ 31.) They used Google Maps, a publicly available navigation application that, upon a user's request, "provides turn-by-turn directions from the user's location to a destination selected by [them]." (*Id*., ¶ 13.) Along the route Plaintiffs were directed to take, which included a stretch of highway dubbed "Hell Run" due to the history of violent attacks that occurred there, they were intercepted by "a gang of violent, armed criminals" in the Nyanga township with an alleged "propensity to assault travelers while driving near the Cape Town airport." (*Id*., ¶¶ 22, 32, 38.) These individuals "smash[ed]" the car's "driver's side window," mugged Plaintiffs, grabbed their property, and escaped. (*Id*., ¶¶ 6, 32, 34.) Mr. Zoladz allegedly suffered a serious injury as a result of the incident when his jaw was hit with a paving brick thrown by the assailants through the driver's side window. (*Id*., ¶¶ 5, 34.) Plaintiffs allege that after the incident, "a United States Consular official" confirmed that the State Department was aware of carjackings in the area and had been in discussions with Google Maps "for a while," trying to get it to stop sending people along that same route to Cape Town International Airport. (*Id*., ¶ 35.) Plaintiffs further allege that they later communicated with Cape Town officials who "emphasized that they too had tried to secure meetings with Google Maps for months, and possibly years, to remove the route to the airport that the [Plaintiffs] were directed to take by the application." (*Id*., ¶ 36.)

Based on the foregoing allegations, Plaintiffs asserts the following causes of action in the FAC: (1) negligence and gross negligence; (2) negligent failure to warn; (3) negligent undertaking; and (4) negligent infliction of emotional distress (by Ms. Zoladz only).

VIII. GOOGLE'S DEMURRER

Google demurs to the FAC and each of the four causes of action alleged therein on the ground of failure to state facts sufficient to constitute a cause of action.[4] (Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard

" 'The purpose of a demurrer is to test the sufficiency of a complaint by raising questions of law.' [Citation.]" (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1143.) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action . . . ." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) All material factual allegations in the complaint are assumed true and "the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof" is not at issue. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Children's Television*).) Moreover, the court must "liberally construe the complaint 'with a view to substantial justice between the parties,' drawing 'all reasonable inferences in favor of the asserted claims.' [Citations.]" (*Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 919.) However, the court does not "assume the truth of 'contentions, deductions, or conclusions of law.' " (*Ibid*.)

Usually, "[a] demurrer can be used only to challenge defects that appear on the face of the pleading under attack . . . ." (*Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 229.) But courts may also consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

In asserting that its demurrer should be sustained in its entirety, Google makes the following arguments: (1) Plaintiffs fail to establish that Google had a duty to protect them from third-party criminals; (2) even is some duty existed, it would be limited by the factors articulated in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) and could not support their claims; (3) Google's alleged breach of duty was not the proximate cause of Plaintiffs' injuries; and (4) Plaintiffs' claims are barred by the First Amendment.[5]

1. *Existence of a Duty of Care*

A required element of Plaintiffs' claims, which all sound in negligence, is the existence of a duty of care on part of Google towards them. (See *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918 (*Ladd*).) The "general rule" of duty in California is established by statute, particularly Civil Code section 1714 ("Section 1714"), which provides in pertinent part:

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[4] Google's request for judicial notice of Exhibits 1-9 attached to the Declaration of Mark Yohalem, which Plaintiffs oppose, is DENIED.

[5] Given the Court's conclusions concerning a duty of care and proximate causation, below, it did not consider the merits of Google's remaining free speech argument.

> Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

(Civ. Code, § 1714, subd. (a).)

Section 1714, however, is not without its limitations. As explained in *Jane Doe No. 1 v. Uber Technologies, Inc.* (2022) 79 Cal.App.5th 410, 419 (*Uber*), "California courts have uniformly held that a defendant owes no legal duty to the plaintiff if the defendant has neither performed an act that increases the risk of injury to the plaintiff nor sits in a relation to the parties that creates an affirmative duty to protect the plaintiff from harm." (*Uber,* quoting *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 216 (*Brown*).) Accordingly, "as a general matter, there is no duty to act to protect others from the conduct of third parties." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235.) This rule is nevertheless subject to "well-established exceptions." (*Uber, supra,* 11 Cal.5th at p. 420.) The California Supreme Court "has set forth a 'two-step inquiry' for determining when such exceptions apply and trigger a duty to protect." (*Ibid.*, quoting *Brown, supra,* 11 Cal.5th at p. 213.) In the first step, the court must evaluate whether there is "a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect." (*Brown, supra,* 11 Cal.5th at p. 213.) If either of the foregoing is determined to exist, the court moves to the second step, which requires it to consider "whether relevant policy considerations counsel limiting that duty" (*ibid.*), "looking to the policy factors identified in [*Rowland*] for guidance." (*Uber, supra,* 79 Cal.App.5th at p. 420.)

Google chiefly relies on *Uber* in arguing that it did not owe Plaintiffs a duty of care. In *Uber*, multiple women were abducted and sexually assaulted by criminals who posed as Uber drivers to lure female passengers into their vehicles. (*Uber,* 79 Cal.App.5th at 414.) The plaintiffs alleged that Uber's business model created the risk that criminals would employ the foregoing scheme and that it negligently failed to warn them of it, failed to implement additional safety precautions to protect them against third parties employing the scheme, and concealed instances of assault committed pursuant to it while continuing to advertise Uber as safe for women.

