SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: June 25, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM 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 at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
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FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	18CV339624	CREDITORS ADJUSTMENT BUREAU, INC. vs CENTURIAN SURPLUS, INC.	This order to show cause why cross-complaint is off calendar. Cross-complainant dismissed the cross-complaint on April 29, 2024.
2	19CV347798	RICK TRAN et al vs Skyway Electric Inc.	Judgment Creditor Financial Pacific Leasing, Inc.'s motion for an order assigning Judgment Debtors' rights to certain payments from third party payors to Judgment Creditor and restraining Judgment Debtor and any servant, agent, employee, or attorney for Judgment Debtor from encumbering, assigning, disposing, or transferring any of the rights to payment is GRANTED. A notice of motion with this hearing date and time was served by U.S. mail on May 2, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The request also satisfies all statutory requirements. Moving party to prepare formal order.
3	19CV360721	Kathleen Radivojec et al vs Vintage Towers et al	Defendant Avanath Capital Management, LLC's motion to compel Plaintiff Robert Radivojec to respond to special interrogatories (set one) is continued to June 27, 2024 at 9 am to be heard with Defendant's motion to compel Plaintiff Robert Radivojec's responses to request for production (set one). The Court notes that neither motion is opposed, although Plaintiff was served, and that Plaintiff submitted no responses. Accordingly, unless the Court receives other information from Plaintiff, the tentative rulings will be to grant both motions to compel and for sanctions. This order will be reflected in the minutes. The Court will prepare formal orders after the June 27, 2024 hearing.
4	20CV364136	Anthony Wyatt vs Holder Construction Group, LLC et al	Defendant's motion for summary judgment is GRANTED. Scroll to line 4 for complete ruling. Court to prepare formal order.
5	21CV389658	CAPITOL INVESTMENT COMPANY vs Dolores Burger et al	Defendant's demurrer is SUSTAINED with 20 days leave to amend. Scroll to line 5 for complete ruling. Court to prepare formal order.
6	22CV402705	KINGDOM OF SWEDEN vs J. Daryaie	Parties are ordered to appear for the debtor's examination.
7	23CV415721	Tony D'Antonio vs Octavia Green et al	Defendants' demurrer to the first cause of action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND and to the second cause of action is OVERRULED. Scroll to line 7 for complete ruling. Court to prepare formal order.

8-9	23CV419297	Avital Lando vs Missy Davis et al	Missy Davis's demurrer to Avital Lando's sixth cause of action in the second amended complaint is moot. Plaintiff dismissed the sixth cause of action without prejudice on May 14, 2024. Jeri Snydor's demurrer to Avital Lando's fifth cause of action in the second amended complaint is SUSTAINED WITHOUT LEAVE TO AMEND. A notice of motion with this hearing date and time was served by electronic mail on April 10, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The demurrer is also well taken, as the second amended complaint fails to allege sufficient facts to support a negligent hiring, supervision, retention claim, and by failing to oppose the demurrer, Plaintiff fails to show how the claim could be amended. Jeri Snydor's Demurrer to the sixth cause of action is moot. Plaintiff dismissed the sixth cause of action without prejudice on May 14, 2024. Court to prepare formal order.
10	23CV423033	ANTHONY VEGAS vs KIA MOTORS AMERICA, INC.	Plaintiff's motion to compel further responses to Plaintiff's requests for production of documents (set one) and for sanctions is DENIED. Plaintiff did not meet and confer as required by the Code of Civil Procedure; a single boiler plate letter does not constitute meeting and conferring—if Defendant sought sanctions for opposing this motion, such sanctions would have been granted. Code of Civil Procedure section 2023.020 states: "the court *shall* impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as result of that conduct." (Emphasis added; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 448 (failure to participate in meet and confer process in good faith is independent discovery abuse for which sanctions are authorized by statute). Plaintiff's requests are also overbroad. The primary focus of permitted discovery in Song-Beverly cases is on the vehicle at issue in a particular case—not sweeping discovery regarding other customers' complaints or other vehicles. (See, e.g., *Lukather v. General Motors, LLC* (2010) 181 Cal. App. 4th 1041, 1051-52; *BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136; *Ramos v. FCA US LLC* (2019) 385 F. Supp. 3d 1056, 1072; *Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 136; *Kwan v. Mercedes-Benz of North America, Inc.* (1996) 23 Cal.App.4th 174, 186.) Plaintiff's citation to *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138 and *Doppes v. Bently Motors, Inc.* (2009) 174 Cal.App.4th 967 does not change this analysis. Neither of those cases directly addressed a trial court's discovery orders in a lemon law case. Code of Civil Procedure section 2019.030(a)(2) states: "The court shall restrict the frequency or extent of use of a discovery method. . . if it determines. . . The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation."). Applying that analysis here requires that Plaintiff's motion be DENIED. Court to prepare formal order.
11	24CV432080	SERENITY MSO LLC et al vs PALO ALTO MIND BODY et al	The hearing on this motion is continued to July 2, 2024 at 9 am to be heard with Defendant's other motion to quash.

