

1 TONY TOOTELL, CA Bar No. 235032
ttootell@foley.com
2 JESSICA N. WALKER, CA Bar No. 275398
jwalker@foley.com
3 FOLEY & LARDNER LLP
555 SOUTH FLOWER STREET, SUITE 3300
4 LOS ANGELES, CA 90071-2411
TELEPHONE: 213.972.4500
5 FACSIMILE: 213.486.0065

6 Attorneys for Defendants Wyndham Resort
Development Corporation and Wyndham
7 Worldwide Operations, Inc.

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF ORANGE**

11 WOODWARD DRAKE, JOANN DRAKE

12 PLAINTIFF,

13 v.

14 WYNDHAM RESORT DEVELOPMENT CORPORATION,
WYNDHAM WORLDWIDE OPERATIONS, INC., DOES
15 1-10, INCLUSIVE

16 DEFENDANTS.

CASE No: 30-2019-01082041-CU-FR-CJC

NOTICE OF RULING ON DEMURRER

CASE FILED: 07/10/2019
FAC FILED: 09/05/2019
REMAND ISSUED: 09/25/2019
SAC FILED: 01/27/2020
JUDGE: HON. JAMES CRANDALL
DEPT: C33

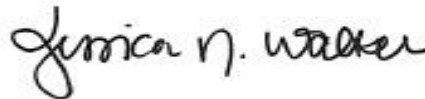
1 **TO PLAINTIFFS WOODWARD DRAKE AND JOANN DRAKE AND THEIR**
2 **ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on August 6, 2020 in Department C33 of the Orange County
4 Superior Court, Hon. James Crandall presiding, Defendants' Demurrer to Plaintiffs' Second Amended
5 Complaint came on for hearing. The Court issued its Tentative Ruling on the Internet, and all parties
6 submitted to the Tentative Ruling in advance of the hearing.

7 On August 6, 2020, the Court adopted its Tentative Ruling, attached hereto as Exhibit "A", as its
8 ruling, overruling Defendants' demurrer to all four causes of action in the Second Amended Complaint,
9 denying Plaintiffs' request for judicial notice, and ordering Defendants to file their Answer to the
10 Second Amended Complaint within 15 days of the Court's ruling on this motion.

11 DATE: AUGUST 11, 2020

12 **FOLEY & LARDNER LLP**
13 **TONY TOOTELL**
JESSICA N. WALKER

14 

15 By: _____
16 JESSICA N. WALKER
17 Attorneys for Defendants Wyndham Resort
18 Development Corporation and Wyndham
19 Worldwide Operations, Inc.
20
21
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 I am employed in the County of Orange, State of California. I am over the age of 18 and not a
3 party to this action; my current business address is 555 South Flower Street, Suite 3300, Los Angeles,
4 CA 90071-2411.

5 On August 11, 2020, I served the foregoing document(s) described as: **NOTICE OF RULING
6 ON DEMURRER TO FIRST AMENDED COMPLAINT** on the interested parties in this action as
7 follows:

8 Mitchell Reed Sussman
9 Sussman & Associates
10 1053 S. Palm Canyon Drive
11 Palm Springs, CA 92264
12 760.325.7255
13 mitchell.sussman@palmspringlitigationattorney.com
14 raventv1@aol.com

Attorney for Plaintiff

15 X **BY MAIL ON 8-12-20**

16 X I am readily familiar with the firm’s practice of collection and processing
17 correspondence for mailing with the United States Postal Service; the firm
18 deposits the collected correspondence with the United States Postal Service that
19 same day, in the ordinary course of business, with postage thereon fully prepaid,
20 at Los Angeles, California. I placed the envelope(s) for collection and mailing
21 on the above date following ordinary business practices.

22 X **BY ELECTRONIC COURT FILING SERVICE ON 8-11-20**

23 X Pursuant to Code of Civil Procedure section 1010.6(d) and Rules of Court, Rule
24 2.253(b)(1)(A), I personally caused each document listed above to be served by
25 Court-approved Electronic Court Filing Service Provider by transmitting true and
26 correct copies of each document for electronic service to the addressees above at the
27 e-mail addresses listed therein.

28 X Executed on August 11, 2020, at Los Angeles, California.

X I declare under penalty of perjury under the laws of the State of California that
the above is true and correct.

