SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 02-29-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV376547 OEX	David Cross vs Annette Waters	Parties are ordered to appear at the hearing at 9 a.m. The Court will administer the oath and the examination will take place offline. The parties should discuss how the examination will take place offline, particularly if either party appears remotely. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 2	22CV406816 Motion to Strike	Sonia Santoro vs Charles Wagner	Notice is still not proper, as no amended notice was filed. The motion was already continued once from Nov. 28, 2023 to allow Plaintiff to provide notice. Since Plaintiff failed to provide notice, the motion is now off calendar.
LINE 3	23CV421013 Hearing: Demurrer	STARS BAY AREA, INC. vs VADIM PESKOV et al	See Tentative Ruling. The Court will prepare the final order.

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LINE 4	23CV423824 Hearing: Demurrer	Portfolio Recovery Associates, Llc vs Mario Estevez	It now appears that notice to Plaintiff of the hearing date is proper. Plaintiff has failed to oppose the motion. However, it does not appear that good cause exists to grant the motion. The complaint is properly pleaded. As such the Demurrer is OVERRULED. Defendant shall file his responsive answer to the complaint no later than April 1, 2024.
LINE 5	22CV396781 Motion: Summary Judgment/Adjudication	YENNY SAAVEDRA OLIVA DE RIVAS vs LISA FLORES et al	See Tentative Ruling. The Court will prepare the final order.

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Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 6	20CV366047 Motion: Compel	Juancarlos Diaz Ronquillo et al vs Jim Edwards et al	Plaintiff moves to compel the deposition of Defendant Russell Devin Goodley. This motion is GRANTED, as plaintiff has a right to depose the defendant and defendant has failed to make himself available, and moreover, Defendant offers no defense to this portion of the motion. Plaintiff seeks sanctions in the amount of $1,950 as the prevailing party on the motion. Defendant also seeks sanctions in the amount of $1,350 based on Plaintiff's failure to properly meet and confer. The court declines to award sanctions to Plaintiff given his failure to properly meet and confer with Defense counsel. Plaintiff filed the motion without discussing with Defense counsel the provision of an investigator. Given that defense counsel believed at the time that Defendant could be located, Plaintiff should have at least discussed a timeline for waiting to see if defendant could be located before filing the motion. The court also declines to issue sanctions to Defense counsel given that he is not the prevailing party, that he waited until the last moment to object to the deposition, and waited to hire an investigator until months after the initial date for deposition.
LINE 7	20CV367835 Motion: Compel	Jeff Stevens vs The Board of Trustees of the Leland Stanford Junior University	See Tentative Decision. Plaintiff shall submit the final order within 10 days.

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Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 8	22CV401457 Motion: Compel	Chris Field et al vs Google Inc. et al	See Tentative Ruling. Plaintiff shall submit the final order within 10 days.
LINE 9	22CV407607 Motion Determination of Good Faith	Petra Macias et al vs Augustina Duran Armendariz et al	Notice appearing proper and good cause appearing, the unopposed motion is GRANTED. The moving party shall submit the final order within 10 days.
LINE 10	23CV419244 Motion Retention of Jurisdiction	Robert Lindblad vs Yahoo Inc. et al	There is no proper notice for the motion. If plaintiff appears, the court may continue to allow for proper notice. Plaintiff is reminded once again that notice of hearing must be provided to other side. Moreover, there has been no proper service of the complaint or summons in this case. Finally, Plaintiff is warned that if proper notice is not made for the hearings on March 7th those matters will come off calendar and will not be continued for a second time.
LINE 11	23CV419906 Motion Withdraw of Attorney	Kendrick Bauer vs CLEARWIRE, INC. et al	Moving party shall appear at the hearing to ensure proper notice was given as ordered by the court in its granting of the ex parte application.
LINE 12	23CV421382 Hearing: Petition for Order	GEORGETTE HARRELL vs ROHEA ENTERPRISES INC. et	The unopposed petition is GRANTED. The Court will sign the proposed order.
LINE 13	22CV406816 Hearing OSC FTA by Def	Sonia Santoro vs Charles Wagner	Parties must appear
LINE 14			
LINE 15			

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LINE 16			
LINE 17			

- oo0oo -

Calendar Line 3
Case Name: *Stars Bay Area, Inc. v. Diffco, Inc., et al.*
Case No.: 23CV421013

This action arises from a contract dispute. Diffco US, Inc., a California corporation ("Diffco") and Vadim Peskov, a California resident and CEO of Diffco ("Peskov") (collectively, "Defendants"), demur to the operative Verified Complaint ("Complaint") filed by Stars Bay Area, Inc., a California corporation, dba Splashworks ("Plaintiff" or "Splashworks").

I. Background

A. Factual

According to the allegations of the Complaint, Plaintiff Splashworks "owns" and manages Stars Therapy Services ("Stars"), an infant and toddler developmental program and service provider for children with "developmental delays." (Complaint, ¶ 8.) Plaintiff heavily relies on its "custom" software system/platform (the "Legacy System") to manage Stars. (*Ibid.*) The Legacy system, also referred to as "Splashworks 1.0," took Plaintiff "years to develop" at a "significant cost." (*Id.*, ¶ 9.) While Legacy was "stable, operational, and provided Splashworks with basic functionality," it needed to be updated. (*Ibid.*) Upon this realization, Plaintiff found, reviewed, and eventually hired Diffco, a "custom software developer," to assess the Legacy System's performance. (*Id*, ¶¶ 8-13.)

On August 31, 2021, Plaintiff entered into a "Master Services Agreement" ("MSA,") with Defendant, which included a "Statement of Work" ("SOW") (collectively, "Agreement,") (Complaint, ¶¶ 17-21.) Specifically, "Diffco agreed to provide services in accordance with the terms of mutually agreed upon [Agreement] being one of those [SOW]. The [Agreement] obligated Diffco to provide services in two phases. In the first phase Diffco would: (i) conduct an existing architecture analysis; (ii) provide a functionality review; (iii) perform solution testing; (iv) perform a code review; (v) conduct technical task development; (vi) provide customer training; and (vii) provide technical support for the Legacy System (collectively, "the Project"). (Complaint, ¶¶ 18-20.)

After the first phase, Defendant Diffco was contractually obligated to prepare a "work plan" for the Project that would include "subsequent phases." (*Id.,* ¶ 21.) Per the Agreement, the "work plan" had to be consistent with "the details, requirements, and specifications contained in the parties' email discussions." (*Id.,* ¶ 22.) The Agreement contained an estimated cost of $6,860.00 for the Project. Diffco would conduct the Project remotely. (*Id.*, ¶ 23.)

