SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

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"Every case is important" . . . . . "No case is more important than any other."— United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Thursday, 15 February 2024
TIME: 9:00 A.M.

This Department uses Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in-court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building. If the doors to the Old Courthouse are locked, please see the deputies at the metal detector next door at 191 North First Street.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit

photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	23CV423653	Ampere Computing LLC vs FICT Limited	**Motion of Defendant to Seal Portions of Defendant's Demurrer to Plaintiff's Complaint.** The motion is GRANTED. NO FORMAL TENTATIVE RULING.
LINE 2	23CV423653	Ampere Computing LLC vs FICT Limited	**Demurrer of Defendant to Plaintiff's Complaint.** Defendant FICT's demurrer to the first, second, and fourth causes of action in Plaintiff Complaint on the ground that the pleading does not state sufficient facts [***Code Civ. Proc.***, §430.10, subd. (e)] is OVERRULED. Defendant FICT's demurrer to third cause of action in Plaintiff Complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code Civ. Proc.***, §430.10, subd. (e)] for fraudulent/negligent misrepresentation is SUSTAINED with 10 days leave to amend. SEE ATTACHED TENTATIVE RULING.
LINE 3	23CV423653	Ampere Computing LLC vs FICT Limited	**Application of Brian G. Liegel to appear Pro Hac Vice on behalf of Defendant.** The application is GRANTED NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 4	23CV423653	Ampere Computing LLC vs FICT Limited	**Motion of Plaintiff to Seal Opposition to Defendant's Demurrer to Plaintiff's Complaint.** The motion is GRANTED. NO FORMAL TENTATIVE RULING.
LINE 5	21CV384601	Mark Rubin; Sarah Weaver vs Douglas HohBach; Hobach-Lewin LLC; Erica Underwood; Marcus Wood; Hohbachn Realty Company Ltd; Kylix Enterprises, Inc.; The Mayfield Building Company And Related Cross-Complaint	**Motion of Defendants Mayfield, Kylix, and Hohbach for Summary Judgment/Summary Adjudication to the First Amended Complaint of Mark Rubin.** Defendant HRCLP's motion for summary judgment of plaintiffs Rubin and Weaver's FAC is GRANTED. Defendant Mayfield's motion for summary adjudication of the first and third causes of action of the FAC against plaintiff Weaver is GRANTED. Defendants Mayfield and Kylix's motion for summary judgment, or in the alternative, summary adjudication against Sarah Weaver is otherwise DENIED. Defendant Mayfield's motion for summary adjudication of the first and third causes of action of the FAC against plaintiff Rubin is GRANTED. Defendants Mayfield and Kylix's motion for summary judgment, or in the alternative, summary adjudication against Mark Rubin is otherwise DENIED. SEE ATTACHED TENTATIVE RULING.
LINE 6	21CV384601	Mark Rubin; Sarah Weaver vs Douglas HohBach; Hobach-Lewin LLC; Erica Underwood; Marcus Wood; Hohbachn Realty Company Ltd; Kylix Enterprises, Inc.; The Mayfield Building Company And Related Cross-Complaint	**Motion of Defendants Mayfield, Kylix, and Hohbach for Summary Judgment/Summary Adjudication On the Cross-Complaint of Mark Rubin and Sarah Weaver.** SEE LINE #6.
LINE 7	21CV384601	Mark Rubin; Sarah Weaver vs Douglas HohBach; Hobach-Lewin LLC; Erica Underwood; Marcus Wood; Hohbachn Realty Company Ltd; Kylix Enterprises, Inc.; The Mayfield Building Company And Related Cross-Complaint	**Motion of Defendants Kylix, and Hohbach Realty for Summary Judgment/Summary Adjudication Against Mark Rubin.** SEE LINE #6.
LINE 8	21CV384601	Mark Rubin; Sarah Weaver vs Douglas HohBach; Hobach-Lewin LLC; Erica Underwood; Marcus Wood; Hohbachn Realty Company Ltd; Kylix Enterprises, Inc.; The Mayfield Building Company And Related Cross-Complaint	**Motion of Defendants Mayfield, Kylix, and Hohbach for Summary Judgment/Summary Adjudication against Mark Rubin and Sarah Weaver.** SEE LINE #6.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 9	22CV408055	Jon Eckfield vs Robert Alan Chaney; Gary Richard Bartmann And Related Cross-Complaint	**Motion of Defendant Gary Richard Bartmann to Compel Plaintiff to Provide Responses to Demand for Production of Documents, Set 1.** It seems that the motion is MOOT inasmuch as plaintiff served responses. Mr. Bartmann believes that the responses are insufficient. In ***Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants*** (2007) 148 Cal.App.4th 390, 408-409, the Court recognized that, in exercise of its discretion and based on the circumstances of the particular case, the trial Court is in the best position to determine whether action taken subsequent to the filing of a discovery motion renders that motion moot. There is an insufficient basis in this action to determine whether or not the responses were in substantial compliance with statutory requirements and therefore, the Court will not order responses or further responses. Without copies of the responses, the Court does not have sufficient information before it to grant the motion. This Court advises the parties to further meet and confer to avoid the necessity and related costs of a motion to compel further responses to the discovery requests. As an aside, this matter is also set on 05 March 2024 at 9:00 AM in this Department for a motion to consolidate with case number 23CV428996. The parties should meet and confer and, if possible, agree on the issue of consolidation which can then be resolved by providing a stipulation to this Court for execution. OFF CALENDAR WITHOUT PREJUDICE to a formal motion to compel further responses. NO FORMAL TENTATIVE RULING.
LINE 10	22CV408055	Jon Eckfield vs Robert Alan Chaney; Gary Richard Bartmann And Related Cross-Complaint	**Motion of Defendant Gary Richard Bartmann to Compel Plaintiff to Provide Responses to Special Interrogatories, Set 1.** SEE LINE #9.
LINE 11	23CV410945	The Carlton Group Limited vs Amond World, LLC; Origo, LLC And Related Cross-Complaint	**Motion Of Plaintiff To Compel Defendant Origo LLC To Provide Further Responses To Plaintiff's Request For Production Of Documents, Set One And For Monetary Sanctions.** NO TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise this Court whether they wish to submit on the papers presented or appear and argue the matter on the merits.
LINE 12	23CV410945	The Carlton Group Limited vs Amond World, LLC; Origo, LLC And Related Cross-Complaint	**Case Management Conference**. SEE LINE #11.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 13	21CV381517	Phunware, Inc. vs Wilson Sonsini Goodrich & Rosati	**Motion of McManis Faulkner Law Firm To Withdraw As Counsel for Plaintiff.** The motion was properly served upon the client. No opposition has been filed. Counsel for plaintiff seeks to withdraw as counsel due to a breakdown of the attorney-client relationship. Communication between client and counsel has deteriorated due to an irreconcilable breakdown of the attorney-client relationship (***Estate of Falco v. Decker*** (1987) 188 Cal.App.3d 1004, 1014.) Therefore, counsel is filing this motion to withdraw as counsel. Counsel alleges that his client will not be prejudiced by the withdrawal. The motion to be relieved as counsel is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and an order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel has added the next court dates on ¶¶ 7 and 8 pf the proposed order. NO FORMAL TENTATIVE RULING.
LINE 14	21CV381702	Sandra Gonzalez; Jennifer Raya vs Manmohan Singh; Siaby Singh	**Motion of Plaintiffs to Set Aside Default and Terminating Sanctions.** The motion is DENIED. Relief is unavailable under the mandatory provision of ***Code of Civil Procedure***, § 473(b) because the plaintiffs are not seeking relief from a "default judgment" but rather from a discovery sanction. (***Hossain v. Hossain*** (2007) 157 Cal.App.4th 454, 456; English v. ***IKON Business Solutions, Inc.*** (2001) 94 Cal.App.4th 130, 138.) The request of defense counsel for monetary sanctions is DENIED and that the request was not made along with the moving papers. NO FORMAL TENTATIVE RULING.
LINE 15	21CV381517	Phunware, Inc. vs Wilson Sonsini Goodrich & Rosati	**Motion of McManis Faulkner Law Firm To Withdraw As Counsel for Plaintiff.** SEE LINE #13.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 16	22CV318119	Nathaniel Villareal; Envia Holdings, LLC vs Robin Silvera-Vásquez; Richard Vásquez; The Foreclosure Company, Inc.	**Motion of Nicholas H. Van Parys to Withdraw As Counsel For Plaintiffs.** The motion was properly served upon the client. No opposition has been filed. Counsel for plaintiff seeks to withdraw as counsel due to a breakdown of the attorney-client relationship. Communication between client and counsel has deteriorated due to an irreconcilable breakdown of the attorney-client relationship (***Estate of Falco v. Decker*** (1987) 188 Cal.App.3d 1004, 1014.) Therefore, counsel is filing this motion to withdraw as counsel. Counsel alleges that his client will not be prejudiced by the withdrawal. Defendant Robin Silvera Vásquez opposes the motion for two reasons. First, she claims that the motion does not comply with California Rules of Professional Conduct, rule 1.16 as granting the motion will cause further unreasonable delay and prejudice to Ms. Vásquez. However, the only prejudice asserted is that the case has been pending for a year and a half during which plaintiff has done nothing. Second, withdrawal does not relieve Mr. Parys of any potential award of sanctions against him. As this point, the motion of 06 February 2024 did not award monetary sanctions. The motion to be relieved as counsel is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and the order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel has added the next court dates on ¶¶ 7 and 8 pf the proposed order. NO FORMAL TENTATIVE RULING.
LINE 17	23CV410945	The Carlton Group Limited vs Amond World, LLC; Origo, LLC And Related Cross-Complaint	**Motion Of Plaintiff For Attorneys Fees etc. From Defendant Origo, LLC.** SEE LINE #11.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 18	23CV412522	Dr. Tal Lavian vs CRadar.AI LLC	**Motion of Valerie M. Wagoner, Esq. and GCA Law Partners, LLP to Withdraw As Counsel for CRadar.AI LLC.** The motion was properly served upon the client. No opposition has been filed. Counsel for defendant seeks to withdraw as counsel due to a breakdown of the attorney-client relationship. Communication between client and counsel has deteriorated due to an irreconcilable breakdown of the attorney-client relationship (***Estate of Falco v. Decker*** (1987) 188 Cal.App.3d 1004, 1014.) Therefore, counsel is filing this motion to withdraw as counsel. Counsel alleges that his client will not be prejudiced by the withdrawal. The motion to be relieved as counsel is GRANTED. The Order will take effect upon the filing and service of the executed order of this Court and an order that is written on Form MC-053 and that otherwise complies with California ***Rules of Court***, rule 3.1362(e). Counsel has added the next court dates on ¶¶ 7 and 8 pf the proposed order and submit it to this Department via the Clerk's efiling queue. NO FORMAL TENTATIVE RULING.
LINE 19	23CV424871	Level 5 Security, Inc. vs Julie Puga and related cross-complaint.	**Motion of Plaintiff for Preferential Trial Setting. (Code of Civil Procedure, § 1062.3)** No party filed opposition to this motion. The parties should agree on a date and appear and advise the Court. NO FORMAL TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
LINE 21			SEE ATTACHED TENTATIVE RULING.
LINE 22			SEE ATTACHED TENTATIVE RULING.
LINE 23			SEE ATTACHED TENTATIVE RULING.
LINE 24			SEE ATTACHED TENTATIVE RULING.
LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

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Calendar Line 2

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV423653 **Ampere Computing LLC v. FICT Limited**
DATE: 15 February 2024 **TIME: 9:00 am** **LINE NUMBER: 02**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 February 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Defendant's Demurrer To Plaintiff's Complaint.