The appellate court affirmed the trial court's order sustaining Uber's demurrer to the complaint, concluding that the plaintiffs had failed to allege facts that would "give rise to a duty to protect." The court explained that the general rule that one has no duty (absent a special relationship) to protect others against harm by third parties is grounded in the idea that, "[g]enerally, the person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another from that peril." (*Uber, supra*, 79 Cal.App.5th at p. 424, quoting *Brown, supra,* 11 Cal.5th at p. 214.) It continued that a "necessary corollary" to the foregoing is that "when a defendant *has* affirmatively created a peril that foreseeably leads to the plaintiff's harm [], the defendant can, even absent a special relationship, be held liable for failing to also protect the plaintiff from that peril." (*Ibid*.) Thus, more than a mere failure to protect (nonfeasance) was present in such a scenario; it involved "*both* misfeasance—the defendant has ma[de] the plaintiff's position work, i.e., defendant has created a risk— *and* the nonfeasance of failing to protect against that risk once created." (*Id*. at 425, internal citations and quotations omitted, emphasis in original.)

"The crux of the difference between misfeasance and nonfeasance for purposes of assessing a duty to protect is whether the third party conduct was a necessary component of the [defendant's] conduct at issue." (*Uber, supra*, 79 Cal.App.5th at p. 427, internal citation and quotations omitted.) The *Uber* court explained that the fact that assault and rape by third parties is a foreseeable result of a defendant's actions, or that such conduct may not have occurred but for the defendant's actions, was *insufficient* to establish that the third-party conduct was a "necessary component" of the defendant's conduct that was at issue. (*Id.* at p. 427.) Thus, the court concluded, the violence that harmed the plaintiffs—abduction and sexual assault—was not a necessary component of Uber's business model, and did not become one because the company "marketed the … app as safe to use, refused to cooperate with sexual assault investigations, or concealed sexual assaults related to the use of the app." (*Ibid*.) It continued: "that a defendant's organization or business creates an opportunity for criminal conduct against a plaintiff and thereby worsens the plaintiff's position does not render such criminal conduct a necessary component of the organization's actions—even when that conduct is foreseeable." (*Id*. at pp. 428-429.) Because the provision of such an opportunity was not deemed to constitute misfeasance, no duty to protect was triggered on the part of Uber.

Google argues that Plaintiffs' allegations are a "weaker version" of what *Uber* deemed insufficient as a matter of law, to wit: (1) while Uber allegedly created the very possibility of the "fake Uber scheme" in which women were lured into cars for sexual assault (*Uber, supra*, 79 Cal.App.5th at pp. 426-427), the carjacking of tourists existed well before Google Maps; (2) while Uber allegedly "actively concealed the fake Uber scheme and instances of sexual assault reported to Uber" (*ibid*.), Plaintiffs do not allege that Google kept them from learning about South Africa's carjacking crisis and a simple Google search would lead to a State Department travel advisory; (3) while Uber allegedly furnished the rapists not just the opportunity to commit crimes but also the "Uber decals" that enabled them to carry out those crimes (*ibid*.), there is no allegation Google furnished Cape Town's "violent gangs" with the "brick[s]" and "guns" used to carry their carjackings such that those were necessary components of its business (FAC ¶ 34). The holding from *Uber*, Google maintains, forecloses Plaintiffs' contention that it had a duty to protect app users from third-party criminals. Upon review of the decision, the Court agrees with Google.

In their opposition, Plaintiffs conversely argue that Google had a duty of care under Section 1714 because it "directly contributed" to their risk of harm and, citing to *Kuciemba v. Victory Woodworks, Inc.* (2023) 14 Cal.5th 993 (*Kuciemba*) and *Hacala v. Bird Rides, Inc.* (2023) 90 Cal.App.5th 292 (*Hacala*), insist that the California Supreme Court and the Court of Appeal have both "squarely rejected" the "necessary component" test relied on by Google. Their case, Plaintiffs urge, is on all fours with *Hacala*.

But *Uber* has not been disapproved by the state Supreme Court, nor does it conflict with another appellate decision. In *Kuciemba*, the court addressed certified questions of law from the U.S. Court of Appeals for the Ninth Circuit concerning whether California law imposes a duty of care on employers to prevent the spread of COVID-19 to their employees' household members. In the complaint at issue, the plaintiff alleged that in violation of a county health order, his employer transferred a group of workers from another location where they may have been exposed to the virus to the construction site at which he worked without taking the required precautions. The court concluded that the default duty of Section 1714 applied because the plaintiff's theory of negligence liability was that his employer created the risk of harm by violating a county health order, thereby violating its obligation to "exercise due care

in [its] *own* actions so as not to create an unreasonable risk of injury to others." (*Kuciemba, supra,* 14 Cal.5th at p. 1018, internal citations omitted, emphasis added.)