Around October 18, 2021, during an in-person meeting, Defendant Peskov, as the CEO of Diffco, informed Splashworks' members, that Legacy "had to be completely replaced," despite Plaintiff's specific request for the

company to assess Legacy, and to recommend modifications/upgrades. (Complaint, ¶¶ 16, 25.) Diffco insisted that Legacy was "deficient in at least the following ways: (i) the coding was outdated; (ii) the code was not scalable; (iii) the software did not have blueprints; (iv) the software was missing code; and (v) certain code was "unavailable." (*Ibid*.) Defendant Peskov made "misrepresentations" about Diffco's ability to "completely replace" Legacy software, with a new, cheaper alternative, and with a delivery time of four months. (*Id.,* ¶ 26.) Plaintiff relied on, and agreed with, Defendant's claims, in good faith, concerning:

> (i) the time and cost to develop an entirely new practice management software system; (ii) Diffco's use of expert consultants; (iii) Diffco's purported skills and experience; and (iv) based on the Diffco Misrepresentations, Splashworks engaged Diffco to replace the Legacy System with what Diffco termed 'Splashworks 2.0' pursuant to the terms of the Agreement and the details and specifications included in the parties' email discussions.

(Complaint, ¶ 28.)

Plaintiff asserts Defendant Peskov "knew the Diffco Misrepresentations were unequivocally false." (*Id.,* ¶ 29.) According to Plaintiff, Legacy was working adequately, and met their basic business needs, and was far from "deficient." (*Id.,* ¶¶ 29, 31) Peskov's "misrepresentations" were made for the purpose of procuring a more "lucrative" business deal because he knew the Legacy system did not need a full replacement. (*Ibid.*) Defendants "assured" Plaintiff the total cost of the amended Project would be $205,000. (*Id.,* ¶ 32.)

Despite the promise of building a new Legacy system "within" four months, Diffco's progress "was minimal" and no "substantial work" beyond "preliminary wire framing" was accomplished. (Complaint, ¶¶ 33-44.) After "minimal" progress was made during the first five months, Diffco invoiced Plaintiff a total of $212,553.67. (*Ibid.*) Defendants failed to meet any of their project deadlines and Plaintiff grew very skeptical. Plaintiffs subsequently informed Defendants of their concerns, to no avail. (*Id.,* ¶¶ 51-57.) Defendants ultimately delayed the software launch date to November 2022, increased their fees, and the delay in timelines still resulted in "unmitigated failure." (*Id.,* ¶¶ 45-50.) Given Defendants' repeated failures, Plaintiff hired an expert to review the "minimal" work conducted by Defendants, and determined that "Splashworks 2.0" was inherently flawed, inefficient, contained "over 200 bugs," and "slow to operate," among other things. (*Id.,* ¶¶ 55-64.) Despite the "multitude of problems" with "Splashworks 2.0," and the involvement of attorneys, Diffco refused to provide a refund of "any fees" Plaintiff had previously paid. (*Id*., ¶¶ 66-74.) Plaintiff asserts it has paid Defendants $455,000 for software product that is "entirely unusable." (*Ibid.*).

Given the allegations, *supra,* Plaintiff asserts Defendants entered into the Agreement as a "scheme to defraud" Splashworks and "fraudulently" induce

Plaintiff, via the Agreement, to have Defendants assess its "Legacy System." (*Ibid*.) Defendants "fraudulently misrepresented" to Plaintiff that its "Legacy System" needed to be "entirely" replaced. (*Ibid.*) Consequently, Defendants breached the Agreement by providing Plaintiff with "incompetent and inexperienced consultants who implemented a defective system" which ultimately resulted in damages to Plaintiff's business. (*Ibid.*) Defendants continued to commit fraudulent acts by promising to "cure any defects" in Plaintiff's computer system and thereby convinced Plaintiff to pay for services both "that were not needed" and that Defendants Diffco "could not perform." (*Ibid.*)

B. Procedural

On August 15, 2023, Plaintiff filed the operative verified complaint. Plaintiff alleges the following causes of action: 1) fraudulent misrepresentation (**against both Defendants**); 2) negligent misrepresentation (**against both Defendants)**; 3) fraud in the inducement **(against both Defendants**); 4) violation of Business and Professions Code section 17200, *et. seq*. (**against both Defendants**); 5) Breach of Contract **(against Diffco only)**; 6) breach of covenant of good faith and fair dealing **(against Diffco only)**; and 7) Unjust Enrichment (**against both Defendants.)**

On October 26, 2023, Defendants filed the instant demurrer to the Complaint's first, second, third, fourth, and seventh causes of action. Specifically, Defendants demur on the grounds that the Complaint does not state sufficient facts to constitute Plaintiff's five causes of action against Defendants, and the claim for negligent misrepresentation is "barred" by the "Economic Loss Rule." (Memorandum of Points and Authorities in Support of Demurrer ("Dem."), pp. 4-5.) On February 15, 2024, Plaintiff filed an opposition to the demurrer. On February 22, 2024, Defendants filed a reply.

II. Defendants' Demurrer

A. Legal Standard

The court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. Merits of the Demurrer

As an initial matter, Defendants discuss the first cause of action for fraudulent misrepresentation and the third cause of action for fraud in the inducement together. For the sake of consistency, the Court will follow suit and consolidate the fraud claims analysis.

i. Fraud Claims – First & Third Causes of Action

The claims for fraudulent inducement and fraudulent misrepresentation are generally subject to the same analysis. To state a fraud claim, a plaintiff must plead: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 638 (*Lazar*)) For "policy reasons," each element of a fraud claim must be pled with specificity. (*Foster v. Sexton* (2021) 61 Cal.App.5th 998, 1028 (*Foster*).)

1. Intent to Induce Reliance

"Fraud in the inducement is a subset of the tort of fraud. It 'occurs when "'the promisor knows what he is signing but his consent is induced by fraud, mutual asset is present and a contract is formed, which, by reason of the fraud, is voidable.'" [Citations.]" (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294-295.)

In both its demurrer and reply, Defendants argue Plaintiff's own allegations "defeat" the element of intent to induce reliance. (Reply, p. 5:4-12.) Specifically, they assert, the Complaint, as pleaded, precludes a finding of inducement because it alleges Plaintiff had already decided to modify and/or "update" its Legacy system *prior to* Defendants making that determination. (Dem., p. 5:3-12; Reply, p. 5:4-12.) Consequently, Defendants conclude that Plaintiff, "did not rely" solely on Defendants making the determination to modify the Legacy system. (*Ibid.*)

In stark contrast, Plaintiff contends, based on meetings and statements made by Defendants' representatives, detailed in the Complaint, that Diffco "coerc[ed]" Plaintiff into *completely replacing* the Legacy system by stating that it was "outdated, not scalable, lacked blueprints, and was missing code," among other things. (Complaint, ¶¶ 77-80; Opp., p. 8:8-17.) Plaintiff asserts these representations were made by Defendants with knowledge of falsity and with the intent that Plaintiff rely on that falsity. (*Ibid.*) It further contends that it had no "actual technical knowledge" itself to determine whether the representations were falsely made. (Complaint, ¶¶ 77-80.) Plaintiff asserts that at the time Defendants Peskov and Diffco made these representations, they knew they were "unequivocally false" as the Legacy system was operable and meeting "basic business needs" at the time. (Complaint, ¶¶ 29, 77.)