I. Statement of Facts.

Plaintiff Ampere Computing LLC ("Ampere") is a semiconductor manufacturer founded in 2017. (Plaintiff Ampere's complaint in case number 23CV423653, "Complaint," ¶1.[1]) Though a new entrant to the semiconductor market, its customers include companies such as Google and Microsoft. (*Ibid.*) Ampere sought a reliable supplier for substrate, specifically, the silicon wafers that power Ampere's microprocessors. (*Id.* at ¶2.)

In early 2021, Ampere began discussions with Fujitsu Limited ("Fujitsu") and one of its affiliated entities, defendant Fujitsu Interconnect Technologies Limited ("FICT"), regarding a potential supply relationship. (Complaint, ¶3.) Over the next several months, Fujitsu and FICT repeatedly represented that FICT could quickly meet Ampere's needs with minimal investment. (*Ibid.*) FICT proposed constructing a new facility that would be more efficient. (*Id.* at ¶4.)

The discussions culminated in two contracts between Ampere and FICT. (Complaint, ¶5.) In October 2021, the parties entered a Basic Transaction Agreement (the "Basic Agreement") under FICT would make available minimum quantities of substrate for Ampere products at specified prices. (*Ibid.*) In April 2022, before FICT began delivering substrate under the Basic Agreement, the parties entered a second contract: the Financing, Capacity Reservation, and Long-Term Supply Agreement (the "Long-Term Agreement"). (*Id.* at ¶6.) Under the Long-Term Agreement, FICT agreed to prioritize Ampere and guaranteed a future supply of substrate, and Ampere agreed to purchase substrate and partially finance the construction of a new FICT facility (the "FICT New Line"). (*Ibid.*)

FICT soon began defaulting on its obligations under the Basic Agreement. (Complaint, ¶7.) Its product yields were below industry standards. (*Ibid.*) In 2022, FICT shipped just 56% of the promised units for May and 28% of the promised units for June. (*Ibid*.) FICT continued to miss its targets through the first half of October 2022. (*Ibid.*) Ampere repeatedly told FICT it was not complying and needed to improve. (*Ibid.*)

Ampere later learned FICT was producing the substrate in an outdated facility rather than updating some equipment as promised. (Complaint, ¶8.) FICT's old machinery caused delays, and the facility allowed foreign

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[1] Case numbers 23CV423653 and 23CV423951 have been consolidated, as explained below.

material into the substrate, resulting in low yields following quality control. (*Ibid*.) Before it entered the agreements with Ampere, FICT either knew or should have known it could not meet its obligations under the Basic Agreement due to its deficient manufacturing process and equipment. (*Ibid.*)

Immediately after signing the Long-Term Agreement in April 2022, FICT was behind schedule and could never recover. (Complaint, ¶9.) FICT could not build out the "clean room"—the most critical part of the manufacturing plant. (*Id.* at ¶10.) FICT initially blamed the delays on its failure to obtain electrical transmission components, but these parts were not part of the new manufacturing equipment. (*Ibid.*) FICT knew or was negligent in not knowing the building needed these retrofits. (*Ibid.*) Further, FICT had not hired enough personnel to build the facility. (Complaint, ¶11.)

Because of the delays, Ampere's personnel visited FICT's facility in October 2022. (Complaint, ¶12.) They were shocked by the decrepit state of the FICT factory, the lack of progress on the FICT New Line, and the lack of any construction personnel at the site. (*Ibid*.) FICT personnel admitted they had not hired enough personnel to construct the facility. (*Ibid*.) By December 2022, construction was six months behind schedule, with the FICT New Line scheduled to be ready by May 2024 at the earliest. (*Ibid.*)

By early 2023, Ampere had no choice but to seek alternative suppliers to mitigate its damages and avoid irreparable harm to its reputation. (Complaint, ¶13.) In February 2023, Ampere formally notified FICT that it was in material breach of the parties' agreements. (*Id.* at ¶14.) FICT expressed regret but refused to take commercial responsibility for the consequences to Ampere's business. (*Ibid.*)

On information and belief, FICT did not hire personnel or accelerate construction of the FICT New Line but instead proposed eliminating important phases of the project, including standard testing and qualification procedures. (Complaint, ¶15.) Because these shortcuts could put the manufacturing process at risk, Ampere was unwilling to agree to the proposed schedule revisions. (*Ibid.*) On 28 April 2023, Ampere exercised its contractual rights to terminate both the Basic Agreement and the Long-Term Agreement. (*Id.* at ¶16.) Ampere also demanded repayment of the funds it had already paid under the Long-Term Agreement. (*Ibid.*)

Ampere performed its obligations under the Long-Term Agreement. (Complaint, ¶ 25.) In July 2021, Ampere made a payment of $418,000, which was recognized by the parties as payment toward the Long-Term Agreement. (*Ibid*.) In May 2022, Ampere made a second payment of $12,110,000 under the Long-Term Agreement. (*Ibid.*) Because FICT has not repaid any of those funds and indicated no intention of doing so, Ampere commenced this action. (*Id.* at ¶17.)

On 2 October 2023[2], plaintiff Ampere filed the complaint (and concurrent motion to seal portions thereof) in this docket against defendant FICT, stating causes of action for:

(1) Breach of Contract

(2) Breach of Implied Covenant of Good Faith and Fair Dealing

(3) Fraudulent/Negligent Misrepresentation

(4) Declaratory Judgment.

On 5 October 2023, FICT commenced case number 23CV42395 by filing a complaint against Ampere, stating causes of action for:

(1) Breach of Sections 2.2, 5.1, 10.1, and 10.2 of the Basic Agreement

(2) Breach of Sections 2.2, 6.2, 8, 8.1, 8.2, and 12.4 of the Long-Term Agreement

(3) Promissory Estoppel

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[2] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (***Government Code***, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil ***Rules of Court***, Rule 3.714(b)(1)(C) and (b)(2)(C).)

(4) Breach of Implied Covenant of Good Faith and Fair Dealing

(5) Declaratory Judgment.

On 11 October 2023, FICT filed a notice identifying cases 23CV423653 and 23CV423951 as related, and the same day, Ampere filed a notice of motion to consolidate the two cases.[3]

On 31 October 2023, Ampere filed an answer to FICT's complaint under case number 23CV423951.

On 23 January 2024, the court granted the motion to consolidate case number 22CV423653 with case number 23CV423951, with both cases to proceed in Department 20.

On 5 December 2023, defendant FICT filed the motion before the court, a demurrer to plaintiff Ampere's complaint.

II. Demurrers in General.

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See ***Williams v. Beechnut Nutrition Corp.*** (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (***Code Civ. Proc.***, § 430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (***Ankeny v. Lockheed Missiles and Space Co.*** (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (***Yolo County Dept. of Social Services v. Municipal Court*** (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (***Committee on Children's Television, Inc. v. General Foods Corp.*** (1983) 35 Cal.3d 197, 213 (***General Foods***).) "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.' [Citation.]" (***Id.*** at pp. 213-214; see ***Cook v. De La Guerra*** (1864) 24 Cal. 237, 239 ["[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to."].)

III. Request for Judicial Notice.

FICT asks the court to take judicial notice of the Long-Term Agreement, attached as Exhibit 1 to the Declaration of Bambo Obaro. The court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (***Evid. Code***, § 452, subd. (h).) A document is subject to judicial notice when there is and can be no factual dispute concerning its contents. (***Performance Plastering v. Richmond American Homes of California, Inc.*** (2007) 153 Cal.App.4th 659, 666 (fn. 2).)

The request is GRANTED insofar as the court takes judicial notice of the existence of the document, though not necessarily the truth or interpretation of its contents. (***Apple Inc. v. Superior Court*** (2017) 18 Cal.App.5th 222, 241 ["the general rule [is] that judicial notice of a document does not extend to the truthfulness of its contents or the interpretation of statements contained therein, if those matters are reasonably disputable. [Citations.]"].)

IV. Analysis.

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[3] On 12 October 2023, Ampere filed a notice in case number 23CV423951 identifying the following matter as related: *FICT Limited v. Ampere Computing LLC*, Northern District of California, San Francisco, Case No. 3:23-cv-04063-VC.

Defendant FICT demurs to the first through fourth causes of action of plaintiff Ampere's complaint on the ground that the pleading fails to state sufficient facts [***Code Civ. Proc.***, § 431.10, subd. (e)].

A. Defendant FICT's demurrer to the first cause of action [breach of contract] is OVERRULED.

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (***Richman v. Hartley*** (2014) 224 Cal.App.4th 1182, 1186; see also ***CACI***, No. 303.) In the first cause of action, the Complaint alleges FICT breached the Long-Term Agreement. (Complaint, ¶¶39-46.)

In demurring, defendant FICT initially argues that the Complaint fails to plausibly allege that FICT misapplied Ampere's financing payments. (Mot., pp: 6:27-7:13.) FICT contends this theory of breach of contract relies on a conclusory allegation without any supporting facts, citing ***Gomes v. Countrywide Home Loans, Inc.*** (2011) 192 Cal.App.4th 1149. There, the court explained that "a pleading made on information and belief is insufficient if it merely asserts the facts so alleged without alleging such information that leads the plaintiff to believe that the allegations are true." (***Id.*** at pp. 1158-1159, internal punctuation and citations omitted.)

Plaintiff Ampere contends FICT's position fails to consider the allegations throughout the Complaint as whole, as well as any reasonable inferences that may be drawn therefrom. (Opp., pp. 8:6-9:1.) On demurrer, a court is to "give the complaint a reasonable interpretation, reading it as whole and its parts in their context." (***Zhang v. Superior Court*** (2013) 57 Cal.4th 364, 370, internal quotations and citations omitted.)

Ampere contends it has plausibly alleged misuse of the financing payments because, in part, it alleges personnel witnessed the state of the FICT factory, lack of progress on the FICT New Line, and lack of any construction personnel at the site. (Complaint, ¶12.) The Complaint also alleges that FICT admitted to not hiring enough personnel and failed to provide Ampere with documentation related to equipment purchases. (*Id.* at ¶¶ 11-12, 35, 43b.) These facts are sufficient to overcome the "information and belief" issue identified by FICT.

Defendant FICT further argues that Complaint fails to allege breaches related to the construction of the FICT New Line. (Mot., pp. 7:14-9:2.) According to FICT, failure to secure necessary equipment and hire adequate personnel do no constitute material breaches under the Long-Term Agreement. FICT asserts the Long-Term Agreement explicitly states that delay in procuring equipment is not a material breach in the event FICT is unable to procure essential equipment through no fault of its own. (*Id.* at pp. 7:28-8:3, citing § 7.2 of the Long-Term Agreement.)

Similarly, FICT contends its alleged failure to hire necessary personnel does not constitute a breach under the Long-Term Agreement. (Mot., pp. 8:11-9:1.) According to defendant FICT, plaintiff Ampere admitted in the Complaint itself that the lack of personnel was through no fault of FICT. FICT directs the court to paragraph 12 of the Complaint, which states as follows, in pertinent part:

> At various points during Ampere's tour, and afterwards, FICT's personnel admitted they had not hired enough personnel to construct the facility…. FICT had no plan and admitted '[t]here is not any update for a gap in human resource requirements.' In November 2022, FICT explained it continued to experience a 'shortage of specialists at this moment,' but that it would 'continue to push the contractors' to hire additional personnel.