Nowhere in *Kuciemba* did the court disapprove of *Uber*; in fact, it declined to review or depublish that case (see *Doe v. Uber Techs., Inc.* (2024) 2024 U.S. App. LEXIS 19911, *4 (*Doe*)), and the court reiterated that the "default duty" of Section 1714 does not apply to claims "against organizations the plaintiffs asserted were negligent in failing to protect them from the harm." (*Kuciemba, supra,* 14 Cal.5th at p. 1017). This is not at odds with *Uber,* where the court explained that in such cases, "the rule [is] that generally one owes no duty to control the conduct of another, nor to warn those endangered by such conduct." (*Ibid.,* internal quotations omitted). The default rule was applied in *Kuciemba* because "[t]he complaint d[id] not allege that [the defendant] was negligent in failing to protect [the plaintiff] from harm caused by the negligent or intentional misconduct of a third party" but instead "allege[d] [the plaintiff] was harmed by [the defendant's] own misconduct in transferring potentially infected workers to [the plaintiff's husband's] jobsite and forcing [him] to work in close proximity to them." (*Ibid.*) While the court in *Kuciemba* stated that it would not "exempt [the defendant] from the default duty to use due care in its operations to avoid foreseeable injuries" based on the fact that the defendant did not "obtain any commercial benefit from [COVID]" (*Id.* at p. 1017), it stated as much *after* explaining that a defendant has no such duty "to protect [a plaintiff] from harm caused by the negligent or intentional misconduct of a third party." (*Ibid.*) Accordingly, the issue in *Uber,* as in this action, was not whether to exempt the defendant from the Section 1714 default duty of care, but whether to impose one despite a "no duty" default, on the theory that the app allegedly set the plaintiffs up to be victimized by third parties whose crimes the app triggered. (*Uber, supra,* 79 Cal.App.5th at pp. 425-429.)

Plaintiffs direct the Court to *Doe,* a divided, unpublished decision from the Ninth Circuit, wherein the court expressed its belief that the "necessary component" test applied in *Uber* was "plainly inconsistent" with *Kuciemba* and that applying it in that case would have precluded the outcome reached by the California Supreme Court. But this decision is not binding on this court (additionally, there is a pending, amicus-supported petition for re-hearing), which is instead "bound by all published decisions of the Court of Appeal" (*Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1193), including *Uber*. *Doe* is also problematic because, as explained in the dissent authored by Judge Graber, *Kuciemba,* like *Uber,* rejected liability for organizations that "merely provide opportunities for harm caused by third parties, rather than meaningfully create, or contribute to, the risk of harm."[6] (*Doe,* at *21 [discussing the state Supreme Court's characterization of *Brown* and *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607 in *Kuciemba* as "cases in which the defendants did not create or contribute to the risk [of harm]" as supporting *Uber's* reasoning because "[i]f neither the entity responsible for coordinating the sporting events that a coach used as opportunities to

[6] The Court also agrees with many of the other points of criticism raised by Judge Graber about the majority's opinion, including that there is a lack of "convincing evidence" that the California Supreme Court would overrule *Uber* such that the Ninth Circuit was, as this Court is, obligated to follow that decision. The California Supreme Court denied the petition to review *Uber* and then "rebuffed [the Ninth Circuit's] request for certification, despite [it] pointing out potential flaws in [*Uber*]'s reasoning and laying out a path for possible reversal." Given the state Supreme Court's refusal—*twice*—to review *Uber*, "the weight of its refusal—and the already heightened importance of adhering to existing state appellate court precedent—increases commensurately." (*Doe,* 2024 U.S. App. LEXIS 19911 at *19.)

sexually abuse young athletes nor the university where an enrolled student stabbed another student meaningfully created or contributed to the risk of those crimes, it follows that Uber did not meaningfully create or contribute to the risk either."]) Similarly, here, there are no facts pleaded which suggest that Google did more than provide opportunities for harm caused by third parties.

The Court also agrees with Google that *Hacala* is not "[e]specially fatal" to *Uber* as argued by Plaintiffs. (Opp. at 9-10.) In *Hacala*, the appellate court reversed the trial court's dismissal of negligence claims against a scooter rental business where the plaintiff suffered injuries after tripping on a scooter sticking out from behind a trash can. The court held that the defendant's general duty of care under Section 1714 encompassed an obligation not to entrust its scooters to individuals who the rental business knew or should have known were likely to leave scooters in hazardous locations where they would pose an unreasonable risk of harm to others.

There are critical distinctions between *Hacala* and *Uber*, including that in the former the plaintiffs were allegedly harmed by the defendant's failure to exercise due care in the management of its *own* property, the scooters, whereas in the latter, the plaintiffs were harmed by *third parties* exploiting the existence of ridesharing services for nefarious purposes. Thus, unlike the claims in *Uber*, the negligence in *Hacala* was *not* predicated on a duty to protect the plaintiff from third-party misconduct. Accordingly, as Google maintains, the *Hacala* court did not reject *Uber* and the necessary component analysis because it did not need to perform such an analysis in the first instance. Plaintiff's reliance on *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, is similarly unavailing because it did not involve a party's duty to prevent a criminal attack.

The Court is therefore persuaded that *Uber* is controlling as to the circumstances alleged in the FAC and therefore concludes that the default duty of Section 1714 does not apply and Google had no duty to protect Plaintiffs from the actions of third parties. In the absence of such a duty, all of Plaintiffs' claims fail as a matter of law.