Defendants' arguments, in both its demurrer and reply, are not persuasive. More importantly, Defendants misstate the facts alleged in the

Complaint. Although the Complaint alleges that Defendants initially agreed to provide an assessment and "architectural analysis" of the Legacy system (Phase one), it further alleges Defendants later convinced Plaintiff that a complete replacement of the software was necessary, more cost effective, and would be complete in four months. (Complaint, ¶¶ 25-30.) The Complaint further alleges that Plaintiff relied on Defendants' "purported skills and experience" when it made representations that the Legacy system was highly "deficient." (Complaint, ¶¶ 25-28.) The Complaint then alleges Peskov knew these "misrepresentations were unequivocally false" given that the Legacy system was still operating on a basic level. (Complaint, ¶ 29.)

Plaintiff has adequately apprised Defendants of the factual basis for its allegations of intent to induce reliance. (*Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 608 (*Geernaert*), citations omitted ["Consistent with the rule requiring specificity in pleading fraud…a complaint must state ultimate facts showing that the defendant intended or had reason to expect reliance by the plaintiff or the class of persons of which he is a member"].) Here, inducement can be inferred from allegations that Defendant Peskov knowingly misrepresented the inadequacies of the Legacy system thereby inducing Plaintiff to agree to a complete redevelopment of the system. (Complaint, ¶¶ 29-31.) Plaintiff's claim that it relied on that falsity, is an ultimate fact that goes to the intent to induce reliance. (Complaint ¶ 30; Opp., p. 9.)

In their reply, Defendants contend that Plaintiff's own allegations that it was seeking to modify or update the Legacy system defeat its claim of reliance. (Reply, p. 5: 4-12.) But, "[e]xcept in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, internal citation and quotation marks omitted.) Here, Plaintiff alleges that the misrepresentations were believable assertions made by supposedly software savvy Diffco representatives, in response to Plaintiff's requests for assurances, and that Plaintiff itself lacked the "actual technical knowledge" to determine if the representations were truthful. (See *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1067 ["There must be more pled than a simple statement plaintiff justifiably relied on the statements"]; Complaint, ¶ 79.)

Thus, Plaintiff's Complaint contains specific allegations of facts showing why its reliance on Defendant Diffco's promise was reasonable under the circumstances.

2. Specificity Requirement

"Fraud must be pleaded with specificity rather than with general and conclusory allegations." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*).) The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations,

their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (*Ibid*; see also *Foster, supra,* 61 Cal.App.5th at p. 1028 [holding the same].)

Courts enforce the specificity requirement in consideration of its two purposes. (*West, supra,* 214 Cal.App.4th at p. 793.) The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them. (*Ibid.*) The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud. (*Ibid*; see also *Orcilla v. Big Sur, Inc*. (2016) 244 Cal.App.4th 982, 1008 [stating the same].)

Defendants contend that both the first and third causes of action fail because Plaintiff has not pleaded fraud with "sufficient particularity," and are conclusory, at best. (Dem., pp. 4-5; Reply, pp. 5-6.) Defendants further contend Plaintiff fails to allege facts showing how, when, where, to whom, and by what means the representations were made. (*Ibid.*) Specifically, Defendants argue that the Complaint is devoid of allegations demonstrating that Diffco "knew" the alleged Legacy "misrepresentations" to be "untrue" at the time the statements were made. (*Ibid.*) Defendants also assert the Complaint fails to show "any representations" that Diffco's "capabilities" were knowingly false. Defendants conclude these are improper "conclusions and deductions." (*Ibid.*) This Court has already discussed, *supra,* the sufficiency of "ultimate facts" regarding Defendant Peskov's knowledge of falsity. Consequently, we need not discuss that matter here.

In both its Complaint and opposition, Plaintiff contends, based on meetings and specific statements made on October 18, 2021, detailed in the Complaint, it pled the specifics of the fraud claims with "sufficient particularity." (Complaint, ¶¶ 77-80.) Plaintiff argues that it sufficiently identified how, when, where, to whom, and by what means the misrepresentations were tendered so as to meet the pleading standard for a claim of fraud.

Applying the *West* court factors, *supra,* Plaintiff sufficiently alleged the following: 1) the specific name of the person who made representations, i.e., Defendant Peskov, 2) Peskov's authority, as CEO, to speak on behalf of Diffco, 3) Defendants representations regarding the Legacy system upgrade were expressly made to Plaintiff, 4) representations were made in emails, phone calls, and in person meetings, and 5) Plaintiff provided a timeline of when these representations were made. (Complaint, ¶¶ 14-39; Opp., p. 8:8-17.)

Plaintiff contends, but for the false promises of a low-cost, speedy Legacy system rebuild, Plaintiff would not have contracted with Defendants. (Complaint, ¶¶ 101-113.) It specifically asserts that its representatives informed Defendant that it was not seeking design and implementation of a new practice management system but that it was requesting modifications, updates, upgrades, and customizations to the Legacy system. (Complaint, ¶ 16.) But, after

reviewing the Legacy system software, Peskov and another representative of Diffco informed Plaintiff that the Legacy system would need to be "completely replaced." (*Id.*, ¶ 25.) Plaintiff asserts Defendants knowingly misrepresented the deficiencies in Plaintiff's Legacy software, and "induc[ed]" Plaintiff to enter into an agreement to produce the new software within four months, an agreement Defendants knew they could not comply with. (*Id.*, ¶ 26.) Plaintiff concludes the Complaint sufficiently demonstrates the Agreement was procured with the intent to defraud especially when Defendants "knew" the Legacy system was not grossly "deficient," and created a product, Splashworks 2.0, that was substantially worse than the original Legacy software. (*Id.*, ¶¶ 75-87, 101-113.)

Given Plaintiff's allegations that Defendant Peskov knew his misrepresentations "were unequivocally false," and Plaintiff relied on them, to its detriment, it sufficiently alleges fraud claims for purposes of a demurrer. (See *Geernaert*, *supra,* 31 Cal.App.4th at p. 608.) Therefore, Plaintiff alleged, with sufficient particularity, Defendants entered into the Agreement with Splashworks with the intent to defraud. Consequently, the demurrer is overruled on this basis.

Accordingly, the argument that the first and third causes of action are not pled with sufficient particularity is rejected.

3. Defendants' "Bootstrapping" Argument

Defendants argue Plaintiff improperly seeks to "boot-strap breach of contract claims into fraud claims." (Dem., p. 5: 22-26.) Defendants do not engage in any further meaningful or relevant analysis on this issue in the moving papers. The argument is therefore undeveloped and this Court need not consider it. (See *Allen*, *supra*, 234 Cal.App.4th at p. 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].)