(Complaint, ¶12.) FICT further asserts that "a delay caused by a global shortage of construction personnel is a factor that was beyond FICT's control. (Mot., p. 8:18-19.)

However, on demurrer, the court cannot consider facts not pleaded or judicially noticed, such as the existence of a global shortage of construction personnel and inability to procure necessary equipment. Further, the court does not agree that plaintiff Ampere admitted in paragraph 12 of the Complaint that the lack construction personnel was through no fault of defendant FICT. Though impracticability of performance may be a defense to the breach of contract claim, particularly in light of the *force majeure* clause in the Long-Term Agreement, these issues represent factual disputes that cannot be resolved on demurrer. In this court's opinion, the allegations stated in the complaint, and the reasonable inferences to be drawn from them, allege a breach of Long-Term Agreement.

Accordingly, defendant FICT's demurrer to the first cause of action in Plaintiff's Complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code Civ. Proc.***, § 430.10, subd. (e)] for breach of contract is OVERRULED.

B. Defendant FICT's demurrer to the second cause of action [breach of implied covenant of good faith and fair dealing] is OVERRULED.

In demurring to the second cause of action, defendant FICT argues that plaintiff Ampere cannot raise a duplicative claim for breach of the implied covenant of good faith and fair dealing when the same facts are used to allege the breach of contract claim.

> "The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." (***Smith v. City and County of San Francisco*** (1990) 225 Cal.App.3d 38, 49 [275 Cal. Rptr. 17].) The covenant does not exist independently of the underlying contract. (***Spinks v. Equity Residential Briarwood Apartments*** (2009) 171 Cal.App.4th 1004, 1033 [90 Cal. Rptr. 3d 453].)

(***Molecular Analytical Systems v. Ciphergen Biosystems, Inc.*** (2010) 186 Cal.App.4th 696, 711-712.)

FICT also reasserts its arguments made in connection with the breach of contract claim. In opposition, Ampere argues there are differences between the two causes of action in this case. (Opp., pp. 12:1-13:25.) Ampere asserts that even if FICT did not breach the Long-Term Agreement, FICT's actions were taken in bad faith and frustrated the benefits of the contract. Ampere argues there are many allegations in the Complaint showing bad faith, including that FICT: concealed the shortcomings of its manufacturing process; did not use Ampere's financing payments as agreed, concealed the decrepit state of its facility; made promises that it could not realistically keep; and made dishonest and pretextual excuses for it delays. (See Complaint, ¶¶11-212, 28, 33) In light of these allegations pertaining to FICT alleged bad faith, the court is satisfied that the implied covenant claim is not duplicative of the breach of contract claim. (See ***Congleton v. National Union Fire Ins. Co.*** (1987) 189 Cal.App.3d 51, 59 ["breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself… [and bad faith] implies unfair dealing rather than mistaken judgment"].)

Accordingly, defendant FICT's demurrer to the second cause of action in Plaintiff's Complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code Civ. Proc.***, §430.10, subd. (e)] for breach of the implied covenant of good faith and fair dealing is OVERRULED.

C. Defendant FICT's demurrer to the third cause of action [fraudulent/negligent misrepresentation] is SUSTAINED.

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (***Lazar v. Superior Court*** (1996) 12 Cal.4th 631, 638 (***Lazar***); see also ***CAC***I, No. 1900.) "The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. [Citation.]" (***Caldo v. Owens-Illinois, Inc.*** (2004) 125 Cal.App.4th 513, 519 (***Caldo***).) "In both causes of action, the plaintiff must plead that he or she actually relied on the misrepresentation. [Citation.]" (***Ibid.***)

"Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (***Committee on Children's Television, Inc. v. General Foods Corp.*** (1983) 35 Cal.3d 197, 216.) "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." (***Commonwealth Mortgage Assurance Co. v. Superior Court*** (1989) 211 Cal.App.3d 508, 518.) The ***Lazar*** court did not comment on how these particular allegations met the requirement of pleading with specificity in a fraud action, but the court did say that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (***Lazar***, *supra*, 12 Cal.4th at p. 645.) "In a fraud claim against a corporation, a plaintiff must allege the names of the person who made the misrepresentations, their authority to speak for the corporation, what they said or wrote, and when it was said or written. [Citation.]" (***Perlas v. GMAC Mortgage, LLC*** (2010) 187 Cal.App.4th 429, 434.)

In demurring, defendant FICT contends the allegations supporting the third cause of action lack sufficient specificity. (Mot., pp. 11:10-12:21.) Further, FICT argues that Ampere has not plausibly alleged knowledge of facility or intent to induce reliance. (*Id.* at pp. 12:22-14:20.) There is merit to FICT's arguments because the third cause of action does not allege that a specific statement made by Ampere was false. Because the Complaint does not allege that FICT intended to induce Ampere's reliance, it does not state a claim for fraudulent misrepresentation.

Finally, Ampere contends FICT had a duty to disclose material information under a fraudulent omission theory. (Opp., pp. 17-19.) Ampere asserts it is plausible to infer from the facts alleged that FICT had a duty to disclose material facts about its lack of experience and the actual state of the facility. "[A] duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement." (***LiMandri v. Judkins*** (1997) 52 Cal.App.4th 326, 337.)

Here, Ampere acknowledges that FICT made disclosures about the need to update its facilities. (Opp., p. 18:5-6; Complaint, ¶¶19, 55-57.) While Ampere asserts that FICT did not disclose the true condition of the facility, Ampere evidently knew significant improvements were needed when it agreed to partially finance construction of the new facility. Although less particularity is required when pleading a fraudulent omission, in this court's opinion on these facts, the Complaint does not sufficiently state what material facts FICT is alleged to have omitted. This leaves negligent misrepresentation.

"Negligent misrepresentation is a form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." (***Fox v. Pollack*** (1986) 181 Cal.App.3d 954, 962; internal citation omitted; see also ***CACI***, No. 1903.)

However, the Complaint does not allege that FICT had no intention of performing under the agreements, but rather that it "knew or should have known the existing production line was outdated and unsuitable … to meet its obligations to Ampere" and that it "knew, or should have known" that "the "estimated costs and timeline for completion of the FICT New Line" were "not realistic." (Complaint, ¶57.) As FICT contends, the alleged misrepresentations were forward-looking statements regarding its ability to comply with its contractual obligations.

As a matter of law, there cannot be a negligent promise to perform a future event. In ***Tarmann v. State Farm Mutual Automobile Ins. Co.*** (1991) 2 Cal.App.4th 153, 159, the court explained, "To maintain an action for deceit based on a false promise, one must specifically allege and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing. [Citations.]

Given this requirement, an action based on a false promise is simply a type of intentional misrepresentation, i.e., actual fraud. [Footnote.] The specific intent requirement also precludes pleading a false promise claim as a negligent misrepresentation, i.e., 'The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.' [Citation.] Simply put, making a promise with an honest but unreasonable intent to perform is wholly different from making one with no intent to perform and, therefore, does not constitute a false promise. Moreover, we decline to establish a new type of actionable deceit: the negligent false promise."

Finally, Ampere contends FICT had a duty to disclose material information under a fraudulent omission theory. (Opp., pp. 17-19.) Ampere asserts it is plausible to infer from the facts alleged that FICT had a duty to disclose material facts about its lack of experience and the actual state of the facility. "[A] duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement." (***LiMandri v. Judkins*** (1997) 52 Cal.App.4th 326, 337.)

Here, Ampere acknowledges that FICT made disclosures about the need to update its facilities. (Opp., p. 18:5-6; Complaint, ¶¶19, 55-57.) While Ampere asserts FICT did not disclose the true condition of the facility, Ampere evidently knew significant improvements were needed when it agreed to partially finance construction of the new facility. Although less particularity is required when pleading a fraudulent omission, in this court's opinion on these facts, the Complaint does not sufficiently state what material facts FICT is alleged to have fraudulently omitted.

Accordingly, defendant FICT's demurrer to the third cause of action in Plaintiff's Complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code Civ. Proc***., § 430.10, subd. (e)] for fraudulent/negligent misrepresentation is SUSTAINED with 10 days leave to amend.

D. Defendant FICT's demurrer to the fourth cause of action [declaratory judgment] is OVERRULED.

"A complaint for declaratory relief should show the following: (a) A proper subject of declaratory relief within the scope of C.C.P. 1060; (b) An actual controversy involving justiciable questions relating to the rights or obligations of a party." (5 ***Witkin, California Procedure*** (4th ed. 1997) § 809, pp. 264 – 265; emphasis omitted.) ***Code of Civil Procedure*** section 1060 specifically provides, "Any person interested … under a contract, … may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action … for a declaration of his or her rights and duties …, including a determination of any question or construction or validity arising under the instrument or contract."

Defendant FICT contends this claim is fatally flawed because it is wholly derivative of the breach of contract claim. (Mot., p. 15.) FICT relies upon ***Ball v. FleetBoston Financial Corp.*** (2008) 164 Cal.App.4th 794, 800, where the court stated, "Where a trial court has concluded the plaintiff did not state sufficient facts to support a statutory claim and therefore sustained a demurrer as to that claim, a demurrer is also properly sustained as to a claim for declaratory relief which is "wholly derivative" of the statutory claim." Defendant FICT contends plaintiff Ampere's fifth cause of action is derivative of its breach of contract claim, and since that other claim is defective, so too is the fourth cause of action for declaratory relief.

In light of the court's ruling above as to the breach of contract cause of action, defendant FICT's demurrer to the fourth cause of action in Plaintiff's Complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code Civ. Proc.***, §430.10, subd. (e)] for declaratory relief is OVERRULED.

V. Tentative Ruling.

The tentative ruling was duly posted.

VI. Case Management.

The Case Management Conference currently set for 19 March 2024 at 3:00 PM in Department 20 is VACATED and RESET to 13 August 2024 at 10:00 AM in Department 20.

The parties should commence discovery and discuss alternate dispute resolution.

VII. Order.

Defendant FICT's demurrer to the first, second, and fourth causes of action in Plaintiff Complaint on the ground that the pleading does not state sufficient facts [***Code Civ. Proc.***, §430.10, subd. (e)] is OVERRULED.

Defendant FICT's demurrer to third cause of action in Plaintiff Complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code Civ. Proc.***, §430.10, subd. (e)] for fraudulent/negligent misrepresentation is SUSTAINED with 10 days leave to amend.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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Calendar Line 3

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Calendar Line 5

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV384601 **Mark Rubin, et al. v. The Mayfield Building Company, et al.**
DATE: 15 February 2024 **TIME: 9:00 am** **LINE NUMBER: 05-08**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 February 2024. Please specify the issue to be contested when calling the Court and Counsel.

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Orders on:
(1) Motion Of Defendants/ Cross-Complainants For Summary Judgment,
Or In The Alternative, Summary Adjudication, On Cross-Complaint;
(2) Motion Of Defendants For Summary Judgment,
Or In The Alternative, Summary Adjudication Against Sarah Weaver;
(3) Motion Of Defendants For Summary Judgment,
Or In The Alternative, Summary Adjudication Against Mark Rubin;
(4) Motion Of Hohbach Realty Company For Summary Judgment,
Or In The Alternative, Summary Adjudication,
Against Plaintiffs Mark Rubin And Sarah Weaver.