12	24CV432739	Kelvin Chong vs Neuron Fuel, Inc. et al	Plaintiff's application for writ of attachment is continued to August 29, 2024 at 1:30 in Department 18a to be heard with the same application filed in Case No. 24CV432742. Case Nos. 24CV432742 and 24CV432743 are also reassigned to this department, the initial case management conferences in each of the three cases are VACATED, the motions to set aside are reset to August 1, 2024 at 9 am in department 6, and the parties in all three cases are ordered to appear at that date and time and show cause why these cases should not be consolidated for all purposes and for a case management conference. These orders shall be reflected in the minutes.
13	24CV439422	ALLIANCE MANUFACTURED HOMES, INC. vs Betty Ebner	Alliance Manufactured Homes' Petition for abandonment is GRANTED. Default judgment is entered against respondent and in favor of petitioner.

Calendar Line 4
Case Name: *Anthony Wyatt vs Holder Construction Group, LLC et al*
Case No.: 20CV364136

Before the Court is Defendant Rudolph & Sletten Inc.'s ("R&S") motion for summary judgment against Plaintiff Anthony Wyatt's complaint. Pursuant to the California Rule of Court, Rule 3.1308, the Court issues its tentative ruling.

I. Background

According to the complaint, on March 6, 2018, Plaintiff was working at the Apple Headquarters, City of Cupertino, County of Santa Clara ("Premises"), when he slipped and fell. (Complaint PLD-PI-001(4), Prem.L-1.) Plaintiff alleges Defendants negligently owned, maintained, managed, and operated the Premises and willfully or maliciously failed to guard or warn against a dangerous condition or use. (*Id*., at Prem.L-3.)

Plaintiff filed his complaint on February 20, 2020 against Holder Construction and Does 1 through 100. On May 18, 2020, Plaintiff's Prem.L-3 Count Two, and Prem.L-4 Count Three were stricken from the complaint. On February 2, 2021, Plaintiff filed an amendment to his complaint adding R&S as Doe 1.

On February 4, 2022, Holder Construction Group, LLC's (erroneously sued as Holder Construction) motion for summary judgment was granted in its favor and against the Plaintiff. R&S filed its motion for summary judgment on April 3, 2024; which Plaintiff opposes.

II. Legal Standard

Motions for summary judgment are governed by Code Civ. Proc. § 437c, which allows a party to "move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (C.C.P. § 437c(a)(1).) The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) Code Civ. Proc. § 437c(c) requires "the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

"The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues; the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67, citing *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 381-382.) As to each claim framed by the complaint, the defendant moving for summary judgment must satisfy the initial burden of proof by presenting facts to negate an essential element, or to establish a defense. (Code Civ. Pro. § 437c(p)(2); *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520.) Defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.)

Defendant must present evidence and not simply point out that plaintiff does not possess and cannot reasonably obtain needed evidence. (*Aguilar, supra,* 25 Cal.4th at 865-66.) Thus, a moving defendant has two means by which to shift the burden of proof under the summary judgment statute: "The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. [Citation.] [Or a]lternatively, the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1103.)

Until the moving defendant has discharged its burden of proof, the opposing plaintiff has no burden to come forward with any evidence. Once the moving defendant has discharged its burden as to a particular cause of action, however, the plaintiff may defeat the motion by producing evidence showing that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc. §437c(p)(2).) Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389.)

III. Request for Judicial Notice

Plaintiff requests the Court take judicial notice of Gavin Kalley's May 5, 2021 declaration filed in connection with Holder Construction's motion for summary judgment.