Irene Rodriguez

Irene Rodriguez

Exhibit A

DEPARTMENT C33 LAW AND MOTION**Judge James L. Crandall**

These are the Court's tentative rulings. They may become orders if the parties do not appear at the hearing. The Court also might make a different order at the hearing. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 442, fn. 1.)

If counsel wish to submit on the tentative ruling, please call the Court Clerk (657-622-5233) to notify the Court that all parties are submitting on the tentative and no appearance will be necessary. The tentative will then become the final ruling. If no one appears at the hearing the tentative will be the final ruling. Either side may appear and argue the Court's tentative ruling.

PREVAILING PARTY SHALL GIVE NOTICE OF THE FINAL RULING TO EACH PARTY and PREPARE AN ORDER/JUDGMENT FOR THE COURT'S SIGNATURE IF THE MOTION IS DISPOSITIVE OF A PARTY OR THE CASE.

The Orange County Superior Court has implemented administrative orders, policies, and procedures noted on the Court's website to address the limitations and restrictions presented during the COVID-19 pandemic at [Civil Covid-19](#). Due to the fluid nature of this crisis, you are encouraged to frequently check the Court's website at <https://www.occourts.org/> for the most up to date information relating to Civil Operations.

APPEARANCES: "Unless otherwise ordered by the Court, all Unlimited and Complex proceedings will be conducted via telephonic appearance through CourtCall with each party/attorney having the option to appear by CourtCall video if the [Court], in [its] discretion, permits a video appearance instead of an audio appearance." Based on Orange County Superior Court Third Amended Administrative Order No. 2020/06, paragraph 12(c), the Court requests that the parties appear by way of CourtCall. If a party is unable to appear by way of CourtCall, please contact the Court Clerk. Please see, Civil Limited Unlimited & Complex Appearance Process at:

- [Civil Covid-19](#);
- [Civil Limited, Unlimited and Complex \(Updated June 11, 2020\)](#); and
- [Third Amended Administrative Order No. 20/06](#).

All appearances will be telephonic through CourtCall. Contact CourtCall at 888-882-6878 or [CourtCall](#). Requests for fee waivers may be submitted to CivilSRL@occourts.org or the drop box outside the Central Justice Center courthouse

COURT REPORTERS: Official court reporters (i.e. court reporters employed by the Court) are **NOT** typically provided for law and motion matters in this department. If a party desires a record of a law and motion proceeding, it will be the party's responsibility to provide a court reporter. Parties must comply with the Court's policy on the use of privately retained court reporters which can be found at:

- [Civil Court Reporter Pooling](#); and
- For additional information, please see the court's website at [Court Reporter Interpreter Services](#) for additional information regarding the availability of court reporters.

PUBLIC ACCESS: The public may listen to remote court hearings at no cost by calling the public access number (657-231-1414) and entering the access code for this Department (12129895#) and PIN for this Department (12129895#). The public will be able to listen, but not participate in the proceedings. The public access number and the access code for a particular unlimited civil courtroom can be obtained at:

- [Civil Limited, Unlimited and Complex \(Updated June 11, 2020\)](#)

Video CourtCall is now available.