I. Statement of Facts.

First Amended Complaint

On or about 1 June 1990, plaintiff Mark Rubin ("Rubin") moved into residential real property located at 345 Sheridan Avenue, Apartment 307, in Palo Alto ("Premises") pursuant to a written lease with defendant Mayfield Building Company ("Mayfield"), the owner and/or manager of the Premises. (First Amended Complaint ("FAC"), ¶¶1, 5, and 9.) The initial monthly rent for the Premises was $1,600. (FAC, ¶11.)

At various times, defendants increased monthly rent for the Premises without providing any written notice. (FAC, ¶11.)

On or about 1 June 2019, plaintiff Sarah Weaver ("Weaver") moved into the Premises. (FAC, ¶10.) Plaintiff Rubin informed defendants that plaintiff Weaver would be moving into the Premises and defendants consented. (*Id.*) Defendants never requested a security deposit of plaintiff Weaver and plaintiff Weaver never paid one. (*Id.*)

Subsequently, on or about 17 July 2019, plaintiff Rubin signed a lease ("Lease") [for the Premises] with defendant Hohbach Realty Company Limited Partnership ("HRCLP") establishing a tenancy from 1 November 2019 to 31 October 2020 and continuing month-to-month thereafter. (FAC, ¶9 and Exh. A.) The Lease required plaintiff Rubin pay $2,568 per month and a security deposit of $2,568 which plaintiff Rubin paid. (*Id.*) The Lease includes an attorney's fee provision. (*Id.*)

On or about 1 November 2019, defendants increased monthly rent for the Premises to $2,768, the amount plaintiffs paid at the time they vacated the Premises. (FAC, ¶11.)

Throughout plaintiffs' tenancy, there were numerous and substantial habitability defects and dangerous conditions at the Premises which, individually and collectively, constituted violations of the Lease as well as applicable housing and residential tenancy laws. (FAC, ¶12.) The defective and dangerous conditions at the Premises reflected decay, neglect, and a lack of adequate maintenance/ management of the property for a prolonged period, some of which directly affected health and safety. (*Id.*) The defective and dangerous conditions included, but were not limited to, ineffective waterproofing and weather protection of roof and exterior walls; building, grounds, and appurtenances not kept clean and sanitary, and/or free from accumulations of debris, filth, rubbish, garbage, rodents and/or vermin; an inadequate number of appropriate receptacles for garbage/ rubbish; floors, stairways, and railings not maintained in good repair; general dilapidation or improper maintenance; broken, rotted, split, or buckled exterior wall coverings or roof coverings; accumulation of material or conditions constituting fire, health, and/or safety hazards; inadequate maintenance; and inadequate exit facilities. (FAC, ¶12.)

Tenants observed water leaks that intruded into the Premises throughout the duration of their tenancy, particularly through the door jamb which did not provide adequate weather protection. (FAC, ¶13.) Defendants neglected to perform necessary maintenance such as repairs to keep the buildings' elevators in operation. (*Id.*) Damage from break-ins was never repaired and no efforts were made to improve/ restore security measures damaged by a major burglary. (*Id.*)

Throughout their tenancy, plaintiffs repeatedly notified defendants and/or their agents of the defective and dangerous conditions requesting defendants address them. (FAC, ¶¶14 – 15.) Defendants failed and refused to repair the conditions and/or have done so in a negligent, unprofessional, and shoddy fashion. (*Id.*)

On 21 June 2021[4], plaintiffs Rubin and Weaver filed a complaint against Douglas Hohbach, Marcus Wood, Erica Underwood, Kylix Enterprises, Inc. ("Kylix"), HRCLP, and Hohbach-Lewin, Inc.

On 30 November 2021, the defendants named in the complaint filed a demurrer to the complaint.

On 14 December 2021, plaintiffs Rubin and Weaver filed the operative FAC against defendants Mayfield, Kylix, and HRCLP asserting causes of action for:

(1) Breach of Implied Warranty of Habitability [against defendants Mayfield and HRCLP]

(2) Breach of the Covenant of Quiet Enjoyment [against defendants Mayfield and HRCLP]

(3) Nuisance

(4) Negligence

(5) Constructive Eviction [against defendants Mayfield and HRCLP]

(6) Violation of California Civil Code Section 1940.2[5] [against defendants Mayfield and HRCLP]

(7) Violation of California Civil Code Section 1942.5[6] [against defendants Mayfield and HRCLP]

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[4] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C).)

[5] In relevant part, Civil Code section 1940.2, subdivision (a) states: "It is unlawful for a landlord to do any of the following for the purpose of influencing a tenant to vacate a dwelling: … (3) Use, or threaten to use, force, willful threats, or menacing conduct constituting a course of conduct that interferes with the tenant's quiet enjoyment of the premises in violation of Section 1927 that would create an apprehension of harm in a reasonable person. Nothing in this paragraph requires a tenant to be actually or constructively evicted in order to obtain relief. (4) Commit a significant and intentional violation of Section 1954."

[6] In relevant part, Civil Code section 1942.5, subdivision (a) states: "If the lessor retaliates against the lessee because of the exercise by the lessee of the lessee's rights under this chapter or because of the lessee's complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following:

On 18 January 2022, defendants Kylix and HRCLP filed a demurrer to plaintiffs Rubin and Weaver's FAC. On 3 May 2022, the court issued an order overruling defendants Kylix and HRCLP's demurrer.

Cross-Complaint

On 15 July 2022, Mayfield, Kylix, and HRCLP filed a cross-complaint against Rubin and Weaver. The cross-complaint alleges on or about 1 June 1990, Rubin moved into the Premises where he remained until 10 May 2020. (Cross-Complaint, ¶8.) On or about 5 April 2018, Mayfield and Rubin entered into a residential lease for Rubin to reside at the Premises from 1 May 2018 until 30 April 2019 and month-to-month thereafter until terminated by either party after giving 30-day written notice. (Cross-Complaint, ¶¶9 and 17.) Rubin was required to pay $2,400 per month for rent plus an additional $200 each month for a parking space. (*Id.*) Kylix and HRCLP never entered into a residential lease with Rubin. (Cross-Complaint, ¶10.)

Pursuant to the terms of the lease, Rubin identified no other occupants at the Premises. (Cross-Complaint, ¶11.) Pursuant to the terms of the lease, no portion of the Premises was to be sublet or assigned any attempt to sublet or assign without the written permission of the landlords shall, at landlord's election, be an irremediable breach of the lease agreement. (Cross-Complaint, ¶12.) Guests that remained more than 30 days were considered additional occupants for which the tenant, Rubin, agreed to pay $40 per day per additional occupant. (Cross-Complaint, ¶13.) Unknown to Mayfield, Kylix, and HRCLP, Rubin alleged in his FAC that Weaver moved into the Premises. (Cross-Complaint, ¶14.) It is unknown what date Weaver moved into the Premises. (Cross-Complaint, ¶15.) Mayfield, Kylix, and HRCLP never entered into a residential lease with Weaver. (Cross-Complaint, ¶16.)

Rubin acknowledged the Premises, equipment, and personal property subject to the lease had been examined and were in good, safe, and clean condition and repair. (Cross-Complaint, ¶18.) Pursuant to the terms of the lease, Rubin was required to promptly notify the landlord of any damage, defect, or destruction of the Premises or in the event of the failure of any of the appliances or equipment. (Cross-Complaint, ¶19.)

On or around 14 January 2020, Marcus Wood ("Wood") offered to pay Rubin $5,000 if he vacated the Premises on or before 10 April 2020 and offered to return, in full, other deposits held by the landlord. (Cross-Complaint, ¶21.)

On or around 18 January 2020, Rubin responded alleging various violations and demanded $17,000 for relocation; $12,000 for future loss of rental unit; $5,000 for alleged harassment and retaliation; $1,800 for the return of his security deposit; a move out date of 10 April 2020, and a positive housing reference moving forward. (Cross-Complaint, ¶22.)

On or around 19 January 2020, Wood rejected Rubin's demand, refuted Rubin's allegations, and advised that his previous offer of $5,000 would be withdrawn and a three-day notice would be issued. (Cross-Complaint, ¶23.)

On or around 27 January 2020, Rubin responded stating he wanted to "restore civility and open the door to a peaceful resolution." (Cross-Complaint, ¶24.) Rubin confirmed he would be leaving the Premises on or before 10 April 2020. (*Id.*)

That same date, Wood responded confirming Rubin's 10 April 202 move-out date and inquired if there was agreement on his initial offer of 14 January 2020. (Cross-Complaint, ¶25.)

On or around 29 January 2020, Rubin countered with $15,000 and advised he could move out on 6 April 2020. (Cross-Complaint, ¶27.)

On or around 3 February 2020, Wood offered Rubin $8,600 (including $1,600 return of security deposit) if Rubin moved out on 10 April 2020. (Cross-Complaint, ¶28.) Rubin accepted three hours later. (Cross-Complaint, ¶29.)

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(1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, has provided notice of a suspected bed bug infestation, or has made an oral complaint to the lessor regarding tenantability."

On or around 1 March 2020, Rubin asked if he could stay at the Premises one additional month until 10 May 2020 and his request was granted. (Cross-Complaint, ¶31.)

On or around 10 May 2020, Rubin moved out of the Premises and a settlement check for $7,000 was sent to Rubin which he cashed. (Cross-Complaint, ¶32.) Thereafter, Wood discovered Rubin was not provided the $1,600 security deposit at the time he moved out of the Premises and immediately sent Rubin the agreed upon security deposit amount with 10% interest. (Cross-Complaint, ¶33.) Rubin cashed the security deposit check. (*Id.*)

The cross-complaint asserts the following causes of action:

(1) Breach of Contract – 2018 Lease Agreement [Mayfield versus Rubin]

(2) Breach of Contract – Settlement Agreement [All defendants/ cross-complainants against Rubin and Weaver]

On 20 July 2022, Rubin and Weaver filed an answer to the cross-complaint.

On 25 October 2022, Mayfield, Kylix, and HRCLP filed an answer to plaintiffs Rubin and Weaver's FAC.

On 29 November 2023, defendants/ cross-complainants Mayfield, Kylix, and HRCLP filed the four motions now before the court: (1) cross-complainants Mayfield, Kylix, and HRCLP move for summary judgment/ adjudication of their cross-complaint; (2) defendants Mayfield, Kylix, and HRCLP move for summary judgment/ adjudication of the FAC insofar as it is asserted by Weaver; (3) defendants Mayfield, Kylix, and HRCLP move for summary judgment/ adjudication of the FAC insofar as it is asserted by Rubin; (4) defendant HRCLP moves for summary judgment/ adjudication of the FAC insofar as it is asserted against it.

II. Summary Judgment in General.

Any party may move for summary judgment. (*Code of Civil Procedure*, § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Code of Civil Procedure*, § 437c, subd. (c); *Aguilar, supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see *Evidence Code*, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar, supra,* at p. 851.) A defendant moving for summary judgment may satisfy its initial burden either by producing evidence of a complete defense or by showing the plaintiff's inability to establish a required element of the case. (*Code of Civil Procedure*, § 437c, subd. (p)(2); *Aguilar, supra,* at p. 853.) *supra,* at p. 853.) Allegations in the complaint alone are not enough to defeat a motion for summary judgment. (*Coyme v. Krempels* (1950) 36 Cal.2d 257.)