Plaintiff's request is GRANTED, IN PART. Gavin Kalley's declaration may be judicially noticed pursuant to Evidence Code section 452(d), which permits judicial notice of the records in the pending action, or in any other action pending in the same court or any other court of record in the U.S. However, "although the existence of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113; see also *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-484.) The Court can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgment. (*Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879.)

IV. Evidentiary Objections

Defendant objects to the following evidence proffered by Plaintiff:

- Objection No. 1 – OVERRULED
- Objection No. 2 - OVERRULED
- Objection No. 3 – OVERRULED
- Objection No. 4 – OVERRULED.

V. Analysis

Plaintiff's complaint contains a single cause of action for premises liability. The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages. (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.) Those who own, possess, or control property generally have a duty to exercise ordinary care in managing the property to avoid exposing others to an unreasonable risk of harm. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 37.)

Defendant seeks summary judgment asserting (1) the "Trivial Doctrine" as well as the "Privette Doctrine" bar Plaintiff's action and (2) Plaintiff cannot prove a 2.5-3 inch height differential

in the overlapping Skudo floorboards caused his trip and fall. In support of its motion, Defendant submits excerpts from Plaintiff's and Brian Dixon's deposition (Exhibits B and D), Plaintiff's interrogatory responses (Exhibit C), and an authenticated copy of a photograph depicting the incident site (Exhibit E).

A. Trivial Defect Doctrine

Persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition. The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor, trivial, or insignificant defect in the property. (*Ursino v. Big Boy Restaurants* (1987) 192 Cal. App. 3d 394, 398-99; *Caloroso v. Hathaway* (2004) 122 Cal. App. 4th 922, 927.) "The trivial defect doctrine is not an affirmative defense. It is an aspect of a landowner's duty which a plaintiff must plead and prove. The doctrine permits a court to determine whether a defect is trivial as a matter of law, rather than submitting the question to a jury. 'Where reasonable minds can reach only one conclusion -- that there was no substantial risk of injury --the issue is a question of law, properly resolved by way of summary judgment.'" (*Stathoulis v. City of Montebello* (2008) 164 Cal. App. 4th 559, 567 (citations omitted).) "Several decisions have found height differentials of up to one and one-half inches trivial as a matter of law." (*Id*. at 568.) "However, it is also true that as 'the size of the depression begins to stretch beyond one inch the courts have been reluctant to find that the defect is not dangerous as a matter of law.' Moreover, size alone is not determinative of whether a rut presents a dangerous condition. It is just one of several factors… . We must also consider the nature and quality of the defect, the time of day and lighting conditions when the accident occurred, and whether there is evidence of anyone else has been injured by the same defect." (*Id*. (citations omitted).)

Therefore, the analysis of whether a defect is trivial, as a matter of law, involves two steps. "First, we review evidence of the 'type and size of the defect.' If that analysis reveals a trivial defect, we then consider 'evidence of any additional factors [bearing on whether the defect presented a substantial risk of injury]. If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person,' then we will 'deem the defect trivial as a matter of law.'" (*Nunez v. City of Redondo Beach* (2022) 81 Cal. App. 5th 749, 758 (citations omitted).) "Aside

from the size of the defect, the court should consider whether the walkway had any broken pieces or jagged edges and other conditions of the walkway surrounding the defect, such as whether there was debris, grease or water concealing the defect, as well as whether the accident occurred at night in an unlighted area or some other condition obstructed a pedestrian's view of the defect." (*Caloroso v. Hathaway*, *supra*, at 927.) The condition on the property that is at issue must create "an unreasonable risk of harm." (CACI No. 1003.)

Here, Defendant contends the trivial defect doctrine bars its liability because at the time of the incident (1) the height differential of one-eighth-inch between the overlapping Skudo boards edges was trivial, (2) the area was sufficiently illuminated, (3) nothing obstructed Plaintiff's view of the incident area, and (4) Plaintiff was very familiar with the incident area and had used it numerous times earlier that day. To establish the triviality of the defect, Defendant primarily relies on Mr. Dixon's deposition testimony and its Exhibit E, post incident photograph of the scene.