Turning to Google's next argument, the Court finds persuasive its contention that even if *some* duty of care existed, it would be limited by the *Rowland* factors. These factors, part of a test designed by the state Supreme Court "as a means for deciding whether to limit a duty derived from other sources" (*Brown, supra,* 11 Cal.5th at p. 217), are:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

(*Rowland, supra,* 69 Cal.2d at p. 113.)

Critically, this analysis is to be conducted "at a relatively broad level of factual generality" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772), with the factors evaluated to determine "not whether they support an exception to the general duty of reasonable care on the

facts of the particular case before [the court], but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." (*Ibid*.)

Google asserts that Plaintiffs have not pleaded facts establishing the requisite level of foreseeability and maintain that the burden of the duty they propose Google has would be extraordinary. Even assuming, for the sake of argument, that the requisite level of foreseeability has been pleaded, the Court agrees with Google that the remaining factors weigh strongly against a finding of duty. As Google contends, the duty Plaintiffs plead that it had—"to avoid routing users of Google Maps on the [section of road that they had received credible information from the governments of the United States and South Africa would expose travels to serious risk of bodily injury or death] so that Google would not expose those uses to an unreasonable risk of harm—would create an incredible burden on Google, as meeting that burden would not just require removing "Hell Run" and redlining the "Nyanga neighborhood," but would require removing every "section of road" and "particular neighborhood" that "Google ha[s] been warned about by government officials" (FAC, ¶ 16), including any "local government officials" (Opp. 16-17). The FAC alleges that Google Maps does not base its directions on crime reports and lacks any "system ..., to address government notifications of serious dangers to its users." (E.g., FAC ¶¶ 13, 29.) Thus, the duty they demand means creating that system-not merely in South Africa, but around the world; an extraordinary ask. (See *Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 151 (*Modisette*).)

Modisette is instructive in this regard. In that case, the court concluded that a cell phone company owned no duty of care under Section 1714 to plaintiffs who were seriously injured when their car was struck by a motorist using a factory-installed video call app. The court also rejected the plaintiff's contention that application of the *Rowland* factors compelled the conclusion that Apple owed them a duty of care given its awareness of the risk of harm created by the use of a phone while driving and its ability to install lockout technology on the devices to eliminate such a risk. While the court opined that several of the *Rowland* factors weighed in *favor* of finding a duty of care (including the foreseeability of harm, the certainty that the plaintiffs suffered injury, the policy of preventing future harm and "moral blame"), it ultimately concluded that the other factors, particularly that "the extent of the burden to [Apple] and consequences to the community of imposing a duty to exercise care with resulting liability for breach would be too great if a duty were recognized," ultimately weighed against finding one. (*Modisette, supra,* 30 Cal.App.5th at p. 145, internal citations and quotations omitted.) Imposing a duty on cell phone manufacturers to design their devices in such a way that users would be incapable of using them while driving implicated "complex public policy considerations," the court reasoned, and would have "sweeping implications" that would simply be too great. (*Ibid*.)

Here too, the burdens would be too significant. First, there is the burden of simply creating and maintaining such a redlining system that extends to all parts of the world where an individual may utilize Google Maps. Google urges that creating such a system would be a "fundamental transformation" of Google maps' functionality that would "entail significant cost, interfere with other core functions, create considerable backlash, and potentially expose the app makers to even more liability given the stated crime-avoiding functionality." (Mot. at 18.) None of these are trivial considerations with easy answers.

Second, even if accomplishing the foregoing did *not* involve significant financial or logistical burdens, "there are significant negative social costs" (*Shikha v. Lyft, Inc.* (2024) 102

Cal.App.5th 14, 29 (*Lyft*)) to giving all government officials the power to redline neighborhoods by identifying them as home to "violent gangs" with dangerous "propensit[ies]." (FAC, ¶ 22.) As Google argues, government officials have labeled various places—e.g. San Francisco's tenderloin, the New York subway system—as very dangerous, pointing to actual violent crimes. If app developers do not redline them, Plaintiffs' theory could impose liability when some tourists inevitably are attacked there. Even with governments acting only in good faith, what Plaintiffs propose "would be extremely overinclusive" (*Lyft*, *supra*, 102 Cal.App.5th at p. 29, fn. 4) and "stigmatizing" to the communities labeled dangerous (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 757). The potential for significant social burdens to result is high. What if, for example, bad-faith government actors utilize crime data to already-marginalized communities for exclusion?

Further, how would the extent of Google's duty even be determined? What level of risk of harm must be reached in order for Google's app to re-route a user? How would this be determined and by whom? Is it only based on determinations made by governments? What level of government? Local? National? As Google explains, "[t]o ask the questions is to demonstrate the futility of attempting to impose and define such a duty." (*7735 Hollywood Blvd. Venture v. Superior Court* (1981) 116 Cal.App.3d 901.) What are the limitations on the potential dangers which Google would be required to warn against? Given the foregoing, the Court is of the opinion that it would be difficult, if not impossible, to impose the duty articulated in Plaintiffs' FAC. Thus, it concludes that even if some duty existed on Google's part, the *Rowland* factors weight against actually imposing one.

2. *Proximate Causation*

Finally, the Court finds persuasive Google's contention that its app was not the proximate cause of the robbery of Plaintiffs by third persons as it "lack[ed] the legal or practical ability to control such criminal actions of third parties." (*Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557, 1564-1569 (*Pac Bell*).) In order to establish liability for a negligence cause of action, a plaintiff must plead and prove that the defendant's breach of duty was the proximate cause of their injury. (See *Ladd, supra,* 12 Cal.4th at pp. 917-918.)