If a moving defendant makes the necessary initial showing, the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civil Procedure, § 437c, subd. (p)(2); see *Aguilar, supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* at p. 850, fn. omitted.) If the plaintiff opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

"An issue of fact can only be created by a conflict of evidence. It is not created by speculation, conjecture, imagination or guess work. Further, an issue of fact is not raised by cryptic, broadly phrased, and conclusory assertions, or mere possibilities that or by allegations in the complaint." (*Lyons v. Security Pacific National Bank* (1995) 40 Cal.App.4th 1001, 1014) (internal citations omitted, punctuation modified.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id.* at p. 843.)

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

In addition to the facts provided by a moving defendant, the burden of production on summary judgment can shift to the plaintiff upon a showing that the plaintiff cannot factually support his claim. (See, e.g., *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283.) Indeed, a defendant can satisfy its initial burden to show an absence of evidence through discovery responses that are factually devoid. (Id. at 1302.)

Thereafter, the plaintiff must present evidence supporting the challenged claim.

III. Analysis.

A. Cross-complainants Mayfield, Kylix, and HRCLP's motion for summary judgment/ adjudication of its cross-complaint.

1. Cross-complainant Mayfield's motion for summary adjudication of the first cause of action [Breach of Contract – 2018 Lease Agreement] of the cross-complaint against cross-defendant Rubin is DENIED.

In relevant part, cross-complainant Mayfield alleges it entered into a residential lease agreement with cross-defendant Rubin on or about 5 April 2018 ("Lease Agreement") and cross-defendant Rubin breached the Lease Agreement by "subleasing the Premises, occupying the Premises with another person who was not included on the [Lease Agreement], and not promptly notifying the landlord of any damages, defects, or destruction of the Premises." (Cross-Complaint, ¶¶35 – 36 and Exh. A.)

"A … cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).) "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

To meet its initial burden, cross-complainant Mayfield proffers the following facts: For over thirty years, from June 1990 until May 2020, cross-defendant Rubin resided at the Premises.[7] Per the terms of the operative lease between cross-complainant Mayfield and cross-defendant Rubin, "No portion of said premises shall be sublet nor this agreement assigned. Any attempted subletting or assignment by the Tenant without written permission of the Landlord shall, at the election of the Landlord, be an irremediable breach of this agreement."[8] Cross-defendant Rubin was obligated to identify any and all occupants of the Premises.[9] The Lease Agreement specifically provided that "the premises shall be occupied only by the following named person(s)."[10] Cross-defendant Rubin did not identify any co-occupants and did not notify property management of any occupants that resided in his unit after the execution of this lease agreement in April 2018.[11] Cross-defendant Rubin admits that he sublet the unit and that he "entered into

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[7] See Defendants/ Cross-Complainants' Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment, or in the Alternative, Summary Adjudication ("Cross-Complainants' SSUF"), Issue No. 1, Fact No. 1.

[8] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 2.

[9] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 3.

[10] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 4.

[11] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 5.

several verbal lease agreements."[12] Pursuant to the Lease Agreement, "the number of occupants is limited by your rental agreement. Guests remaining more than 30 days shall be considered additional occupants. Tenant agrees to pay the sum of $40 per day for each additional occupant."[13] Since executing the Lease Agreement, cross-defendant Rubin admitted that at least two occupants moved into his unit for approximately 22 months' worth of days in May 2019 through April 2020."[14] This did not include cross-defendant Weaver as an additional occupant in the unit, who resided there for ten months.[15] Cross-defendant Rubin never paid any amounts to the landlord above the monthly rent for these occupants.[16] Cross-complainant Mayfield upheld the terms in the lease agreement by providing a habitable premise, to which cross-defendant Rubin admits.[17]

In opposition, cross-defendant Rubin argues initially that cross-complainant Mayfield has waived its right to enforce the provision in the Lease Agreement which prohibits subleasing and/or the provision in the Lease Agreement concerning payment for additional occupants.

> Case law is clear that waiver is the intentional relinquishment of a known right after knowledge of the facts. The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver. [Citations.] The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation.]

(*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31; internal punctuation omitted.)

> Whether there has been a waiver is usually regarded as a question of fact to be determined by the jury, or by the trial court if there is no jury. Although some authorities say waiver is a mixed question of law and fact, each case depending on its own circumstances, the only question of law that can be involved must relate to the legal definition of waiver. For example, the jury might be instructed that, as a matter of law, a waiver must be voluntary, and that it implies a knowledge of the right claimed or thing waived. Whether it actually was voluntary, and whether the party had knowledge of the right or thing waived, are questions of fact to be submitted to the jury, unless but one inference can be drawn from the evidence.

(*Kay v. Kay* (1961) 188 Cal.App.2d 214, 217 – 218.)

To support his waiver argument, cross-defendant Rubin proffers the following evidence: During his deposition, cross-defendant Rubin testified, in relevant part, "I had roommates, and management was well aware of that over a period of 30 years. That's – the Alesses were aware of that. Harold Hohbach specifically requested that I function as lead roommate. … Franco Caruba was well aware for years that I had roommates at the time of the initial request for – for leases in 2018. … no issue had ever been raised about this. And as I said, Harold Hohbach was aware for decades that I had roommates, and he asked me to function as the lead roommate and give him one – one rent."[18] Further, cross-defendant Rubin testified, "At no time during my tenancy of 30 years has management ever raised an issue about roommates somehow being improper or a violation of my tenancy."[19]

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[12] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 6.

[13] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 7.

[14] See Cross-Complainants' SSUF, Issue No. 1, Fact Nos. 8 and 15 – 18.

[15] See Cross-Complainants' SSUF, Issue No. 1, Fact Nos. 9 and 19.

[16] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 10.

[17] See Cross-Complainants' SSUF, Issue No. 1, Fact No. 22.

[18] See ¶3 and Exh. B to the Declaration of Ari Rief in Support of Opposition, etc. [Rubin Deposition, Vol. II, page 279, line 7 – page 279, line 25.]

[19] See ¶3 and Exh. B to the Declaration of Ari Rief in Support of Opposition, etc. [Rubin Deposition, Vol. II, page 275, lines 18 – 20.]

Cross-defendant Rubin's testimony presents a triable issue of material fact with regard to whether cross-complainant Mayfield waived its right to enforce the provision in the Lease Agreement which prohibits subleasing and/or the provision in the Lease Agreement concerning payment for additional occupants.

Accordingly, cross-complainant Mayfield's motion for summary adjudication of the first cause of action [Breach of Contract – 2018 Lease Agreement] of the cross-complaint against cross-defendant Rubin is DENIED.

2. Breach of Contract – Settlement Agreement.

The second cause of action of the cross-complaint alleges, in relevant part, that on or about 3 February 2020 (prior to Rubin and Weaver filing their complaint in the instant action on 21 June 2021), "Mr. Rubin and Mr. Wood entered into a written settlement agreement resolving all of the issues raised in Mr. Rubin's First Amended Complaint. (See Exhibit B)." (Cross-Complaint, ¶48.) Weaver "was a third party beneficiary of that settlement agreement." (Cross-Complaint, ¶49.) Rubin and Weaver "breached the settlement agreement by bringing a lawsuit against MAYFIELD, KYLIX ENTERPRISES, and HOHBACH REALTY for issues that were fully negotiated and resolved per the terms of the settlement agreement." (Cross-Complaint, ¶50.)

As set forth above, "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.) In moving for summary adjudication of this second cause of action, cross-complainants themselves cite *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1585-1586 for the following general principles:

> "A settlement agreement is a contract, and the legal principles [that] apply to contracts generally apply to settlement contracts." (*Weddington Productions, Inc. v. Flick*, *supra*, 60 Cal.App.4th 793, 810.) Its validity is thus "judged by the same legal principles applicable to contracts generally." (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1128 [131 Cal. Rptr. 2d 387]; see also *Nicholson v. Barab* (1991) 233 Cal. App. 3d 1671, 1681 [285 Cal. Rptr. 441].) [The party moving for summary adjudication in reliance on a contract] therefore had the burden of establishing each contractual element—parties who are capable of entering into contract, their mutual consent, a lawful object, and sufficient cause or consideration (Civ. Code, § 1550; *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 53 [67 Cal. Rptr. 2d 850])—in support of their motion.

"Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage', controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608; internal citations omitted.)

In order for cross-complainants to meet their initial burden, they would have to demonstrate that they entered into a settlement agreement with cross-defendants Rubin and Weaver and the terms of the settlement agreement (e.g., covenant not to sue or a release of claims) precluded Rubin and Weaver from bringing the claims asserted in their FAC.

Initially, the court observes that cross-complainants make some effort to establish that Weaver, although not a party to the settlement agreement, is an intended beneficiary of the settlement agreement.[20] However, cross-complainants do not take the same care to show that they (Mayfield, Kylix, and HRCLP) are the parties on the other side of the settlement agreement. Cross-complainants contend Rubin engaged in settlement discussions with Wood but do not identify who Wood is or Wood's relationship to the cross-complainants or Wood's authority to act on behalf of the cross-complainants.

Even if the court were to assume Wood properly acted on behalf of all cross-complainants, the court is not persuaded cross-complainants have met their initial burden to show that the settlement agreement precluded cross-

[20] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 25.

defendants Rubin and Weaver from bringing a lawsuit (the underlying FAC) against cross-complainants. The written settlement agreement purportedly attached as exhibit B to the cross-complaint is actually a series of e-mail exchanges between Wood and Rubin occurring between 14 January 2020 and 3 February 2020 culminating in Rubin's statement to Wood: "Your offer of $7,000 is acceptable and we will move out on April 10, 2020. The amount of $1,600 for the security deposit is fine." Cross-complainants are unable to point to an express covenant by cross-defendants Rubin and Weaver not to sue the cross-complainants or a release of cross-complainants from any claims cross-defendants Rubin and Weaver held.

Instead, cross-complainants apparently contend such a release of cross-defendants Rubin and Weaver's claims can be implied from language found in the e-mail exchanges and, in particular, language authored by cross-defendant Rubin. Cross-complainants begin with a "Settlement Proposal" prepared by cross-defendant Rubin on 10 January 2020 in which he states, in relevant part, "in order to resolve this matter before I have to retain counsel and exercise my legal rights, I am willing to terminate my tenancy as requested, and surrender the premises on April 10, 2020 with the following stipulations: with an agreement of a payment from owners/ management of $17,000, equal to the no-fault relocation required by the City of Palo Alto. In addition to a payment from owners of $10,000 in compensation for the demeaning and belittling attitude to which I have been subjected."[21] There is no clear definition of the "matter" or what "legal rights" cross-defendant Rubin contemplated.

In a 14 January 2020 response to cross-defendant Rubin's "Settlement Proposal," Wood e-mailed the following relevant statement: "Without addressing the issues raised in your letter I would like to find an amicable solution. Toward this end, I am willing to offer you $5,000, once you vacate on April 10, 2020. This, of course, is in addition to any other deposits held by the Mayfield Building Company."[22] When read as a whole, the prefatory language, "without addressing the issues raised," suggests the exchange of consideration is limited to money/ security deposit and possession of the premises.