For the first time in reply, Defendants argue that because they partially performed on the Agreement in question, and Plaintiff concedes this, Plaintiff's fraud claims should solely proceed as breach of contract. (Reply, pp. 3-4.) Additionally, Defendants contend that because Plaintiff is alleging deficiencies in the quality, and timeliness of the product, their remedies are in contract, not fraud. (*Ibid.*) Defendant cites authority for the proposition that "the mere failure to perform a portion of a promise does not constitute fraud." (*Ibid.*; See *Kaylor v. Crown Zellerbach, Inc*. (9th Cir. 1981) 643 F.2d 1362, 1368 ["Crown's initial performance in accordance with its promises negates any possible inference of fraud."]; *Church of Merciful Saviour v. Volunteers of America, Inc*. (1960) 184 Cal.App.2d 851, 858-859 [evidence of attempts to perform demonstrate absence of fraudulent intent].) However, Plaintiff did not have an opportunity to reply to this argument and as a result, the Court declines to consider it. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [points raised for the first time in reply brief will not ordinarily be considered, because this would deprive opposing party of an opportunity to counter the argument]; *L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles* (2015)

239 Cal.App.4th 918, 926, fn. 7 [contention forfeited where raised for the first time in reply brief without a showing of good cause].)

The demurrer to the fraud claims against Plaintiff Splashworks will accordingly be OVERRULED.

ii. Second Cause of Action – Negligent Misrepresentation

Defendants assert Plaintiff's second cause of action is subject to demurrer because it is barred by the "Economic Loss Rule." (Dem., p. 6; Reply, pp. 6-8.)

1. Economic Loss Rule ("ELR")

Defendants assert that Plaintiff fails to state a claim for negligent misrepresentation because it is barred by the "Economic Loss Rule" ("ELR") (Dem., p. 6; Reply, pp. 6-8.) Defendants argue that Plaintiff's claims arise out of a breach of the Agreement, and consequently, the only alleged damages are "purely economic." (*Ibid.*)

It has been stated that "there is no recovery in tort" for "pure" economic losses. (See *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 922 (*Sheen*) ["In general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage. The rule functions to bar claims in negligence for pure economic losses in deference to a contract between litigating parties"].)

In the context of a purchase agreement, the economic loss rule has been stated as follows: "where a purchaser's expectations in a sale are frustrated because the product he brought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." (*Robinson Helicopter Company v. Dana Corporation* (2004) 34 Cal.4th 979, 988.) This doctrine hinges on a distinction between claims based in commercial and contract law, and those involving the sale of defective products causing injury to consumers, which has traditionally been remedied by resort to the law of torts. (*Ibid*.) The rule requires a commercial purchaser to recover solely in contract for purely economic loss due to disappointed expectations, unless the purchaser can demonstrate harm above and beyond a broken contractual promise. (*Ibid.*)

Defendant asserts that Plaintiff raised the issue of an "independent legal duty" to circumvent the ELR, during the parties' meet and confer efforts. (See Declaration of Sean M. Fischer in Support of Defendants' Demurrer to Verified Complaint, p. 3: ¶ 12.) But Plaintiff makes no such argument in the opposition. Therefore, Plaintiff appears to have abandoned this argument. Instead, Plaintiff now contends in opposition that ELR does not apply because the parties were in a special relationship. (Opp., p. 10: 8-28.) Plaintiff asserts it was the intended beneficiary of the new software "Splashworks 2.0," and consequently, that "transaction at issue," resulted in a special relationship between the parties. (*Ibid.*) In support of this proposition, Plaintiff cites *Southern California Gas*

Leak Cases (2019) 7 Cal.5th 391, 400 (*Southern*). In *Southern*, the court explained, "[t]he primary exception to the general rule of no recovery for negligently inflicted purely economic losses is where the plaintiff and the defendant have a 'special relationship.' [Citation.] What we mean by special relationship is that the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out." (*Id.,* at p. 400.)

Plaintiff argues that because it was the intended beneficiary of Splashworks 2.0, it was in the kind of special relationship envisioned in *Southern*. But, in the portion of *Southern* Plaintiff cites, the court stated that an intended beneficiary of a will was in a special relationship *with a notary* who had negligently prepared the will. (See *Southern, supra,* 7 Cal.5th at p. 400.) It is clear from this portion of *Southern*, that the special relationship it was describing was one in which a third party and not the drafter of the will or the intended beneficiary was responsible for the negligence. Here, there is no third party who acted negligently. It is alleged in the Complaint that Diffco itself acted negligently. If the contractual relationship between two contracting entities were a sufficient special relationship to avoid the ELR, the ELR would be eviscerated as it applies when a party claims only economic damages stemming from improper performance of a contract. (See *Sheen*, *supra*, 12 Cal.5th at p. 922 ["In general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage. The rule functions to bar claims in negligence for pure economic losses in deference to a contract between litigating parties"]; *Id.* at p. 941 [finding a special relationship in this context "would unduly tip the scale in favor of finding a tort duty and subvert the economic loss rule in a class of cases in which that principle clearly applies."].) As Defendants correctly state in its reply, Plaintiff's reliance on *Southern, supra,* is misplaced, as it refutes, rather than bolsters, Plaintiff's argument that the ELR does not apply.

Here, Plaintiff does not allege sufficient facts from which the Court could conclude that the "special relationship" exception is applicable here. Nor does the opposition engage in any meaningful or relevant analysis of the considerations set forth in *Southern, supra.* The argument is therefore undeveloped and does not provide a basis for defeating the economic loss rule. (See *Allen, supra,* 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].)

Finally, Plaintiff seeks damages stemming from "loss of profits and loss of business," and forced diversion of "thousands of hours of employee time," which it alleges goes "beyond a mere breach of contract." (Complaint, ¶¶ 85-86; Opp., p. 11:1-9.) But, these allegations establish purely monetary or economic losses, as pointed out by Defendant, and is subsequently barred by ELR. (See *Sheen, supra,* 12 Cal.5th at p. 922 [there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by *physical or property damage*]; see also *Moore v. Centrelake Medical Group, Inc.* (2022) 83 Cal.App.5th 515, 536 ["We reject appellants' contention that their asserted lost-time damages are noneconomic losses and therefore exempt

from the economic loss rule. Appellants' complaint alleged they suffered '[a]scertainable losses in the form of … the value of their time,' implicitly referring to their time's financial value. Appellants do not claim these financial losses were accompanied by any personal injury or property damage."].) Consequently, Plaintiff fails to demonstrate *how* Defendants' misrepresentations result in noneconomic damages under *Sheen.*

Plaintiff also contends it has pleaded that Defendant acted fraudulently and, therefore, the ELR does not apply. (Opp., p. 11:1-9.) But, Plaintiff fails to cite to authority to show that pleading fraud takes its negligent misrepresentation claim outside the purview of the ELR. Accordingly, this argument is rejected.

The demurrer to the second cause of action is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND to allow Plaintiff an opportunity to plead facts demonstrating how ELR does not apply. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if a plaintiff has not had an opportunity to amend the complaint in response to a demurrer, leave to amend is liberally allowed as a matter of fairness].)

iii. Fourth Cause of Action – Business & Professions Code Section 17200

Defendants argues Plaintiff's fourth cause of action, a violation of the Unfair Competition Law ("UCL") is "improper" and subject to demurrer because: 1) it has not alleged the loss of any "real or personal property," 2) its claim for monetary losses it "continues to suffer" are compensatory not "restitution," 3) Plaintiff's request for injunctive relief lacks specificity, and 4) Defendant Peskov is not a proper party to the claim because he "never acquired any money or property from Plaintiff." (Dem., p. 7.)