Pac Bell is instructive in this regard. In that case, the court held that the defendant phone company's alleged negligence "was not, as a matter of law, the proximate or legal cause of the assailants' tortious acts," despite the phone company having been warned that two phone booths it operated were being used primarily or exclusively for conducting drug deals and that the individuals involved represented a danger to the people located nearby. Drug dealers attracted by the phones robbed and shot the plaintiff, severely injuring him. Nevertheless, the court concluded that the plaintiff could not "seek[] damages … for the consequences of the battery by unknown attackers bent on robbery." (*Id.* at 1566.) This was the case even though the assailants' conduct was foreseeable because the defendant could not control their conduct. The Court concludes that the same is true here, and Plaintiffs' citation to *Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1030 (*Raven H*) does not compel a contrary conclusion.

In *Raven H.*, the landlord "owned, operated, maintained and controlled the apartment complex premises" where "plaintiff was attacked." (*Raven H., supra*, 157 Cal.App.4th at p. 1021.) The purported causal acts included the landlord's failed "efforts to keep unauthorized persons out of the apartment complex." (*Id.* at p. 1030.) Because the landlord had the ability to

control who came onto the premises and failed to do so, he was deemed liable. This is wholly distinguishable from *Pac Bell*, where the defendant could not control the tortfeasors' conduct.

The facts of this case place it within the realm of *Pac Bell* and not *Raven H.*, as Google had no ability to control the criminal actions of the third parties that harmed Plaintiffs. As such, its action or inaction was not the proximate cause of the robbery and Plaintiffs have failed to state claims for negligence against Google.

In accordance with the foregoing, Google's demurrer to the FAC is SUSTAINED WITHOUT LEAVE TO AMEND. (See *State of California Auto. Dismantlers Assn. v. Interinsurance Exchange* (1986) 180 Cal.App.3d 735, 742 ["Where . . . amendment could not correct a deficiency in the complaint or where the action is barred as a matter of law, the demurrer is properly sustained without leave to amend."].)

IX. CONCLUSION

Google's demurrer to the FAC on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

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Case Name: *Terra Fritch, et al. v. Universal Protection Service, LP, et al. (Frtich)*
Case No.: 22CV399095 (Lead Case)

Case Name: *Gil v. Universal Protection Service, LP (Gil)*
Case No.: 22CV400206

Case Name: *Vickie Lane, et al. v. Universal Protection Service, LP, et al. (Lane)*
Case No.: 22CV398848

Case Name: *Firoozeh Davallou, et al. v. Universal Protection Service, LP, et al. (Davallou)*
Case No.: 22CV399418

Case Name: *Heather Balleza, et al. v. Universal Protection Service, LP, et al. (Balleza)*
Case No.: 23CV413374

On May 26, 2021, then-Valley Transit Authority ("VTA") employee Samuel Cassidy shot and killed nine coworkers at a VTA facility in San Jose. Many of the decedents' heirs and estates, as well as individuals who survived the shooting, have sued VTA, Santa Clara County ("the County"), and security company Universal Protection Service, LP ("Universal").[1]

Before the Court are Universal's motion for judgment on the pleadings as to the operative complaints filed in the *Fritch*, *Gil*, *Lane*, *Davallou* and *Balleza*, which are opposed by those parties. As discussed below, the Court DENIES the motions.

I. BACKGROUND

A. Factual

The following facts are applicable to each case.

VTA is a public transportation agency that operates bus and light rail services throughout Santa Clara County and employs about 2,000 workers. On May 26, 2021, VTA employee Samuel Cassidy perpetrated a mass shooting and killed a total of nine fellow employees. The shooting took place at VTA's Guadalupe Division facility, which is located in the Civic Center neighborhood of San Jose. Among the victims were the loved ones of the plaintiffs in these consolidated cases.

According to dispatch audio, at 6:33 a.m. on the day of the shooting, the San Jose Fire Department received a call to respond to the Guadalupe facility, though the caller did not mention anything about an active shooter. About a minute later, Santa Clara County authorities received 911 calls about shots being fired at the facility. Sheriff's deputies and police officers responded from their nearby offices. When they arrived at about 6:35 a.m., they found multiple

[1] The above-captioned cases have been consolidated, along with *Megia v. Universal Protection Service LP* (Case No. 22CV399096) and *Bertolet, et al. v. Universal Protection Service, LP, et al.* (Case No. 22CV398948).

people shot. The shooting occurred in two separate buildings at the busiest time of the day: a shift change during which employees from the overnight and morning shifts overlapped. According to the Sheriff, over 100 people were at the facility at the time of the shooting.

The shooting began in a conference room in Building B on the western side of the yard during a power crew meeting with the local Amalgamated Transit Union president. The gunman then walked over to Building A on the eastern side of the facility where he continued firing. At about 6:43 a.m., officers closed in on the gunman as he killed himself on the third floor of Building A between administrative offices and the operations control room. The Sheriff's office established that the gunman fired a total of 39 rounds from three semiautomatic handguns equipped with 32 high-capacity magazines. This was the deadliest mass shooting in the history of the Bay Area.