Cross-complainants place great emphasis on cross-defendant Rubin's response thereafter on 18 January 2020 which included an outlining of numerous causes of action that cross-defendant Rubin believed he could assert against cross-complainants and then specifically wrote, "in lieu of civil action," before demanding $34,000.[23] Wood responded to Rubin's monetary demand, and reiterated his $5,000 counteroffer.[24] Cross-complainants' own evidence shows that Wood kept reiterating his $5,000 counteroffer of 14 January 2020.[25] Then, finally on 3 February 2020, Wood addressed cross-defendant Rubin's reduced demand for $17,000 concluding cross-defendant Rubin is not entitled to that amount because termination was with cause (for subleasing) and then stating, "You are entitled to one months rent. We gave you two. To simplify life I am willing to go to $7000. We discovered a handwritten note from Harold Hohbach regarding the security deposit, so you will also receive $1600 for a total of $8600.00 once you have moved out on April 10, 2020."[26] Cross-defendant responded within three hours stating, in relevant part, "Your offer of $7000 is acceptable and we will be moved out on April 10, 2020. The amount of $1600 for the security deposit is fine."

Cross-complainants' evidence does not affirmatively demonstrate an agreement by cross-defendants Rubin and Weaver releasing any claims they may have had against cross-complainants. Even if cross-complainants' evidence could be viewed as implicitly including such a release, cross-defendants Rubin and Weaver argue in opposition that the settlement agreement is ambiguous.

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[21] See Cross-Complainants' SSUF, Issue No. 2, Fact Nos. 28 and 30.

[22] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 31.

[23] See Cross-Complainants' SSUF, Issue No. 2, Fact Nos. 32 – 36.

[24] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 37.

[25] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 41. [Exhibit M—"Please let me know, if you are in agreement with that which I proposed on January 14; Exhibit N—"Mark-Please let me know, if you are in agreement with my email proposal of January 14…"]

[26] See Cross-Complainants' SSUF, Issue No. 2, Fact No. 45.

"Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39–40 [69 Cal. Rptr. 561, 442 P.2d 641]; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1140–1141 [234 Cal. Rptr. 630].) Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 40 & fn. 8; *Pacific Gas & Electric Co. v. Zuckerman*, *supra*, 189 Cal. App. 3d at pp. 1140–1141.)" [Footnote omitted.]

The interpretation of a contract involves "a two-step process: 'First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]' (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 [6 Cal. Rptr. 2d 554].) The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. (*Ibid.*) ***The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.*** (*Id.* at p. 1166.) ***Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made … parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.'*** (*Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal. App. 3d 149, 158 [241 Cal. Rptr. 677].)" [Footnote omitted.]

(*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350-1351 and 1356-1357; emphasis added.)

In opposition, cross-defendant Rubin proffers his deposition testimony with regard to his own understanding of the settlement agreement.[27] In particular, cross-defendant Rubin understood his proposal(s) to have been rejected which supports an interpretation that the offer by Wood was limited to monetary consideration and return of security deposit in exchange for possession of the premises, and did not include a covenant not to sue or a release of claims by cross-defendants Rubin and Weaver. At the very least, this presents a triable issue of material fact.

Accordingly, cross-complainants Mayfield, Kylix, and HRCLP's motion for summary adjudication of the second cause of action [Breach of Contract – Settlement Agreement] of the cross-complaint against cross-defendants Rubin and Weaver is DENIED.

B. Defendant HRCLP's motion for summary judgment/ adjudication of plaintiffs' FAC.

Defendant HRCLP moves for summary judgment/ adjudication of the seven causes of action asserted in plaintiffs' FAC by asserting that it is neither the owner or property manager of the Premises. Instead, defendant Mayfield has owned the Premises since the land was purchased and developed in 1986.[28] Defendant Kylix is the current property manager for the Premises.[29] HRCLP is not the property manager for the Premises.[30] Prior to being

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[27] See Plaintiffs/ Cross-Defendants Mark Rubin and Sarah Weaver's Response to Defendant/ Cross-Complainant's Separate Statement of Undisputed Facts, Issue No. 2, Fact Nos. 24 – 27 and 31.

[28] See Defendant HRCLP's Separate Statement of Undisputed Facts in Support of Summary Judgment, or in the Alternative, Adjudication Against Plaintiffs Mark Rubin and Sarah Weaver ("HRCLP SSUF"), Issue No. 1, Fact Nos. 1 – 2.

[29] See HRCLP SSUF, Issue No. 1, Fact No. 3.

[30] *Id.*

named Kylix, the Premises was previously managed by Hohbach Enterprises, Inc.[31] Harold Hohbach was owner and President of Hohbach Enterprises, Inc. until his passing in December 2017.[32] Harold Hohbach's son, Doug Hohbach, took over as President of Hohbach Enterprises, Inc. in early 2018.[33] In February 2019, Hohbach Enterprises, Inc. was renamed to Kylix.[34] Defendant HRCLP is an entity created by Harold Hohbach to hold property.[35] Defendant HRCLP currently owns a number of commercial and residential properties, but has never owned the Premises.[36] Defendant HRCLP does not provide any services to the Premises.[37]

Plaintiffs acknowledge that all causes of action in the FAC except the fourth cause of action [negligence] require an ownership interest or control of the property. As such, plaintiffs concede defendant HRCLP is "free of liability due to their lack of contractual relationship to the subject property."[38] Based on this concession, defendant HRCLP is entitled to summary adjudication of the first through third and fifth through seventh causes of action of plaintiffs Rubin and Weaver's FAC.

Plaintiffs, however, do not concede defendant HRCLP's non-liability with regard to their fourth cause of action for negligence. Instead, plaintiffs assert in opposition that HRCLP failed to exercise proper oversight over defendant Kylix and allowed its employees to represent themselves as employees of defendant HRCLP. This reflects a change in theory from what was alleged in plaintiffs' FAC. In relevant part, the fourth cause of action of plaintiffs' FAC alleges, "***Because of the landlord-tenant relationship between DEFENDANTS and PLAINTIFFS***, DEFENDANTS owed PLAINTIFFS the duty to exercise reasonable care in the management and control of the PREMISES, owed a duty to provide PLAINTIFFS with a residential rental property meeting minimum standards of habitability, and were required to allow PLAINTIFFS the peaceful and quiet enjoyment of the PREMISES." (FAC, ¶34; emphasis added.)

The pleadings serve as the "outer measure of materiality" in a summary judgment/ adjudication motion, and the motion may not be granted or denied on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Sup. Ct.* (2000) 79 Cal App 4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal App 4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal App 4th 60, 73—"the pleadings determine the scope of relevant issues on a summary judgment motion.")

Since plaintiffs' fourth cause of action is premised specifically upon the existence of a landlord-tenant relationship between defendants and plaintiffs and since plaintiffs concede defendant HRCLP is not the landlord or property manager of the subject Premises, the court will not consider this change of theory/ factual allegation raised in opposition to be a basis for denying summary adjudication of the fourth cause of action. Even if, as plaintiffs assert, defendant HRCLP's negligence caused plaintiffs to hold a belief that HRCLP may be their landlord or property manager, plaintiffs do not now dispute that defendant HRCLP is neither landlord nor property manager of the subject Premises. As such, there is no basis to hold defendant HRCLP liable on the fourth cause of action, as alleged.

Consequently, defendant HRCLP's motion for summary judgment of plaintiffs Rubin and Weaver's FAC is GRANTED.

[In opposition, plaintiffs Rubin and Weaver filed an Objection to Evidence Submitted by Defendant Hohbach Realty Company in Support of Summary Judgment, etc. The court declines to rule on said objections since the court

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[31] See HRCLP SSUF, Issue No. 1, Fact No. 5.

[32] *Id.*

[33] See HRCLP SSUF, Issue No. 1, Fact No. 6.

[34] *Id.*

[35] See HRCLP SSUF, Issue No. 1, Fact No. 11.

[36] See HRCLP SSUF, Issue No. 1, Fact Nos. 11 – 12.

[37] See HRCLP SSUF, Issue No. 1, Fact No. 13.

[38] See page 7, lines 3 – 5 of Plaintiffs' Opposition to Defendant Hohbach Realty Company's Motion for Summary Judgment, or in the Alternative Summary Adjudication.

did not consider the material objected to in rendering its ruling. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)]

C. Defendants Mayfield and Kylix's motion for summary judgment/ adjudication of the FAC against plaintiff Weaver.

1. Settlement Agreement.

Initially, defendants Mayfield and Kylix contend the Settlement Agreement (discussed above in section II(A)(2)) bars plaintiff Weaver's FAC. Presumably, defendants Mayfield and Kylix assert the Settlement Agreement includes an implied release by Weaver of any claims now being asserted in the instant FAC. "In general, a written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence." (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366.) However, as the court observed above, a triable issue of material fact exists with regard to whether the Settlement Agreement includes such a release.

2. Tenancy.

Defendants move for summary adjudication on all but the fourth cause of action (negligence) asserted by plaintiff Weaver on the ground that each of the causes of action (except the fourth) requires the existence of a landlord-tenant relationship and plaintiff Weaver was not a tenant. Defendants proffer the following evidence in support: Weaver never signed a lease while she resided at the Premises.[39] "A tenancy may be created by consent and acceptance of rent, despite the absence of a lease." (*Cobb v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (2002) 98 Cal.App.4th 345, 352.)[40] However, Rubin did not obtain approval from property management or owners for Weaver to move in.[41] Weaver did not inform property management that she was going to be moving in to Rubin's apartment.[42] For these last two proffered facts, defendants cite to page 72:25 – 73:6 of Rubin's deposition and page 163:22 – 24 of Weaver's deposition, respectively. Purportedly, the relevant pages of deposition testimony can be found in defendants' counsel's accompanying declaration. However, in reviewing the declaration, the court was unable to locate the relevant pages of deposition testimony. Consequently, defendants have not met their initial burden to show that Weaver did not create a tenancy at the subject Premises.

3. Breach of Implied Warranty of Habitability.

"Case law supports an independent action by a tenant or former tenant for damages for breach of a landlord's implied warranty of habitability." (*Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1169.)

In *Green v. Superior Court* (1974) 10 Cal.3d 616 (*Green*), our Supreme Court enunciated the implied warranty of habitability in its current form, which is founded on modern legal decisions that have protected the reasonable expectations of consumers by "impl[ying] a warranty of fitness and merchantability in the case of the sale of goods." (*Id.* at p. 626.) Reasoning that "the modern urban tenant is in the same position as any other normal consumer of goods," and thus "reasonably expect[s] that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit," the court held that leases contain an implied warranty that protects these expectations. (*Id.* at p. 627.)

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[39] See Defendants' Separate Statement of Undisputed Facts in Support of Summary Judgment, or in the Alternative, Summary Adjudication Against Sarah Weaver ("SSUF re Weaver"), Issue No. 1, Fact No. 7; Issue No. 2, Fact No. 68, Issue No. 3, Fact No. 129; Issue No. 5, Fact No. 252; Issue No. 6, Fact No. 314; and Issue No. 7, Fact No. 375.

[40] See also *Mosser Companies v. San Francisco Rent Stabilization & Arbitration Bd.* (2015) 233 Cal.App.4th 505, 516— "Tenancies in property need not be created by written leases. (*Parkmerced Co. v. San Francisco Rent Stabilization & Arbitration Bd.*, *supra*, 215 Cal.App.3d at p. 495.) One may become a tenant by occupancy with consent. (*Ibid.*)"

[41] See SSUF re Weaver, Issue No. 1, Fact No. 8.

[42] See SSUF re Weaver, Issue No. 1, Fact No. 9.