Mr. Dixon testified:

- He saw Plaintiff fall approximately three feet away from him. (Dixon Depo. 23:10-16.)
- [Referring to the Exhibit E photograph] Plaintiff fell as he walked between the gang box on the right and the plan table on the left, took a spill and ended up out in the walkway beyond the plan table and the gang box. (Dixon Depo. 61:25-62:1-3.)
- It looked like Plaintiff caught his toe against an uncovered overlapping Skudo edge. While he did not see Plaintiff's feet at the exact time due to a plan table blocking his view he could tell Plaintiff tripped over the Skudo edging because it had crinkled up. (Dixon Depo. 28:18-24.)
- The edges of the Skudo boards were usually taped together at the seams where it overlaid onto another piece. The taping was constantly repaired due to moving rolling carts and heavy equipment. (Dixon Depo. 24:3-14.)
- In the morning of the incident, laborers from R&S had removed the tape covering the seams. (Dixon Depo. 24:14-18.)
- After the tape was removed, the raised edge of the Skudo boards were less than a quarter of an inch at its highest point. Skudo Boards overlapping each other create an edge due to

their thickness. Mr. Wyatt tripped on the overlapped edge of the Skudo board that was raised about one eighth of an inch plus the thickness of the board itself. (Dixon Depo. 34:12-23, 36:6-7, 19-24.)

- He could not specifically say what the height differential was at the exact spot where Plaintiff tripped. (Dixon Depo. 36: 14-17.)
- The raised portion of the Skudo boards overlapping edges were less than quarter of an inch at its highest point. (Dixon Depo. 34:12-14.)
- The picture was taken on March 7, 2018, at 8:47 a.m. (Dixon Depo. 71:20-72:3.)
- [Referring to the Exhibit E photograph] The flat part is where the tape was removed, and the two spots look like they were kicked or runover post incident. He did not believe those raised areas were there or caused the accident. He believed the raised areas happened after Plaintiff's fall. (Dixon Depo. 61:7-13.)
- He could not specifically testify whether the 2.5–3-inch bump/bubble shown in the picture happened after or before the fact. However, based on the picture it seems Plaintiff hit it twice. (Dixon Depo. 70:5-17.)

Mr. Dixon's key testimony is that without tape bridging the overlapping edges of the Skudo boards, the seam had a height differential of approximately 1/8 of an inch plus the thickness of the board. While no information or evidence has been provided regarding the thickness of the Skudo boards, Mr. Dixon testified that the raised overlapping edge was less than a quarter of an inch at its highest point. It is undisputed that the incident occurred between a plan table and a "gang box," approximately three feet from where Mr. Dixon was standing. (Responses to Defendant's Separate Statement of Undisputed Facts ("RSSUF") No. 22.) Indeed, the photograph of the scene shows a horizontal Skudo seam between the "gang box" and the "plan table" that was not taped down. (Defendant's Ex. E; Plaintiff's Ex. 6.) Undisputed evidence establishes there was no debris or water concealing the differential, nothing obstructed Plaintiff's view, the area was sufficiently lit, Plaintiff was very familiar with the area, and Plaintiff had not seen any irregularities on the surface of the Skudo boards ahead of him immediately before the incident. (RSSUF Nos. 12, 16, 18, 20, Wyatt

Depo. 87:24-88:1; 89: 2-8; 95:11-17.) Considering all the circumstances presented, the Court finds Defendant has met its burden of showing that the defect here is trivial as a matter of law.

Plaintiff claims (1) Skudo boards are usually taped down to prevent them from rising, (2) when not taped down they present a dangerous condition that is not trivial, (3) Mr. Dixon's testimony as to the 1/8 inch height differential between the overlapping Skudo boards was merely an estimation, and (4) a reasonable inference can be made that a 2.5–3 inch height differential between overlapping Skudo boards caused Plaintiff's trip and fall. Plaintiff also contends "it would take only a very small board, for this to rise to the height of the ¼ inch defects in *Dolquist, Stathoulis and Kasparain*." (Opposition, p. 8:17-18, citing *Dolquist v. City of Bellflower* (1987) 196 Cal.App.3d 261; *Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559; *Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 1.)