The gunman had a pattern of insubordination, had verbal altercations with coworkers on at least four separate occasions that were known to VTA management, and previously made death threats to coworkers. This information was, allegedly, readily available to each of the defendants by virtue of their relationship with VTA.

In order to provide security and risk advisory services to prevent mass shootings, VTA entered into a contract with Universal and the County of Santa Clara (through the Sheriff's Office) for security and protective services.

B. Procedural

In *Gil*, the operative Third Amended Complaint ("TAC"), filed February 7, 2024, alleges causes of action for assault, battery, and false imprisonment. The *Gil* TAC also includes a cause of action for negligence against Universal. In *Lane*, the operative fourth amended complaint ("4AC"), filed September 1, 2023, alleges causes of action for wrongful death; assault; battery; false imprisonment; and negligent hiring, supervision, or retention; and two separate causes of action for breach of contract.[2] The sole claim pleaded against Universal in the 4AC is the first for wrongful death.

In *Balleza*, *Fritch* and *Davallou*,[3] after Universal successfully demurred to the breach of contract claim asserted against it, the sole claim remaining against this defendant is for wrongful death.

The operative complaints allege that since 2014, VTA has contracted with Universal for the provision of security and protective services, and a major purpose of the related agreements were to provide security to protect VTA's employees from violence, whether internal or external. By virtue of these agreements, plaintiffs allege, Universal had a special relationship with them and their decedents and undertook a duty to provide security to protect these parties from harm. Universal allegedly breached this duty by failing to meet the applicable security standards, resulting in injury to Plaintiffs and their decedents.

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[2] VTA settled with the *Fritch*, *Davallou*, *Megia*, and *Balleza* plaintiffs and is no longer a defendant in those cases. VTA is a defendant in the *Lane*, *Bertolet* and *Gil* cases.

[3] In *Balleza*, the operative pleading in the First Amended Complaint ("FAC"), in *Fritch* it is the SAC and in *Davallou* it is the SAC.

Universal now moves for judgment on the pleadings as to the wrongful death cause of action asserted by the *Lane*, *Fritch*, *Balleza* and *Davallou* plaintiffs and the negligence claim asserted by Ms. Gil on the grounds that they fail to plead facts sufficient to establish that it owed the decedents and Ms. Gil a duty of care, and such claim cannot be maintained because decedents and Ms. Gil were not intended third-party beneficiaries of the agreement between Universal and VTA.[4]

II. MOTIONS FOR JUDGMENT ON THE PLEADINGS

A. Legal Standard

A motion for judgment on the pleadings brought by a defendant or respondent may be granted where the petition fails to state sufficient facts to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) The motion may be directed to the entire complaint or any cause of action therein. (§ 438, subd. (c)(2)(A).) The grounds for the motion "shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc., § 438, subd. (d).) In ruling on a motion for judgment on the pleadings, "[t]he trial court must accept as true all material facts properly pleaded, but does not consider conclusions of law or fact, opinions, speculation, or allegations contrary to law or facts that are judicially noticed." (*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.* (2006) 138 Cal.App.4th 1215, 1219-1220.)

"[A] motion for judgment on the pleadings may be addressed to the pleading as a whole or to separate counts. If addressed to the pleading as a whole, the motion must be denied if even one count is good. [Citation.] If addressed to separate counts, the motion may be granted as to some counts and denied as to others. [Citation.]" (*Heredia v. Farmers Ins. Exch.* (1991) 228 Cal.App.3d 1345, 1358.) Disputed factual issues that cannot be resolved without reference to items not appearing the face of the complaint or those subject to judicial notice cannot be determined on a motion for judgment on the pleadings. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1018.)

"A common law [i.e. non-statutory] motion for judgment on the pleadings 'ha[s] the purpose and effect of a general demurrer.' [Citations.]" (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 145.) In ruling on such a motion, the court determines whether the challenged pleading states facts sufficient to constitute a cause of action. (*Id*. at pp. 145-146.) In so doing, the court confines itself to considering the allegation appearing on the face of the pleading, which are accepted as true, and matters subject to judicial notice. (*Id*. at p. 146.)

B. Discussion

As set forth above, the thrust of Universal's motions is that the plaintiffs in these claims cannot maintain claims for negligence and/or wrongful death rooted in negligence because Universal did not owe Ms. Gil and the plaintiffs' decedents the requisite duty of care. The plaintiffs counter that such a duty of care *was* owed because a special relationship existed

[4] The requests for judicial notice filed by Universal and the *Fritch* plaintiffs are GRANTED. (Evid. Code, § 452, subds. (d) and (h).)

between Universal and Ms. Gil/the decedents' by virtue of the former's agreement with VTA for the provision of security services to protect those individuals.

A required element of the claims at issue, which all sound in negligence, is the existence of a duty of care on the part of Universal towards the decedents and Ms. Gil. (See *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918 (*Ladd*).) The "general rule" of duty in California is established by statute, particularly Civil Code section 1714 ("Section 1714"), which provides, in pertinent part:

> Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

(Civ. Code, § 1714, subd. (a).)