The UCL "defines 'unfair competition' to 'mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising' and any act prohibited by [Business and Professions Code] section 17500. [Citation.]" (*Searle v. Wyndham Int'l* (2002) 102 Cal.App.4th 1327, 1332-1333 (*Searle*).) "Section 17200 'is not confined to anticompetitive business practices, but is also directed toward the p*ublic's right to protection from fraud, deceit, and unlawful conduct.* [Citation.] Thus, California courts have consistently interpreted the language of section 17200 broadly.' [Citation.]" (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877-878, emphasis added.) "The statute prohibits 'wrongful business conduct in whatever context such activity might occur.' [Citation.]" (*Searle, supra,* at p. 1333.)

In opposition, Plaintiff alleges pursuant to California's UCL, a private plaintiff has standing when it has "suffered injury in fact and has lost money or property." (Opp., p. 11.) Plaintiff contends it has sufficiently pled damages under Business and Professions Code section 17200 resulting from "being forced to divert thousands of employee time and additional expenses in a futile

attempt to cause Diffco to deliver a software system that Diffco was not capable of delivering[.]" (Opp., p. 11.) According to paragraphs 37, 46, and 74 of the Complaint, Plaintiff has paid multiple Diffco invoices during the redevelopment phase of its Legacy software. Specifically, Plaintiff asserts it has paid Diffco $455,000 for practice management software product that was ultimately "entirely unusable," given Diffco's "wrongful acts." (Complaint, ¶¶ 74, 116-117.) Plaintiff concludes that Defendant Diffco acquired Plaintiff's money via "fraudulent" business practices. (*Ibid.*)

In its reply, Defendants again argue, as they did in demurring to this cause of action in the Complaint, that Plaintiff improperly alleges "continuing" monetary losses and has not alleged that it is seeking restitution of any money that was unlawfully obtained from Defendant. (Reply, p. 8.) Defendants conclude that the claim for "continuing" monetary losses are "compensatory" in nature and beyond the scope of UCL. (*Ibid.*) Plaintiff fails to address this issue in her opposition.

"While the scope of conduct covered by the UCL is broad, its remedies are limited. [Citation.] A UCL action is equitable in nature; damages cannot be recovered. … We have stated that under the UCL, '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.'" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144 (*Korea*).) As the California Supreme Court explained, "[T]he concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178 (*Cortez*).) Restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest. (*Korea, supra,* 29 Cal.4th 1134 at p. 1144; see also *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 455.)

Defendants do not contend that Plaintiff lacks standing to assert a claim under Business and Professions Code section 17200, but they argue the fourth cause of action requests an improper remedy, namely Plaintiff "improperly" alleges it "*continues* to suffer injury in fact and lost money or property as a result of Diffco's wrongful acts." (Reply, p. 8:15-18; Complaint, ¶ 116.) Defendants conclude the alleged monetary losses are not a finite, "vested interest." (Reply, pp. 8-9.) They also contend that Plaintiff has not alleged its request for injunctive relief with particularity.

But, a demurrer does not lie to challenge a remedy. (See *Kong, supra,* 108 Cal.App.4th at p. 1047 ["a demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy"]; see also *Caliber Bodyworks, Inc. v. Super. Ct.* (2005) 134 Cal.App.4th 365, 385 ["The appropriate procedural device for challenging a portion of a cause of action seeking an improper remedy is a motion to strike."].) Here, Defendants do not argue that the Complaint fails to sufficiently allege Plaintiff suffered monetary losses due to Defendants' unfair business practices. (Complaint, ¶ 79.) The proper challenge to an inadequate remedy is by motion to strike, not demurrer. This argument therefore is not sustainable on demurrer.

Finally, Defendants' assertion that Peskov, the CEO of Diffco, is an improper party has not been adequately developed. (Reply, pp. 8-9.) In light of the agency relationship between Defendants Peskov and Diffco alleged in the Complaint, (Complaint, ¶ 89), this one sentence argument made without citation to authority, is underdeveloped. (*Allen, supra,* 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].)

Accordingly, the demurrer is OVERRULED as to the fourth of cause action against Defendants Diffco and Peskov.

iv. Seventh Cause of Action – Unjust Enrichment

The seventh cause of action is a standalone cause of action for unjust enrichment alleging that Defendants' false "promises induced" Plaintiff to pay "significant monies" for software development services that were never provided. (Complaint, ¶¶ 131-135.) Plaintiff argues it would be "unjust" and "inequitable" for Defendants to retain money for software it never developed. (*Ibid.*)

Defendants contend that Plaintiff's unjust enrichment cause of action is subject to demurrer because California law does not recognize unjust enrichment as an "independent cause of action." Defendants cite multiple authorities for support. (Dem., p. 7: 13-22.)

Plaintiff, in Opposition, asserts that a mere "label" of a "cause of action" is not dispositive of whether a claim has been stated. (Opp., p. 12.) Specifically, Plaintiff concedes unjust enrichment "is technically not a cause of action," but because it is a "general principle," courts have treated such claims as a "quasi-contract claim seeking restitution." (*Ibid.*) Plaintiff cites multiple authorities for the proposition that a party to an express contract can assert a claim for restitution based on unjust enrichment. (*Ibid.*; *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387-388 ["Restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct"]; see also *Russell City Energy Co., LLC v. City of Hayward* (2017) 14 Cal.App.5th 54, 70, fn. 8 [stating that a party to an express contract can only "assert a claim for restitution based on unjust enrichment by alleging in that cause of action that the express contract is void or was rescinded."].)

As Plaintiff concedes, a party must "alleg[e in that cause of action] that the express contract is void or was rescinded." *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014) (citing, *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.*, 44 Cal. App. 4th 194, 203 (1996)). (See Opp. p12). Here, Plaintiff does not allege in the cause of action for unjust enrichment that the contract is void or was rescinded. Plaintiff can do this even while inconsistently pleading a breach of contract claim that alleges the existence of an enforceable agreement. See *Rutherford Holdings*, 223 Cal.App.4th at 231. Because Plaintiff has failed to properly allege the

unjust enrichment cause of action the demurrer is SUSTAINED as to the seventh cause of action with 10 days' leave to amend.

III. Conclusion

The demurrer to the Complaint is OVERRULED as to the first, third, and fourth causes of action. The demurrer is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND as to the second and seventh causes of action.

The Court will prepare the final Order.

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Calendar Line 5
Case Name: *De Rivas v. City of San Jose, et al.*
Case No.: 22CV396781

This is a slip and fall case. According to the allegations of the complaint, on October 16, 2021, plaintiff Yenny Saavedra Oliva De Rivas ("Plaintiff") tripped and fell on uneven and broken pavement on the sidewalk located in front of 1650 The Alameda in San Jose, sustaining serious injuries. (See complaint, ¶¶ 5, 11.) Plaintiff asserts that her damages were the result of defendant City of San Jose's ("City") acts and omissions (see complaint, ¶ 14) and defendant Lisa M. Flores' ("Flores") negligent failure to maintain, inspect, repair and warn of the dangerous condition of the subject property (see complaint, ¶¶ 20-23). On October 21, 2021, Plaintiff presented a claim for damages with defendant City of San Jose ("City") in compliance with Government Code section 911.2, and, on November 10, 2021, City sent written noticed rejecting Plaintiff's claim. (See complaint, ¶ 7.)