Plaintiff also relies on the photograph of the scene, excerpts from Mr. Dixon's and Plaintiff's deposition testimony, and the undisputed facts:

- The upper Skudo seam in the photograph shows a curved raised area with the height differential of approximately 2.5-3 inches. It is unclear whether this height differential existed after or before the fact. This height differential may have resulted from Plaintiff's kicking during his fall (Dixon Depo. 71:4 -17.)
- At no time before the incident had Plaintiff seen any irregularities in the Skudo coverings. (RSSUF No. 16.)
- Immediately before the incident, as Plaintiff was walking to the point where he tripped, he did not see any problem with the Skudo boards anywhere ahead of him. (RSSUF No. 18; Wyatte Depo. 89:2-6.)
- Plaintiff has no knowledge of whether damage to the Skudo coverings was worsened by his contact. (Wyatt Depo. 111:7-10.)
- Plaintiff's belief that he stumbled on the Skudo floor covering is based on Mr. Dixon's statements and photograph of the area. (Wyatt Depo. 99:1-6.)

None of this evidence supports Plaintiff's claim that the exposed Skudo floorboards overlapping edges were inherently dangerous or that a height differential of 2.5-3 inches between Skudo overlapping edges caused Plaintiff's trip and fall.

Plaintiff has the burden of showing Defendant's act or omission was a substantial factor in bringing about his injuries. "In other words, plaintiff must show some substantial link or nexus between omission and injury." (*Saelzler v. Advanced Group 400 (2001)* 25 Cal.4th 763, 778.) Plaintiff must therefore introduce evidence setting forth a reasonable basis for the conclusion that it is more likely than not that the 2.5- 3 inch height differential was a cause in fact of his injuries. "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200,1205–1206.)

Notably, although without Mr. Dixon's testimony, Plaintiff cannot establish a non-trivial defect, Plaintiff argues Mr. Dixon cannot estimate the height differential of the raised Skudo edges. And Plaintiff submits no evidence establishing the conditions were materially different than those presented in Defendant's motion.

The Court finds thus finds Plaintiff fails to raise a triable issue of material fact.

As the Court's finding on the trivial defect doctrine is dispositive, the Court need not reach the other grounds presented for summary judgment.

Based on the foregoing, Defendant's motion for summary judgment is GRANTED.

Calendar Line 5
Case Name: *Capitol Investment Company v. Dolores Burger, et al.*
Case No.: 21CV389658

Before the Court is plaintiff/cross-defendant Capitol Investment Company's ("Capitol") demurrer to defendant/cross-complainant Dolores 'Dee Dee' Burger ("Dolores") and Andrea Burger's ("Andrea") (collectively, the "Burgers") second amended cross-complaint ("SACC").[1] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of an alleged breach of contract. Capitol is the owner in fee of 3 parcels of real property (the "Property") located at the southwest corner of Capitol Avenue and Hostetter Road in San Jose. (SACC, ¶ 2.) The Property is part of a neighborhood shopping center (the "Shopping Center"), which consists of five parcels, Capitol owns three of them (parcels 1, 2, & 5) and the Burgers own one (parcel 3). (*Ibid*.) Capitol acted as the property management operator for the parking lot and common areas of the Shopping Center since it became the successor-in-interest to Duckett-Wilson Development Company and Robert N. Blackburn Development Corporation (collectively, "Blackburn"). (*Ibid*.) Capitol, Save Mart, and the Burgers were parties to agreements related to the operation, maintenance, and tenancy of parcel 3. (SACC, ¶ 3.) The main agreement is the Declaration of Restrictions and Grants of Easement and Maintenance of Parking Lot Agreement (the "Declaration"), recorded on June 3, 1975, and the first amendment to the Declaration ("Amended Declaration") was recorded on June 18, 2001. (*Ibid*.)

On October 12, 2021, Capitol filed its complaint for (1) breach of written instrument, and (2) common counts – goods and services rendered. On March 18, 2022, the Burgers filed their cross-complaint and on November 13, 2023, they filed their first amended cross-complaint, asserting (1) breach of contract, (2) breach of fiduciary duty, (3) misrepresentation-fraud, and (4) declaratory relief. On March 14, 2024, they filed their SACC, asserting, (1) breach of contract, (2) breach of fiduciary duty, and (3) declaratory relief. On April 22, 2024, Capitol filed the instant demurrer, which the Burgers oppose.

[1] As the Burgers share a surname, the Court will refer to them by their first names, when necessary, for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "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.)