> ***The elements of a cause of action for breach of the implied warranty of habitability "are the existence of a material defective condition affecting the premises' habitability, notice to the landlord of the condition within a reasonable time after the tenant's discovery of the condition, the landlord was given a reasonable time to correct the deficiency, and resulting damages."*** (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1297 [173 Cal. Rptr. 3d 159].) The alleged defective condition must "affect the tenant's apartment or the common areas which he uses." (*Hinson v. Delis* (1972) 26 Cal.App.3d 62, 70 [102 Cal. Rptr. 661], disapproved on another point in *Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 55, fn. 7 [171 Cal. Rptr. 707, 623 P.2d 268].) When the alleged defect is in a common area, the landlord's duty to inspect and maintain the common area removes any excuse by the landlord regarding a lack of knowledge. (*Muro v. Superior Court* (1986) 184 Cal.App.3d 1089, 1092, fn. 1 [229 Cal. Rptr. 383].)
>
> A violation of a statutory housing standard that affects health and safety is a strong indication of a materially defective condition. (See *Knight v. Hallsthammar*, *supra*, 29 Cal.3d at p. 59, fn. 10.) By statute, a dwelling will be considered untenantable if (1) the "[b]uilding, grounds, and appurtenances" are not "clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin" (Civ. Code, § 1941.1, subd. (a)(6)); or (2) the dwelling substantially lacks "[a]n adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair" (Civ. Code, § 1941.1, subd. (a)(7)).

(*Peviani v. Arbors at California Oaks Property Owner, LLC* (2021) 62 Cal.App.5th 874, 891; emphasis added.)

Defendants move for summary adjudication of this first cause of action by Weaver on the ground that Weaver has not identified the existence of a material defective condition affecting the premises' habitability. Defendants proffer the fact that during the course of ten months [that Weaver resided at the Premises], Weaver alleges that she experienced habitability issues, yet in her deposition, testified that she did not have any concerns about the habitability of the property.[43] In opposition, Weaver cites to her deposition testimony describing a security door within fifty feet of the Premises which had been forced open and not repaired sufficiently to prevent further forced entry.[44]

Defendants anticipated Weaver would assert a lack of security as the factual basis for her breach of implied warranty of habitability cause of action and contends the lack of security is not a material defective condition. Defendants rely upon *Penner v. Falk* (1984) 153 Cal.App.3d 858 (*Penner*) where the plaintiff-tenant sued defendant apartment owner after being assaulted on premises by two non-tenant intruders waiting in the common hallway. The plaintiff tenant asserted, among others, a claim for breach of warranty of habitability. The trial court sustained a demurrer to that cause of action without leave to amend and the *Penner* court affirmed. In explaining, the *Penner* court wrote: "There is here neither the allegation of a written lease nor the allegation of an agreement with respondents concerning security of the premises." (*Penner*, *supra*, 153 Cal.App.3d at p. 869.) "[Plaintiff] here has not alleged that there existed a level of security of the premises which was relied upon by him in entering into the landlord-tenant relationship. [Plaintiff] has not alleged that [defendants] permitted or effected a reduction in that level of security which existed at the time he entered into the lease." (*Id.* at p. 870.) Defendants invite this court to follow *Penner* in rejecting Weaver's assertion that a lack of security does not amount to a breach of the implied warranty of habitability. Just as in *Penner*, there is no allegation nor any assertion by Weaver that she had an agreement with defendants concerning security. There is also no allegation nor any assertion by Weaver that she relied upon the existence of a certain level of security or that defendants permitted or effected a reduction in that level of security. Weaver does not address *Penner* in opposition.

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[43] See SSUF re Weaver, Issue No. 1, Fact No. 49.

[44] See Plaintiff Sarah Weaver's Response to Defendants The Mayfield Building Company and Kylix Enterprises, Inc.'s Separate Statement of Undisputed Facts, Issue No. 1, Fact No. 49.

Accordingly, defendant Mayfield's[45] motion for summary adjudication of the first cause of action of the FAC against plaintiff Weaver is GRANTED.

4. Breach of the Covenant of Quiet Enjoyment.

> "In every lease the landlord impliedly covenants that the tenant shall have quiet enjoyment and possession of the premises. In California this covenant is partially expressed in Civil Code section 1927, which guarantees the tenant against rightful assertion of a paramount title." (*Guntert v. City of Stockton*, *supra*, 55 Cal.App.3d at p. 138.) The statute provides: "An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same." (Civ. Code, § 1927.) "Beyond the statutory covenant, the landlord is bound to refrain from action which interrupts the tenant's beneficial enjoyment." (*Guntert v. City of Stockton*, at p. 138.)[46]
>
> …
>
> ***Determining whether there has been a breach of the covenant of quiet possession generally "depends upon the facts in a proper case."*** (*Stockton Dry Goods Co. v. Girsh* (1951) 36 Cal.2d 677, 682 [227 P.2d 1]; see also, e.g., *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 593 [22 Cal. Rptr. 3d 832].)
>
> ***Breach can take many forms, including actual or constructive eviction.*** (See, e.g., *LaFrance v. Kashishian* (1928) 204 Cal. 643, 644 [269 P. 655] [covenant breached where "plaintiff was evicted from the leased premises by one who had established paramount title to the property"]; *Guntert v. City of Stockton*, *supra*, 55 Cal.App.3d at p. 139 ["arbitrary and unreasonable notice of termination violated the lessor's implied obligation to abstain from interference with the tenant's use and enjoyment of the premises"]; *Goldman v. House* (1949) 93 Cal.App.2d 572, 576 [209 P.2d 639] [under the covenant of quiet enjoyment, "attempt to evict by the use of wrongful and malicious means with knowledge of probable injury is actionable"]; see *id.* at p. 574 ["defendants wilfully and maliciously shut off the electric current" and the tenant "fell down the darkened stairway and sustained injuries"].) Pursuant to another provision of division 3, part 4, title 5, chapter 2, the hirer or tenant need not even "be actually or constructively evicted in order to obtain relief." (Civ. Code, § 1940.2, subd. (a)(3).)

(*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1034-1035 (emphasis added).)

"The claim [for breach of implied covenant of quiet enjoyment] has often been inextricably tied to breach of the covenant by eviction, which disturbs the tenant's right to undisturbed possession of the leased premises. … If the landlord's acts or omissions affect the tenant's use of the property and compel the tenant to vacate, there is a constructive eviction." (*Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873, 897.)

In moving for summary adjudication of this cause of action, defendants apparently rely again on Weaver's deposition testimony that she did not have any concerns about the habitability of the property.[47] Issue concerning habitability are distinct from issues concerning quiet enjoyment. The court is not persuaded that the cited evidence is sufficient for defendant to meet its initial burden.

Defendants argue additionally that, to the extent Weaver's tenancy at the Premises ended, it was attributable to ***Rubin's*** violation of the Lease Agreement's prohibition against subletting and not based on anything

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[45] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[46] Defendants apparently argue that the covenant of quiet enjoyment is implied from a lease and since plaintiff Weaver did not enter into a lease agreement, the covenant does not run to her. However, as this authority states, the covenant is only partially expressed by Civil Code section 1927 and the landlord has an obligation beyond the statutory covenant.

[47] See SSUF re Weaver, Issue No. 2, Fact No. 110.

that defendants did or did not do.[48] However, as argued previously, Weaver argues in opposition that Rubin's subletting was not a valid reason for the termination of his and Weaver's tenancy since defendants had waived enforcement of the subletting provision or, rather, at least a triable issue of material fact exists with regard to whether defendants had waived enforcement of the subletting provision.

For the same reason discussed above, defendant Mayfield's[49] motion for summary adjudication of the second cause of action of the FAC against plaintiff Weaver is DENIED.

5. Nuisance.

In the third cause of action, plaintiff Weaver generically alleges, "DEFENDANTS' acts and failures to act created an obstruction to the free use of the property and therefore constitute a nuisance." (FAC, ¶29.) The third cause of action incorporates by reference all the general allegations. Taken together and reasonably construed, the only acts and failures attributed to defendants in those general allegations is defendants' "refus[al] and fail[ure] to correct the defective and dangerous conditions [relating to habitability], perform[ance of] inadequate, shoddy repairs, and/or deliberate[] delay[in] making repairs and remedying the conditions for an unreasonable amount of time." (FAC, ¶15.)

Nuisance is broadly defined by Civil Code section 3479 to mean, in relevant part, "Anything which is injurious to health, … or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." "[I]n order for a defendant's conduct to constitute a nuisance, the interference with use and enjoyment of land must be both substantial and unreasonable." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1178.)

In moving for summary adjudication of this third cause of action, defendants argue, essentially, that Weaver's nuisance cause of action is premised on the same alleged conduct which forms the basis for Weaver's first cause of action for breach of implied warranty of habitability and since plaintiff Weaver cannot maintain that first cause of action, plaintiff Weaver cannot maintain the nuisance cause of action.

In opposition, plaintiff Weaver now asserts her claim of nuisance is premised upon defendants' "exercising inconsistent application of policies and fail[ure] to effectively communicate the rules under which tenancies would be governed," presumably in reference to plaintiffs' assertion that defendants improperly sought to evict plaintiffs for the purportedly pretextual reason that Rubin violated the lease agreement's prohibition against subletting. Plaintiff Weaver's argument is not consistent with the allegations of the FAC. The pleadings serve as the "outer measure of materiality" in a summary judgment/ adjudication motion, and the motion may not be granted or denied on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Sup. Ct.* (2000) 79 Cal App 4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal App 4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal App 4th 60, 73—"the pleadings determine the scope of relevant issues on a summary judgment motion.") Having made the allegations noted above, the court will not consider this change of theory raised in opposition to defendants' motion for summary adjudication.

Accordingly, defendants Mayfield and Kylix's[50] motion for summary adjudication of the third cause of action of the FAC against plaintiff Weaver is GRANTED.

6. Negligence.

Defendant Kylix moves for summary adjudication of plaintiff Weaver's fourth cause of action for negligence by relying on CACI 1000 to suggest that only an "owner" of property may be liable for negligence/ premises liability and Kylix is not the owner of the subject Premises. CACI 1000, however, does not limit liability to only "owners" of property. As plaintiff Weaver points out in opposition, "rental agents owed a duty of ordinary care towards the tenant

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[48] See SSUF re Weaver, Issue No. 2, Fact Nos. 66 and 71.

[49] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[50] The third cause of action of the FAC is directed against all defendants. In light of the court's ruling with regard to defendant HRCLP, only defendants Mayfield and Kylix remain as defendants to the third cause of action.

because the transaction between the rental agent and the landowner was clearly intended to affect the tenants, and because harm would be foreseeable to the tenants if the rental agent did not properly perform his duty." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 930-931.)

Defendants seek summary adjudication of plaintiff Weaver's negligence cause of action by again relying on their earlier argument that they have not breached any standards regarding habitability. However, the decision defendants themselves relied on earlier, *Penner*, *supra*, 153 Cal.App.3d at pp. 864 – 866, makes clear that a claim for negligence is broader than a claim for breach of implied warranty of habitability and can, under certain circumstances be based upon inadequate security. Thus, this court finds defendants have not met their initial burden by simply referring to the same argument and facts presented with regard to breach of the implied warranty of habitability. Likewise, and also for the reasons discussed earlier, the court is also unpersuaded by defendants' assertion that since there has been no breach of plaintiff Weaver's quiet enjoyment of the Premises, defendants are not liable for negligence.

Accordingly, defendants Mayfield and Kylix's[51] motion for summary adjudication of the fourth cause of action of the FAC against plaintiff Weaver is DENIED.