Section 1714, however, is not without its limitations. As explained in *Jane Doe No. 1 v. Uber Technologies, Inc.* (2022) 79 Cal.App.5th 410, 419 (*Uber*), "California courts have uniformly held that a defendant owes no legal duty to the plaintiff if the defendant has neither performed an act that increases the risk of injury to the plaintiff nor sits in a relation to the parties that creates an affirmative duty to protect the plaintiff from harm." (*Uber, supra,* 79 Cal.App.5th at p. 419, quoting *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 216 (*Brown*).) Accordingly, "as a general matter, there is no duty to act to protection others from the conduct of third parties." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235.) This rule is nevertheless subject to "well-established exceptions." (*Uber, supra,* 11 Cal.5th at p. 420.) The California Supreme Court "has set forth a 'two-step inquiry' for determining when such exceptions apply and trigger a duty to protect." (*Ibid.*, quoting *Brown, supra,* 11 Cal.5th at p. 213.) In the first step, the court must evaluate whether there is "a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect." (*Brown, supra,* 11 Cal.5th at p. 213.) If either of the foregoing is determined to exist, the court moves to the second step, which requires it to consider "whether relevant policy considerations counsel limiting that duty" (*id.*), "looking to the policy factors identified in [*Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*)] for guidance." (*Uber, supra,* 79 Cal.App.5th at p. 420.)

As stated above, the position of the plaintiffs is that a special relationship giving rise to a duty of care existed between Universal and the decedents (and Ms. Gil) by virtue of the agreement for security services between the company and VTA. In making this argument, the plaintiffs primarily rely on *Marois v. Royal Investigation and Patrol* (1984) 162 Cal.App.3d 196 (*Marois*) and *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225 (*Rosh*). In *Marois,* the owner of a fast food establishment hired a security company to provide such services on the premises, including the parking lot. While company guards were present, they observed a person with bloody clothing enter the restaurant and they instructed him to leave. That individual returned to the parking lot and struck and injured the plaintiff, a patron at the restaurant, despite verbal attempts by the guards to dissuade him attacking.

The trial court granted the defendants' motion for nonsuit, concluding that the plaintiff had failed to show that the defendants owed him a duty to act affirmatively to prevent the assault. The appellate court reversed, rejecting the lower court's conclusion that no such duty of care was owed, and reasoned that the pertinent question to answer was whether the security

guards responded reasonably to a foreseeable risk of harm. In reaching its holding, the *Marois* court explained that:

> [T]he relationship between a business and its customers is a special one requiring the business "to take affirmative action to control the wrongful acts of third persons which threaten invitees where [it] has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." … Just as a business may be liable … for its failure to take reasonable precautions to protect its customers (including, presumably, its failure to hire a competent security guard where there is such a need), a security guard hired by the business should be liable to an injured customer where the guard fails to act as would a reasonable security guard under similar circumstances and that failure causes the customer's injury. By contracting with the business to provide security services, the security guard creates a special relationship between himself and the business's customers. This relationship, in and of itself, is sufficient to impose on the guard the obligation to act affirmatively to protect such customers….

(*Marois, supra,* 162 Cal.App.3d at pp. 199-200, citations omitted.)

In *Rosh*, the defendant company provided security services for the plaintiff manager's employer. After the plaintiff terminated an employee, that employee returned to the premises and shot him. The plaintiff brought an action alleging that the defendant had negligently failed to provide adequate security at the plaintiff's place of employment. At trial, the jury found the security company acted negligently in failing to prevent the former employee from returning and awarded over $5,000,000 in damages to the plaintiff. (*Id*. at p. 1233.) Specifically, the jury found that the security company was 75% at fault for failing to prevent the shooting from happening. The defendant appealed, arguing that it could not legally be held liable for the plaintiff's injuries for a variety of reasons. The appellate court disagreed, affirming the judgment after concluding that the jury's apportionment of fault was reasonable in light of the evidence presented at trial and that defendant's failure to act was an unreasonable and proximate cause of the plaintiff's injuries. (*Id*. at p. 1238.) In reaching its holding, the court explicitly relied upon the fact that defendant was "*a company which ostensibly provided protection and deterrence from criminal activity in the workplace*." (*Id*. (emphasis added).)

Plaintiffs urge that both *Marois* and *Rosh* hold that a security company has an affirmative duty to protect others from third parties based on their contract to provide security services, and this Court need only look to the facts pleaded regarding the contract in this case to see that Universal was similarly under a duty to protect the decedents/Ms. Gil from violence in the workplace. They direct the Court to the provisions of the subject agreement, including those that state that Universal was to provide security services for "employees and contractors, and VTA properties" that "security guards will generally be responsible for employer/contractor and passenger security, property and revenue protection, lost and found, fixed asset inventory, site security and facility access control, security at special events, undercover and special operations, the closed circuit television program (CCTV) and other security services as required by VTA," and that the duty to provide services extended to the Guadalupe Rail yard and included facility access control. (See *Gil* TAC, Exhibit A at UPS000008, "A. Project Overview"; Exhibit A at UPS000043, "Exhibit A, Scope of Services").

Given the holding of *Marois*, the Court agrees that Plaintiffs have sufficiently pleaded the existence of a duty of care on the part of Universal to their decedents (VTA employees) or themselves (Ms. Gil) due to the special relationship that existed by virtue of the agreement between VTA and Universal for the latter to provide security services.