Capitol demurs to the second cause of action on the ground it fails to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

III. Analysis

"In order to plead a cause of action for breach of fiduciary duty, there must be shown the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. The absence of any one of these elements is fatal to the cause of action." (*Brown v. California Pension Administrators & Consultants, Inc*. (1996) 45 Cal.App.4th 333, 347-348 (*Brown*); see also CACI, No. 605.)

A. Broker's License

The Burgers allege under the Declaration and Amended Declaration, "Capitol had a strict financial fiduciary duty for the benefit of Burgers with regard to its obligations as an agent on behalf of [the Burgers] as property management which duties included [:]

> [1.] The right and obligation to maintain and repair the parking and common areas of the Shopping Center, maintaining the surfaces of parking lots and other common areas;
>
> [2.] Removing all papers, debris, filth, and refuse;
>
> [3.] Taking whatever steps necessary to remove or exclude from the common areas any persons whose presence thereon is deemed to be detrimental as the property management operator of the Shopping Center…
>
> [4.] To keep accurate financial records of its accounting for costs, expenditures and charges and send, deliver, provide reasonable timely notice and actually send and deliver such notices of common area reimbursement expenditures to [the Burgers] within a reasonably approximate time… from Capitol having incurred the expense(s)…
>
> [; and]
>
> [5.] To register itself with the State of California as a licenses realtor/broker/agent in order to charge fees to act as property manager."

(SACC, ¶ 15.)

However, neither the Declaration nor the Amended Declaration state that "a strict financial duty was owed" to the Burgers. Article 9 of the Declaration pertains to the maintenance of the parking lot. (SACC, Exh. A.) It provides that Blackburn shall have the right to maintain and repair the entire parking lot and common areas and the obligation "on the part of Blackburn to maintain said parking and common areas in good condition and repair shall, without limiting the generality thereof, include the following:

> **1.** Maintaining the surfaces in a level, smooth and evenly covered condition….;

2. Remove all papers, debris, filth and refuse and thoroughly sweep the areas to the extent reasonably necessary to keep said areas in a neat, clean and orderly condition;

3. Placing, keeping in repair and replacing when necessary appropriate directional signs, markers and lines, and keeping in repair and replacing when necessary, such artificial lighting facilities as shall be reasonably required;

4. Maintaining any perimeter walls in a good condition and state of repair; and

5. Maintaining all landscaped areas, making such replacement of shrubs and other landscaping as is necessary, and keeping said areas at all times adequately weeded, fertilized and watered.

(SACC, Exh. A, Art. 9; see also *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83 (*SC Manufactured Homes*) ["[i]f the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits"].)

The Burgers argue Capitol is required to have a broker's license to provide property management services. Business & Professions Code section 10131, subdivision (b) provides that a real estate broker license is required if a person, for compensation, "leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of lease on real property, or on a business opportunity, or collects rents from rental property, or improvements thereon, or from business opportunities." (Bus. & Prof., § 10131, subd. (b).) "Business opportunity" includes "the sale or lease of the business and goodwill of an existing business enterprise or opportunity." (Bus. & Prof., § 10030.)

The Burgers do not allege Capitol was involved in the leasing of the Property or the collection of rent on their behalf. Rather, they allege Capitol performed property management duties pertaining to the parking lot and common areas of the Shopping Center. (See SACC, ¶ 15.) The Burgers fail to provide any authority in support of their assertion that a property manager that handles the maintenance and/or improvements of common areas only, without any involvement with the renting or leasing of the property, is required to obtain a broker license. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [points asserted without supporting authority are waived].) Therefore, the Court

is not persuaded by the Burger's contention that such activities require licensure. (See *MKB Management, Inc. v. Melikian* (2010) 184 Cal.App.4th 796, 802-803 ["A broker's license was required for offering for lease or leasing apartment units and collecting rent… but was not required for other management duties such as causing repairs to be made, decorating, and general maintenance"].) Consequently, it does not appear Capitol is required to obtain a license to act as property manager due to the limited nature of its activities.