7. Constructive Eviction.

> "A constructive eviction occurs when the acts or omissions . . . of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises, or a substantial portion thereof, unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises."

(*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 925-926 (*Stoiber*).)

Defendants argue, essentially, that since there has been no breach of the warranty of habitability and there has been no breach of the covenant of quiet enjoyment, the subject premises were not unfit nor has there been any disturbance/ interference with plaintiffs' possession of the subject premises. However, as discussed above, there remains a triable issue of material fact with regard to whether there has been a breach of the covenant of quiet enjoyment.

Alternatively, defendants note that, "Abandonment of premises by the tenant within a reasonable time after the wrongful act of the landlord is essential to enable the tenant to claim a constructive eviction." (*Stoiber*, *supra*, 101 Cal.App.3d at p. 926.) Defendants omit from *Stoiber* the statement, "Whether [plaintiff] abandoned within a reasonable time would constitute a jury question." (*Ibid.*) Instead, defendants cite *Bakersfield Laundry Asso. v. Rubin* (1955) 131 Cal.App.2d Supp. 862, 865 (*Bakersfield*) where the court noted, "Many cases hold as a matter of law one month is a reasonable time." Defendants proffer evidence that Rubin was issued a Notice of Non-Renewal for Cause on 12 December 2019, but did not vacate or abandon the subject Premises until 10 May 2020, a span of five months. Defendants seemingly suggest that anything more than one month is unreasonable. That is not the holding from Bakersfield. *Bakersfield* does not address what amount of time is unreasonable, as a matter of law, instead finding that more than six months "should be held to be beyond a reasonable time" under the circumstances presented there. Since it is clear the *Bakersfield* holding considered other circumstances ("retaining possession for at least one half of the term of the lease") in reaching its determination, *Bakersfield* is not support for defendants' assertion that five months is, as a matter of law, unreasonable.

Accordingly, defendant Mayfield's[52] motion for summary adjudication of the fifth cause of action of the FAC against plaintiff Weaver is DENIED.

8. Violation of California Civil Code Section 1940.2.

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[51] The fourth cause of action of the FAC is directed against all defendants. In light of the court's ruling with regard to defendant HRCLP, only defendants Mayfield and Kylix remain as defendants to the fourth cause of action.

[52] The fifth cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

Plaintiff Weaver's sixth cause of action asserts a violation of Civil Code Section 1940.2, subdivision (a) which states, in relevant part:

> (a) It is unlawful for a landlord to do any of the following for the purpose of influencing a tenant to vacate a dwelling: …
>
> (3) Use, or threaten to use, force, willful threats, or menacing conduct constituting a course of conduct that interferes with the tenant's quiet enjoyment of the premises in violation of Section 1927 that would create an apprehension of harm in a reasonable person. Nothing in this paragraph requires a tenant to be actually or constructively evicted in order to obtain relief.
>
> (4) Commit a significant and intentional violation of Section 1954.

Civil Code Section 1954, in turn, states, in relevant part:

> (a) A landlord may enter the dwelling unit only in the following cases:
>
> (1) In case of emergency.
>
> (2) To make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors or to make an inspection pursuant to subdivision (f) of Section 1950.5.
>
> (3) When the tenant has abandoned or surrendered the premises.
>
> (4) Pursuant to court order.
>
> (5) For the purposes set forth in Chapter 2.5 (commencing with Section 1954.201).
>
> (6) To comply with the provisions of Article 2.2 (commencing with Section 17973) of Chapter 5 of Part 1.5 of Division 13 of the Health and Safety Code.
>
> (b) Except in cases of emergency or when the tenant has abandoned or surrendered the premises, entry may not be made during other than normal business hours unless the tenant consents to an entry during other than normal business hours at the time of entry.

In moving for summary adjudication of plaintiff Weaver's sixth cause of action, defendant Mayfield asserts it has not entered the dwelling without permission and plaintiff Weaver has not provided any fact to support such an allegation. However, defendant Mayfield does not direct the court to any particular evidence to support this assertion.

> Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. … For the defendant must "support[]" the "motion" with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." (Code Civ. Proc., § 437c, subd. (b).) The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence-as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing.

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854–855.)

Defendant Mayfield has not met its initial burden simply by making a naked assertion that plaintiff lacks evidence. Accordingly, defendant Mayfield's[53] motion for summary adjudication of the sixth cause of action of the FAC against plaintiff Weaver is DENIED.

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[53] The sixth cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

9. Violation of California Civil Code Section 1942.5.

Plaintiff Weaver's seventh cause of action alleges retaliatory eviction pursuant to Civil Code Section 1942.5.[54] In addition to arguing that plaintiff Weaver is not a tenant and that this cause of action has been released (already discussed above), defendant Mayfield argues plaintiff Weaver cannot establish that defendant Mayfield retaliated against Weaver and Rubin (i.e., issued plaintiffs a Notice of Non-Renewal) because plaintiffs complained of tenantability/ habitability concerns. Just as it did in the second cause of action, defendant Mayfield asserts its issuance of a Notice of Non-Renewal was entirely attributable to ***Rubin's*** violation of the Lease Agreement's prohibition against subletting.[55] From this, the court should infer that the issuance of the Notice of Non-Renewal was not in retaliation for plaintiffs' complaints regarding tenantability/ habitability. However, as argued previously, Weaver argues in opposition that Rubin's subletting was not a valid reason for the issuance of the Notice of Non-Renewal (and thus pretextual) since defendants had waived enforcement of the subletting provision or, rather, at least a triable issue of material fact exists with regard to whether defendants had waived enforcement of the subletting provision.

For the same reason discussed above, defendant Mayfield's[56] motion for summary adjudication of the seventh cause of action of the FAC against plaintiff Weaver is DENIED.

10. Evidentiary objection.

In opposition, plaintiff Weaver filed an Objection to Evidence Submitted by Defendants Mayfield and Kylix in Support of Summary Judgment, etc. The court declines to rule on said objection since the court did not consider the material objected to in rendering its ruling. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

D. Defendants Mayfield, Kylix, and HRCLP's motion for summary judgment/ adjudication of the FAC against plaintiff Rubin.

1. Settlement Agreement.

Initially, defendants Mayfield and Kylix contend the Settlement Agreement (discussed above in section II(A)(2)) bars plaintiff Weaver's FAC. Presumably, defendants Mayfield and Kylix assert the Settlement Agreement includes an implied release by Weaver of any claims now being asserted in the instant FAC. "In general, a written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence." (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366.) However, as the court observed above, a triable issue of material fact exists with regard to whether the Settlement Agreement includes such a release.

2. Breach of Implied Warranty of Habitability.

Substantively, the argument in support of and in opposition to summary adjudication of the first cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver. The only observable difference is that plaintiff Rubin raised an objection to evidence cited by defendants in support. Specifically, plaintiff Rubin objects to his own deposition testimony on the ground that he is not qualified to render an expert opinion or legal conclusion as to habitability. Plaintiff Rubin's objection is OVERRULED. The court declines to rule on the

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[54] Civil Code Section 1942.5, subdivision (a)(1) states: "If the lessor retaliates against the lessee because of the exercise by the lessee of the lessee's rights under this chapter or because of the lessee's complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following: (1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, has provided notice of a suspected bed bug infestation, or has made an oral complaint to the lessor regarding tenantability."

[55] See SSUF re Weaver, Issue No. 7, Fact Nos. 373, 378, and 380.

[56] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

balance of plaintiff Rubin's evidentiary objections since the court did not consider the material objected to in rendering its ruling. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

For the same reasons discussed above in connection with plaintiff Weaver, defendant Mayfield's[57] motion for summary adjudication of the first cause of action of the FAC against plaintiff Rubin is GRANTED.

3. Breach of the Covenant of Quiet Enjoyment.

Substantively, the argument in support of and in opposition to summary adjudication of the second cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendant Mayfield's[58] motion for summary adjudication of the second cause of action of the FAC against plaintiff Rubin is DENIED.

4. Nuisance.

Substantively, the argument in support of and in opposition to summary adjudication of the third cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendants Mayfield and Kylix's[59] motion for summary adjudication of the third cause of action of the FAC against plaintiff Rubin is GRANTED.

5. Negligence.

Substantively, the argument in support of and in opposition to summary adjudication of the fourth cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendants Mayfield and Kylix's[60] motion for summary adjudication of the fourth cause of action of the FAC against plaintiff Rubin is DENIED.

6. Constructive Eviction.

Substantively, the argument in support of and in opposition to summary adjudication of the fifth cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendant Mayfield's[61] motion for summary adjudication of the fifth cause of action of the FAC against plaintiff Rubin is DENIED.

7. Violation of California Civil Code Section 1940.2.

Substantively, the argument in support of and in opposition to summary adjudication of the sixth cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver. The only observable difference is that defendant Mayfield directs the court's attention to its separate statement of undisputed facts, numbers 261 – 312. However, in reviewing those facts, the court did not find any facts or evidence which affirmatively demonstrates that defendant Mayfield did not enter the dwelling without permission or that plaintiff Rubin has no facts

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[57] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[58] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[59] The third cause of action of the FAC is directed against all defendants. In light of the court's ruling with regard to defendant HRCLP, only defendants Mayfield and Kylix remain as defendants to the third cause of action.

[60] The fourth cause of action of the FAC is directed against all defendants. In light of the court's ruling with regard to defendant HRCLP, only defendants Mayfield and Kylix remain as defendants to the fourth cause of action.

[61] The fifth cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

to support an allegation that defendant Mayfield entered the dwelling without permission. As such, defendant Mayfield has not met its initial burden.

Accordingly, defendant Mayfield's[62] motion for summary adjudication of the sixth cause of action of the FAC against plaintiff Rubin is DENIED.

8. Violation of California Civil Code Section 1942.5.

Substantively, the argument in support of and in opposition to summary adjudication of the seventh cause of action against plaintiff Rubin is the same as the argument raised with regard to plaintiff Weaver.

For the same reasons discussed above in connection with plaintiff Weaver, defendant Mayfield's[63] motion for summary adjudication of the seventh cause of action of the FAC against plaintiff Rubin is DENIED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

All remaining settlement conference, readiness conference and trial dates REMAIN AS SET.

VI. Order.

Cross-complainant Mayfield's motion for summary adjudication of the first cause of action [Breach of Contract – 2018 Lease Agreement] of the cross-complaint against cross-defendant Rubin is DENIED. Cross-complainants Mayfield, Kylix, and HRCLP's motion for summary adjudication of the second cause of action [Breach of Contract – Settlement Agreement] of the cross-complaint against cross-defendants Rubin and Weaver is DENIED.

Defendant HRCLP's motion for summary judgment of plaintiffs Rubin and Weaver's FAC is GRANTED.

Defendant Mayfield's motion for summary adjudication of the first and third causes of action of the FAC against plaintiff Weaver is GRANTED. Defendants Mayfield and Kylix's motion for summary judgment, or in the alternative, summary adjudication against Sarah Weaver is otherwise DENIED.

Defendant Mayfield's motion for summary adjudication of the first and third causes of action of the FAC against plaintiff Rubin is GRANTED. Defendants Mayfield and Kylix's motion for summary judgment, or in the alternative, summary adjudication against Mark Rubin is otherwise DENIED.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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[62] The sixth cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

[63] The first cause of action of the FAC is directed against defendants Mayfield and HRCLP. In light of the court's ruling with regard to defendant HRCLP, only defendant Mayfield remains.

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