On April 1, 2022, Plaintiff filed a complaint against defendants City and Flores (collectively, "Defendants") asserting causes of action for:

1) Statutory liability pursuant to Government Code; and,
2) Premises liability.

On June 10, 2022, Flores filed a cross-complaint ("XC") against City, asserting causes of action for: implied indemnity and total indemnity; and, declaratory relief and apportionment of fault.

Defendant and cross-defendant City moves for summary judgment, asserting that: under San Jose Municipal Code sections 14.16.2200(B) and 14.16.2205 and California Street & Highway Code section 5610, Flores, as the owner of the property adjacent to the sidewalk at issue here, is responsible for the maintenance and repair of such sidewalks and liable for the injuries that might result from the lack of maintaining the subject property such that it was not in a non-dangerous condition; Plaintiff cannot establish the existence of a dangerous condition public property under Government Code section 835 because there is no evidence that City had actual or constructive notice of the alleged dangerous condition, i.e. the elevated sidewalk slab; there is no evidence that a negligent or wrongful act or omission of a City employee acting within the scope of their employment created the dangerous condition; and, as to the XC, there can be no indemnity against City without an initial finding of liability against City on Plaintiff's claim.

I. CITY'S MOTION FOR SUMMARY JUDGMENT

Defendant's burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 (internal citations omitted; emphasis added).)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

City meets its initial burden.

"There is no common law governmental tort liability in California; and except as otherwise provided by statute, there is no liability on the part of a public entity for any act or omission of itself, a public employee, or any other person." (*Gibson v. City of Pasadena* (1978) 83 Cal.App.3d 651, 655; see also *Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457 (stating that "[i]n California, all government tort liability must be based on statute… Government Code section 815 'abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or state Constitution'").) The complaint asserts a single cause of action against City for statutory liability for a dangerous condition pursuant to Government Code section 835. (See complaint, ¶¶ 10-13.) Section 835 states that "a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: … (a) [a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or… (b) [t]he public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code § 835; see also *Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 (stating same); see also *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1104 (stating same).) City argues that Plaintiff is unable to demonstrate the existence of a triable issue of material fact because there is no evidence that an employee acting within the scope of their employment created the dangerous condition and that City had actual notice of the dangerous condition.

<u>The City is not liable under the San Jose Municipal Code.</u>

San Jose City Municipal Code 14.16.2200, subdivision (B) regarding maintenance and repair of sidewalks states:

> The owners of lots or portions of lots adjacent to or fronting on any portion of a sidewalk area between the property line of the lots and the street line, including parking strips, sidewalks, curbs and gutters, and persons in possession of such lots by virtue of any permit or right shall repair and maintain such sidewalk areas and pay the costs and expenses therefor, including a charge for the City of San José's costs of inspection and administration whenever the city awards a contract for such maintenance and repair and including the costs of collection of assessments for the costs of maintenance and repair under subsection A. of this section or handling of any lien placed on the property due to failure of the property owner to promptly pay such assessments.

(San Jose Municipal Ord. No. 14.16.2200, subd. (B).)

Likewise, California Streets and Highway Code section 5610 states:

> The owners of lots or portions of lots fronting on any portion of a public street or place when that street or place is improved or if and when the area between the property line of the adjacent property and the street line is maintained as a park or parking strip, shall maintain any sidewalk in such condition that the sidewalk will not endanger persons or property and maintain it in a condition which will not interfere with the public convenience in the use of those works or areas save and except as to those conditions created or maintained in, upon, along, or in connection with such sidewalk by any person other than the owner, under and by virtue of any permit or right granted to him by law or by the city authorities in charge thereof, and such persons shall be under a like duty in relation thereto.

(Cal. Sts. & Hy. Code § 5610.)

Further, San Jose City Municipal Code 14.16.2205 regarding liability for injuries to the public on sidewalks states:

> The property owner required by Section 14.16.2200 to maintain and repair the sidewalk area shall owe a duty to members of the public to keep and maintain the sidewalk area in a safe and nondangerous condition. If, as a result of the failure of any property owner to maintain the sidewalk area in a nondangerous condition as required by Section 14.16.2200, any person suffers injury or damage to person or property, the property owner shall be liable to such person for the resulting damages or injury.

(San Jose Municipal Ord. No. 14.16.2205.)

In *Gonzales v. City of San Jose* (2004) 125 Cal.App.4th 1127, the Sixth District discussed San Jose City Municipal Code 14.16.2205 and Streets and Highway Code section 5610, and determined that the ordinance "and its imposition of a duty of care on an abutting landowner serves an important public purpose… [by] provid[ing] an additional level of responsibility for the maintenance of safe sidewalks on the owners whose property is adjacent to and abuts the sidewalk." (*Id*. at p.1139.) "These owners are often in the best position to quickly identify and address potentially dangerous conditions that might occur on the sidewalks, as opposed to San Jose." (*Id*.) "Without section 14.16.2205, abutting landowners would have no incentive to maintain the sidewalks adjacent to their property in a safe condition." (*Id*.) The *Gonzales* court also noted that City would still have potential liability under the Government Torts Claim Act pursuant to Government Code section 835, but that such liability is restricted "to notice of the dangerous condition or responsibility for the condition through wrongful conduct." (*Id*., citing Gov. Code § 835.) The San Jose Municipal Code cannot be a basis for liability against City.

City demonstrates that it did not have actual or constructive notice of the purported dangerous condition.

In terms of actual notice as defined by Government Code section 835, subdivision (b), section 835.2 states that "[a] public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (Gov. Code, § 835.2, subd. (a).) To establish actual notice, "[t]here must be some evidence that the employees had knowledge of the particular dangerous condition in question." (*State of Cal. v. Super. Ct. (Rodenhuis)* (1968) 263 Cal.App.2d 396, 399.) City presents Flores deposition testimony in which she states that she did not notice that the sidewalk adjacent to her property was uneven and even after receiving notice from the City, the unevenness of the sidewalk "didn't strike [her] as being a hazard." (Gray decl. in support of City's motion for summary judgment ("Gray decl."), exh. B ("Flores depo"), pp.9-25, 10:1-19.) City also presents the declaration of its Principal Construction Inspector for the Trees and Sidewalk Division of the Department of Transportation, Jeremiah Stagi, in which he states that "the City relies upon citizen complaints about sidewalk conditions prior to sending a DOT employee out to inspect a particular piece of sidewalk… [or] if a DOT or other City employee is out conducting City business and notices a particular piece of sidewalk in repair, that employee will also notify the Trees and Sidewalk Division of that particular piece of sidewalk needing repair." (Stagi decl. in support of City's motion for summary judgment ("Stagi decl"), ¶ 3.) After a review of the City's records of the Sidewalk Section's database of citizen complaint and other reports of sidewalk conditions for any records related to 1650 The Alameda, Stagi could find no reports of sidewalk conditions abutting or adjacent to 1650 The Alameda. (See Stagi decl., ¶ 6.) City meets its initial burden to demonstrate that it did not have actual notice of the purported dangerous condition.