B. Whether Capitol Owes the Burgers a Fiduciary Duty

"While breach of fiduciary duty is a question of fact, the existence of legal duty in the first instance and its scope are questions of law." (*Kirschner Brothers Oil, Inc. v. Natomas, Co.* (1986) 185 Cal.App.3d 784, 790.) "Before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 632 (*Oakland Raiders*).) However, "[a] mere contract or debt does not constitute a trust or create a fiduciary relationship." (*Id*. at p. 634; see also *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30-31 (*Wolf*).) A fiduciary relationship can be created if the person charged with a fiduciary obligation knowingly undertakes to act on behalf of and for the benefit of another. (*Oakland Raiders, supra,* 131 Cal.App.4th at p. 632.)

The Burgers allege Capitol's fiduciary duties derive from the Declaration and Amended Declaration. (See SACC, ¶ 16.)

The Burgers rely on *Woolley v. Embassy Suites, Inc.* (1991) 227 Cal.App.3d 1520, 1531 (*Woolley*), which involved a partnership between hotel owners, who owned 22 hotels, which were franchised by the defendant, and 17 of the hotels were managed by the defendant. (*Id*. at p. 1525.) The written contract permitted the owners to terminate the manager upon written notice of the breach and the manager's failure to cure within 60 days. (*Ibid*.) After the owners served the notices, they subsequently filed suit in California. (*Ibid*.) The manager filed five separate actions in Texas, demanded arbitration of the California action, and shortly after, filed for a temporary restraining order in the California action, which was granted by the court. (*Id*. at p. 1526.) The Burgers rely on *Woolley* for the proposition that a property manager is both an agent and fiduciary of the property

owners. (*Id*. at p. 1531.) However, in *Woolley,* the contract contained a provision, which stated the parties had a principal/agent relationship. (*Ibid*.) This is distinguishable because while the Burgers allege Capitol was acting as its agent, the Declaration, provides,

> It is the intent of the parties in making this Agreement to subject every portion of the shopping center to the covenants, condition, and restrictions hereinafter set forth, and to provide for a reciprocal exchange of rights and easements in order that each party…may freely use the parking areas…It is also the intent of the parties hereto to provide for the operation and maintenance of the parking areas…

(SACC, Exh. A, Art. 2.)

The Declaration is devoid of any provisions which create a principal/agent relationship or a fiduciary relationship. (See *SC Manufactured Homes, supra,* 162 Cal.App.4th at p. 83.) The Burgers fail to allege any other facts to support an agency relationship. Thus, the Burger's reliance on *Woolley, supra*, is without merit.

Nevertheless, it appears the Burgers may be able establish a fiduciary duty based on the accounting of the services taken on their behalf, specifically the alleged overcharging and inaccurate charges attributed to them. (See *Oakland Raiders, supra,* 131 Cal.App.4th at p. 632.) However, the Burger's opposition contains facts not included in the SACC. (See Opp., 6:6-17.) While Capitol contends its billing practices do not impose a fiduciary duty, it fails to cite any authority in support. (See *People v. Dougherty, supra,* 138 Cal.App.3d at p. 282 [points asserted without supporting authority are waived].) Thus, the demurrer is SUSTAINED with 20 days leave to amend.

Calendar Line 7
Case Name: *Tony D'Antonio v. Octavia Green, et al.*
Case No.: 23CV415721

Before the Court is Defendants Lenell Green's ("Lenell") and Octavia Green's ("Octavia") (collectively, "Defendants") demurrer to Plaintiff Tony D'Antonio's complaint ("Complaint"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This action arises from Defendants' alleged breach of contract. On November 23, 2020, the parties entered into a written lease agreement (the "Lease") for real property located at 3037 Mauna Loa Court in San Jose (the "Property"). (Complaint, ¶¶ 1, 7.) The Lease was for one year starting on December 12, 2020, at $4,000 per month, with rent due on the first of the month. (Complaint, ¶ 7.) Defendants left the Property in significant disrepair when they vacated in December 2021. (Complaint, ¶¶ 9-10.) Plaintiff paid for the cost of maintenance, clean up, and repairs, which should have been done by Defendants. (Complaint, ¶ 10.) In addition, Defendants owe rent for the time they occupied the Property, specifically, September, October, November, and eleven days in December, which totals $13,466. (Complaint, ¶ 11.)