Recognizing that *Marois* compels a result contrary to its interests, Universal argues that the decision "got it wrong" and it is not the case that, based on *Marois*, any time there is a contractual relationship between a security company and a business for "security services," the security company is in a special relationship with the plaintiff invitee and thus owes them an absolute duty of care. It contends that a special relationship *only* rises if the contract itself imposes a duty to protect, and plaintiffs fail to point to any part of the subject agreement that would support the assertions they have made that, among other things, a major purpose of it was to provide "excellent security to decedents/Ms. Gil." (See *Fritch* SAC, ¶ 14.) Plaintiffs *cannot* allege as much, Universal insists, because its contract was with *VTA*, and therefore it was not obligated to provide the decedents/Ms. Gil with *any* services such that a special relationship can be found to exist.

The Court does not find Universal's contentions persuasive. First, *Marois* is still governing law and this Court is bound by its conclusions in the absence of a conflicting appellate court decision, which Universal has not identified.[5] (See *Sarti v. Salt Creek Ltd*. (2008) 167 Cal.App.4th 1187, 1193.) Given *Marois's* clear affirmation that "[b]y contracting with the business to provide security services, the security guard creates a special relationship between himself and the business's customers …. [and] [t]his relationship, in and of itself, is sufficient to impose on the guard the obligation to act affirmatively to protect such customers while they are on the business premises" (*Marois, supra*, 162 Cal.App.3d at p. 200), and the absence of any focus on the specific language of the security services agreement at issue with regards to ascertaining the applicable duty of care, the Court must conclude that sufficient facts have been pleaded by the parties that a special relationship existed between Universal and the decedents/Ms. Gil by virtue of Universal's agreement to provide security services to those individuals on VTA property, and thus that Universal owed those individuals a duty of care.

The Court also questions that if, as Universal argues, a duty was only owed to VTA as the contracting party, what does that mean in practice? There is nothing or no one to provide security services to or for in the absence of the individuals who work for the entity and the properties at which they work, thus, undoubtedly a duty was owed to VTA employees by virtue of the security contract with VTA. Moreover, the agreement itself states as much given language which provides that Universal was to provide security services for "*employees and contractors*, and VTA properties" and that "security guards will generally be responsible *for employee/contractor* and passenger *security*, property and revenue protection, lost and found, fixed asset inventory, site security and facility access control, security at special events, undercover and special operations, the closed circuit television program (CCTV) and other security services as required by VTA." (See *Gil* TAC, Exhibit A at UPS000008, "A. Project Overview"). Universal's argument to the contrary is thus unavailing, and given *Marois's* recognition of an enforceable duty of care in circumstances such as the one at bar, the Court

[5] The Court does not find that Universal's reliance on *Delgado v. Trax Bar & Grill* (2005) 36 Cal. 4th 224 compels a contrary conclusion.

need not address "whether relevant policy considerations counsel limiting that duty." (See *Uber*, *supra,* 79 Cal.App.5th at p. 420, internal citations and quotations omitted.)

The Court also does not find Universal's second argument persuasive. As set forth above, Universal insists that the plaintiffs cannot maintain their negligence/wrongful death claims because the Court has already determined that the decedents/Ms. Gil were not third-party beneficiaries of the agreement for the provision of security services. But in making such an argument, Universal conflates separate legal concepts of duty imposed by a special relationship under tort principles and a third party's right to sue under a breach of contract claim. While it is true that the Court previously found that the decedents/Ms. Gil were not intended third-party beneficiaries under the contract between Universal and VTA, that finding only impacts the plaintiffs' ability to sue for breach of contract damages, *not* their right to sue for tort damages. The Court has already recognized the difference between such claims when addressing demurrers to breach of contract claims asserted in earlier pleadings, having explained:

> This claim is fundamentally a tort claim, not a contract claim, and seeks tort damages, not contract damages. Many of the Complaints characterize this claim as a "wrongful death-negligence" claim, which underscored that this is not a contract-based claim. That a special relationship may have been created by the contract that gives rise to a duty for a public entity does not make this a contract-based claim, in the Court's view.

(August 3, 2023 Order Concerning Demurrers at 10:24-11:1.)

Further, Universal's reliance on *Goonewardene v. ADP* (2019) 6 Cal.5th 817 (*Goonewardene*), a case previously discussed in detail in prior orders issued by the Court, is misplaced because that case in no way stands for the proposition that the three-factor test articulated therein for evaluating whether an entity or an individuals that is not a party to a contract may bring a claim for violation of its terms must be followed in order to determine whether a duty of care exists under *tort* law. Even *Goonewardene* itself acknowledged the distinction in separately discussing how the existence of a duty of care is determined. (See *Goonewardene*, *supra,* 6 Cal.5th at p. 837 [explaining that "[t]he existence or nonexistence of a common law legal duty of care is a question of policy that, depending upon the context, may turn on a court's consideration of a variety of factors …"].) While it is true that a duty of care may arise through a contract, whether a duty exists is still a wholly distinct question from whether a third-party to a contract may sue to enforce its terms.

In sum, the Court finds that *Marois* is controlling and that the plaintiffs have adequately pleaded that a duty of care was owed to their decedents/themselves (Ms. Gil) by Universal. Consequently, Universal's motion for judgment on the pleadings is DENIED.

III. CONCLUSION

Universal's motions for judgment on the pleadings are DENIED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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