As to constructive notice, section 835.2, subdivision (b) states that "[a] public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (Gov. Code, § 835.2, subd. (b).) "The primary and indispensable element of constructive notice is a showing that the *obvious condition existed a sufficient period of time before the accident*." (*State of Cal*., *supra*, 263 Cal.App.2d at pp.400-401 (also stating that "[w]here there is no evidence of actual notice,

the city is charged with constructive notice if the defects have existed for such length of time and are of such conspicuous character that a reasonable inspection would have disclosed them").) The California Supreme Court has stated that "in order to charge the city with constructive notice under these principles, some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character" is required. (*Nicholson v. Los Angeles* (1936) 5 Cal.2d 361, 364-365 (also stating that "[i]t is well settled that a municipality is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident… [i]t is a matter of common knowledge that no sidewalk is perfect, and that certain irregularities and inequalities in the surface of such sidewalks exist, not only in the city and county of San Francisco, but in all cities… [i]n many instances a wooden or concrete pavement will terminate, and the sidewalk then consist of the surface of the street, and there will be a step of a few inches depression from the artificial sidewalk to the earth… [i]n many cases there is, even in paved sidewalks, a drop of a few inches in the surface… [i]n fact, the drop from the curb or outer edge of almost every sidewalk is from three to four inches, or several inches, and it is not usual for the surface to be on a level with the surface of the street… [w]hile a municipality is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel, it is by no means an insurer against accidents, nor can it be expected to keep the surface of its sidewalks free from all irregularities… [t]he doctrine of constructive notice cannot be so applied as to effect a change in the substantive obligations of the city"); see also *Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 317 (stating that obviousness of an alleged dangerous condition is established through evidence that it is "substantial enough and so readily apparent from public thoroughfares as to support an inference that its danger was known"); see also *Whiting v. National City* (1937) 9 Cal.2d 163, 166 (reversing judgment in favor of plaintiff based on finding of constructive notice, stating that "[t]he city is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident therefrom… in order to hold the city because of such defect there must also be notice of the dangerous character of such defect before the duty imposed by the statute is created… [where there is] no element of conspicuousness or notoriety showing any dangerous character in the slight rise of a portion of a sidewalk, which would put the city authorities upon inquiry or place upon them the duty of remedying the defect or condition pursuant to the provisions of the statute… [it is] insufficient to impose liability upon the city for injuries resulting therefrom").) Here, City presents Flores' deposition testimony in which she states that neither she nor her gardeners nor any employees nor any members of the public noticed or reported the purported dangerous condition. (See Flores depo, pp.43:13-25, 44:1-25, 45:1-25, 46:1-7, 46:21-25, 47:1-25, 48:1-19.) City also presents Plaintiff's deposition testimony in which she stated that she didn't see the unevenness of the pavement. (See Gray decl., exh. A ("Pl.'s depo"), p.10:9-14.) City also cites to *Heskel*, *supra*, 227 Cal.App.4th 313, to support its assertion that its complaint-based system for inspection is beyond that of San Diego's which was found to be reasonably adequate. (See City's memorandum of points and authorities in support of motion for summary judgment ("City's memo"), citing *Heskel*, *supra*, 227 Cal.App.4th at pp.318-319.) City meets its initial burden to demonstrate that the purported dangerous condition was not so conspicuous or obvious for any period of time prior to the incident that it gave constructive notice to City.

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City also meets its initial burden to demonstrate that no employee acting within the scope of his employee created the dangerous condition

City also presents the Stagi declaration, in which Stagi states that it is his opinion that the uplift of the sidewalk was caused by a root from a large tree located near the sidewalk, and not by the City. (See Stagi decl., ¶ 10.) Also attached is Exhibit 5 to the Flores deposition, a photograph depicting the subject purported dangerous condition. City meets its initial burden to demonstrate that no employee acting within the scope of his employee created the dangerous condition.

In opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact.

In opposition, Plaintiff argues that City "is not immunized from liability for the dangerous conditions of [a] sidewalk by the concurrent liability of an abutting landowner," citing *Gonzales*, *supra*, 125 Cal.App.4th at pp.1138-1139. (See Pl.'s opposition to City's motion for summary judgment ("Opposition"), pp.9:24-28, 10:1-28, 11:1-12.) Plaintiff is correct; however, she misunderstands the issue. It is true that a public entity such as City may be liable for the dangerous condition of its property and the San Jose Municipal Code does not provide immunity for City as to any cause of action for dangerous condition of public property pursuant to Government Code section 835. However, City's argument is that any cause of action against it must be based on statute, as stated in Government Code section 815, subdivision (a), and the San Jose Municipal Code cannot be a basis for any cause of action against it since the Municipal Code expressly provides liability for the landowner rather than the City. City may still be liable pursuant to Government Code section 835, and it presented evidence demonstrating that its employees did not create the purported dangerous condition and that it neither had actual or constructive notice of the purported dangerous condition prior to the subject incident on October 16, 2021. Therefore, to survive City's summary judgment, Plaintiff must present evidence demonstrating a triable issue of material fact as those issues.

Here, as to whether a City employee created the dangerous condition, Plaintiff admits that "a City tree caused the uplift." (Opposition, p.11:13.) However, Plaintiff notes that "[t]here were several times that City workers were documented to be at the address of the sidewalk in question during the 6 years before the incident… [and] inferences that City cleaning crews were in the area frequently, though no documents regarding their schedules were produced in discovery." (Opposition, p.11:13-17.) Plaintiff does not explain how this argument is relevant to establishing a triable issue as to "a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition" pursuant to section 835, subdivision (a). However, the deposition testimony of Stagi cited by Plaintiff in response to material fact number 22 establishes that: City owned the street and sidewalk but the landowner has the maintenance responsibilities and the City's obligation is to inform the landowner with regards to their maintenance responsibilities after the receipt of a report—which it did (see Kurdoghlian decl. in opposition to City's motion for summary judgment ("Kurdoghlian decl."), exh. B ("Stagi depo"), pp.12:14-25, 13:1-10, 61:11-25, 62:1-23); there was a tree emergency in 2015 in which a tree limb that was 28 inches in diameter and 20 feet in length fell on the sidewalk and that if there was another hazard, the inspector would have reported it (*id*. at pp.10:19-25, 11:1-7, 21:8-25, 22:1-25, 23:1-25, 24:1-25, 25:1-25, 26:1-21); and, there was another request for a tree emergency in May 2019 (*id*. at pp.40:13-25, 41:1-12, 48:17-25, 49:1-25, 50:1-25, 51:1-15).

This evidence does not demonstrate that a City employee created the dangerous condition and Plaintiff fails to demonstrate the existence of a triable issue of material fact as to liability for a dangerous condition pursuant to Government Code section 835, subdivision (a).