On May 3, 2023, Plaintiff filed his Complaint, asserting (1) breach of contract for failure to pay rent and (2) breach of contract for failure to maintain the premises. On June 9, 2023, Defendants filed the instant demurrer, which Plaintiff opposes.[2]

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

[2] After filing their motion, Defendants failed to obtain a hearing date but on April 24, 2024, the Court, on its own motion, set a hearing date for June 25, 2024.

The court treats a demurrer "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.)

Defendants demur to the Complaint on the ground it fails to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

III. Analysis

A. First Cause of Action: Breach of Contract -Failure to Pay Rent

To allege a cause of action 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 (*Bushell*).)

Plaintiff alleges the Lease, his performance, Defendants' breach of the Lease, and the resulting damages. (Complaint, ¶¶ 12-16.) Thus, Plaintiff alleges sufficient facts to state this claim. (*Bushell, supra,* 220 Cal.App.4th at p. 921.) Defendants contend Plaintiff failed to provide the required documentation for an action for the collection of COVID-19 rental debt.

While Defendants incorrectly cite to Code of Civil Procedure section 870.10 in their notice of demurrer and memorandum of points and authorities ("MPA"), they appropriately cite to Code of

Civil Procedure section 871.10, which involves COVID-19 rental debt, in their Memorandum of Points and Authorities. (See MPA, p. 4:3.) Therefore, the Court declines to strike the citation.[3]

The COVID-19 Tenant Relief Act (the "Act") applies to the period between March 1, 2020 to September 30, 2021. (Code Civ. Proc., § 1179.02, subd. (a).) COVID-19 rental debt "means unpaid rent or any other financial obligation of a tenant under the tenancy that came due during the covered time period." (Code Civ. Proc., § 1179.02, subd. (c).) Code of Civil Procedure section 871.10, subd. (a), provides, "in any action seeking recovery of COVID-19 rental debt, as defined in [Section 1179.02], the plaintiff shall, in addition to any other requirements provided by law, attach to the complaint documentation showing that the plaintiff has made a good faith effort to investigate whether governmental rental assistance is available to the tenant, seek governmental rental assistance for the tenant, or cooperate with the tenant's efforts to obtain rental assistance from any governmental entity, or other third party…" (Code Civ. Proc., § 871.10, subd. (a).)

Defendants contend Plaintiff seeks recovery of COVID rental debt but has not attached documentation showing a good faith effort to obtain governmental rental assistance as required by the statute. However, the Act only applies to the period between March 1, 2020 to September 30, 2021. (Code Civ. Proc., § 1179.02, subd. (a).) Therefore, Plaintiff is not required to provide any documentation for October, November, and December. Although "a demurrer does not lie to a portion of a cause of action," if Plaintiff would like to recover the September 2021 rental debt, he needs to provide the necessary documentation. (See Code Civ. Proc., § 871.10, subd. (a).) Plaintiff requests leave to amend to provide the documentation. (Opp., p. 4:23-25.) Thus, the demurrer to the first cause of action is SUSTAINED with 20 days leave to amend.

B. Second Cause of Action: Breach of Contract -Failure to Maintain

Plaintiff alleges the Lease, his performance, Defendant's violation of paragraphs 8 and 10 of the Lease, and the resulting damage. (See Complaint, ¶¶ 17-22.) It appears the breach for this claim

[3] Plaintiff's reliance on Code of Civil Procedure section 116.223, is without merit because the statute pertains to claims brought in small claims court, which is not applicable here. (See Code Civ. Proc., § 116.223, subd. (a)(4) ["it is the intent of the Legislature that landlords of residential real property and their tenants have the option to litigate disputes regarding rent which is unpaid for the time period between March 1, 2020, and September 30, 2021, *in the small claims court*. It is the intent of the Legislature that the jurisdictional limits of the *small claims court* not apply to these disputes over COVID-19 rental debt."] [emphasis added].)

occurred when Defendants vacated the Property in December 2021 and left it in "significant disrepair." (Complaint, ¶ 10.) Therefore, the Act does not apply to this claim. (See Code Civ. Proc., § 1179.02, subd. (c) [defines COVID-19 rental debt as "unpaid rent or any other financial obligation… *that came due during the covered time period*"] [emphasis added].) Plaintiff alleges sufficient facts to state this claim. (See *Bushell, supra*, 220 Cal.App.4th at p. 921.) Thus, the demurrer to the second cause of action is OVERRULED.