The same evidence is also cited in support Plaintiff's assertion that "City has actual or constructive knowledge of the issue of the sidewalk in question" because "merely five months before the incident, it appears City crews responded to a 'tree emergency' in the area when a large tree branch fell and damaged a car" and "it is more likely than not that the condition that existed in October 2019 was substantially similar to the condition that existed in May 2019 and City employees were required to report the hazard." (Opposition, p.11:17-28.) However, this evidence certainly does not establish actual notice. As to constructive notice, there is nothing here to suggest that the purported dangerous condition was so conspicuous or obvious that it was required to be reported and does not demonstrate the existence of a triable issue of material fact. While Plaintiff does not provide the height of the subject sidewalk differential, she appears to base the danger of the differential to be around a half an inch. (See Opposition, p.11:22-25 (stating that "the crew should have noticed the condition of the sidewalk and per the City's own policies should have reported the uplift as a hazard… the City considered a 'hazard' to be a rise of ½ inch or larger").) However, even if Plaintiff had stated that the differential was a ½ inch it would not be sufficient to put City on inquiry as to its existence. (See *Nicholson*, *supra*, 5 Cal.2d at pp.367-368 (stating that "aside from the testimony that it had existed for several months, that it was about an inch and one-half high, and that the plaintiff thought it was caused by the root of a tree growing in the parking beside it, there is no testimony with regard to the defect itself… [t]his, we think, is insufficient to sustain a finding that had the city fulfilled its duty of reasonable inspection and supervision of the streets of the city as a whole it would have had actual knowledge of the break… [b]ecause of the plaintiff's failure to bring home to the defendant city a neglect of its duty of inspection or knowledge of facts which would have put it upon inquiry, the city cannot be held to have had constructive notice of the defect and the judgment must be reversed"); see also *Heskel*, *supra*, 227 Cal.App.4th at p.320 (stating that "[a]lthough the pictures are poor, the size of the circled structure in relation to the curb suggests that it was not substantial or readily apparent from the street… [t]he pictures show a condition that was roughly a few inches in height… [e]vidence of a condition of that nature, without more, is not a prima facie showing that the condition was obvious… [t]he pictures only support inferences that the structure was not obvious… [w]hile Heskel has supplied evidence that the condition existed for more than one year, he does not substantiate that the dangerous condition was obvious… [t]he burden then shifted to Heskel either to show the existing evidence created a reasonable inference that the condition was obvious or to present additional evidence proving that element… [b]ecause Heskel did neither, the trial court's grant of the City's motion for summary judgment was proper"); see also *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1107, 1110 (stating that "[s]idewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held trivial as a matter of law… to constitute a dangerous condition, the height differential, and the area surrounding it, must have posed 'a substantial (as distinguished from a minor, trivial or insignificant) risk of injury' when 'used with due care in a manner in which it is reasonably foreseeable that it will be used'").) Plaintiff fails to demonstrate the existence of a triable issue of material fact as to actual or constructive notice by City.

Flores does not oppose City's motion as to her cross-complaint.

Accordingly, City's motion for summary judgment is GRANTED.

Plaintiff's objection numbers 2, 3, and 6 to paragraph 5, 6, and 10 of the Stagi declaration is OVERRULED. The portion of paragraphs 4, 7 and 9 of the Stagi declaration that are the subjects of Plaintiff's objection numbers 1, 4 and 5 are not the basis for the Court's decision.

The Court will prepare the Order.

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Calendar Line 7
Case name: Jeff Stevens v. Stanford University
Case No.: 20CV367835

Plaintiff brings a motion to compel.

SI numbers 10, 11, 13, and 70

These requests are DENIED, as unlikely to lead to admissible evidence. The basis for Defendant's hiring of Zurich is not relevant to Plaintiff's claims.

SI numbers 22-24, 26-28, 30-40, 56-64, 67, 68, 78, 80-82

In these requests, Plaintiff seeks statistical information regarding departures of employees post-injury. These requests are DENIED. Because there is no showing that any of these injuries, departures, or situations are similar to Plaintiff's, it is the type of fishing expedition not authorized by the discovery rules, as Plaintiff has failed to show that his request is reasonably calculated to lead to the discovery of admissible evidence. *Mead Reinsurance Co. v. Superior Court* (1986) 188 Cal. App. 3d 313, 320.

SI 76, 86, 95-98 and RFP 59

SI numbers 86, and 95-98 are GRANTED as specifically relevant to Plaintiff's claims. SI number 76 is DENIED as overly broad. RFP 59 is GRANTED.

SI 77, 79, 83, 94, 87, 89 and 90

SI numbers 79, 84, 89 and 90 are GRANTED as relevant and specific to Plaintiff's case. SI Numbers 77, 83, and 87 are DENIED.

While several of Stanford's objections were substantially justified, others were not and Stanford has not adequately accounted for its delay in providing its verified answers, which were not provided for many months after they were due, or in providing much of the discovery it did ultimately provide. As such, Stanford shall pay sanctions to Plaintiff in the reduced amount of $1,875 for 3 hours of work at $625 per hour. Plaintiff shall submit the final order within 10 days of the hearing. Defendant shall provide the ordered discovery responses and pay the sanctions within 10 days of service of the final order.

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Calendar Line 8

Case Name: Chris Field v. Google
Case No.: 22CV401547

Plaintiff moves to compel Google to produce documents it initially requested in May 2023. The parties agreed to extend the deadline to December 15, 2023. By that date, Google had provided only 58 pages of discovery. While Google is correct that it promised to produce discovery once it received a stipulated protective order and narrowing of search terms, it still had barely done so by December 15, 2023, despite receiving the protective order by the end of October and receiving some narrowing of the requests. While it certainly would have been beneficial had the parties continued to work out a plan for the provision of the discovery, the Plaintiff is not required to wait more than six months for its requested discovery. The Court does not find Plaintiff's decision to file its motion to compel more than six months after its initial propounding of discovery unreasonable. While Google may have been acting in good faith, the fact remains that it had hardly provided any discovery prior to the agreed upon deadline of December 15, 2023. It appears from Google's opposition that it still has not provided responses to 11 of the requests. See Pollini Dec. ¶ 33. As such, the motion is GRANTED. Plaintiff shall meet and confer with Google no later than March 11, 2024 wth respect to limiting the scope of those 11 requests and Google has until April 1, 2024 to provide the outstanding discovery.

Plaintiff asks for sanctions based on Google's failure to comply with its discovery obligations. Sanctions are appropriate unless the objections were substantially justified. Here, due to Google's long delay, the Court does not find that Google was substantially justified in not providing a substantial amount of its responses by the mutually agreed upon date of December 15, 2023. The court finds that the amount of time claimed to have been spent on the motion is excessive, however. The Court orders Google to pay sanctions to Plaintiff in the amount of $1,710 (for 3 hours + $60 fee). Sanctions shall be paid no later than April 1, 2024. Plaintiff shall submit the final order within 10 days of the hearing.

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