TENTATIVE RULINGS ON LAW & MOTION MATTERS

Date: August 6, 2020 - *NOW AT 10:00 a.m.*

#	Case Name	Tentative
1	<i>Andrews vs. Taco Bell Corporation</i>	<p data-bbox="581 369 1354 432">Demurrer to Complaint filed by Defendant Taco Bell Corporation</p> <p data-bbox="581 464 1487 558">The demurrer filed by defendant Taco Bell Corp. ("Taco Bell") to the Complaint filed by plaintiff Andre Andrews is SUSTAINED with 20 days leave to amend.</p> <p data-bbox="581 590 1484 747">Taco Bell's request for judicial notice of Exhibit B is GRANTED. The request for judicial notice of Exhibit A is DENIED because the document attached as Exhibit A is a blank document and not a "Statement of Information for Sonar Incorporated filed January 25, 2017."</p> <p data-bbox="581 779 1503 999">A demurrer challenges the defects appearing on the face of the pleading or from other matters properly subject to judicial notice. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) "A demurrer admits all material and issuable facts properly pleaded. (Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 713.) A demurrer "does not admit contentions, deductions or conclusions of fact or law alleged therein." (Ibid.)</p> <p data-bbox="581 1031 1495 1419">Taco Bell demurs to the Complaint on the grounds that it is not a proper party. The Complaint alleges that "Defendant Sonar Incorporated is the owner of the Taco Bell franchise location of the incident involving the Plaintiff." (Complaint, ¶ 21.) The Complaint further alleges that "Defendant Ramesh Patel is the owner of Sonar Incorporated." (Complaint, ¶ 22.) "A franchisor will be liable if it has retained or assumed the right of general control over the relevant day-to-day operations at its franchised locations . . ." Patterson v. Domino's Pizza, LLC (2014) 60 Cal. 4th 474, 503. Here, the Complaint does not allege any facts indicating that Taco Bell, the franchisor, was responsible for the day-to-day operations at the franchise location where the alleged unlawful acts took place.</p> <p data-bbox="581 1451 1503 1608">Plaintiff also attempts to hold Taco Bell liable under the theory of vicarious liability and alleges that "Defendant Taco Bell Corporation's is the company which employs the physical actor (s) involved in the incident which led to the current lawsuit before the court . . ." (Complaint, ¶ 9.)</p> <p data-bbox="581 1640 1503 1766">While an employer may be vicariously liable for the torts of its employees, the plaintiff must show that the employee's tortious conduct was committed within the course and scope of employment. Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 208-09.</p> <p data-bbox="581 1797 1503 2020">Here, the Complaint alleges that the security guard allegedly involved in the unlawful conduct was "contracted" and not employed by Taco Bell. (Complaint, ¶3.) Further, the Complaint does not allege any facts that Taco Bell exercised control over the employees of the franchisee who served Plaintiff at the restaurant or that they were acting within the course and scope of an alleged employment relationship with Taco Bell.</p>

She went to "Santiago Oaks Regional Park...for a stroll with her husband. When Plaintiff and her husband arrived at or near [sic] South Hidden Canyon Road and East Overlook Terrace, they decided to park their vehicle. When Plaintiff exited her car on the passenger side with prudence and care, she slipped and fell on the driveway ramp covered in sand. The sand originated from torn sandbags which Defendants negligently failed to maintain and/or clean in a prompt manner." (Complaint, ¶ 6.)

The parties do not dispute that Santiago Oaks Regional Park is "recreational" area within the meaning of the statute.

In applying the three-factor test from *Amberger-Warren*, it is impossible to discern from the allegations of the complaint whether the ramp is subject to immunity, let alone where it is situated. For example, there are no allegations as to the purpose for which the property is designed and used, aside from the implication that Plaintiff stepped on the ramp on her way to the park. Nor is it alleged that the ramp is an access point to the Park or that it is connected to an immunized trail, so as to be integrated into and essential to the trail's purpose.

Defendant's demurrer is OVERRULED.

Defendant shall file its answer to the Complaint within 15 days of the ruling on this motion.

Moving party to give notice.

Future Hearings:

MSC: 10/29/21

Jury Trial: 12/6/21

3 *Drake vs. Wyndham Resort Development Corporation*

30-2019-01082041

Demurrer to Second Amended Complaint filed by Defendants Wyndham Resort Development Corporation and Wyndham Worldwide Operations, Inc.

Defendants Wyndham Resort Developments Corp. ("WRD") and Wyndham Worldwide Operations, Inc. ("WVO" and collectively, "Defendants") demur to all causes of action alleged in plaintiffs Woodward Drake and Joanne Drake's (collectively "Plaintiffs") Second Amended Complaint ("SAC") for fraud (1st cause of action), intentional concealment (2nd cause of action), declaratory relief (3rd cause of action) and breach of fiduciary duty (4th cause of action).

Defendants' demurrer is OVERRULED.

Plaintiffs also request judicial notice.

Meet and Confer Declaration

The demurrer is accompanied by the requisite meet and confer declaration under Code of Civil Procedure §430.41. (See Declaration of Jessica N. Walker, ¶ 3.)

Requests for Judicial Notice ("RJN")

Plaintiffs seek judicial notice of the same documents for which judicial notice was requested in opposition to the demurrer to the First Amended Complaint, which the court denied. (ROA 47 – Minute Order.) Plaintiffs offer no new arguments or authority for judicial notice relative to these materials.

Plaintiffs' RJN is DENIED. Plaintiffs do not specify any basis (i.e., any specific statutory authority) for judicially noticing the documents. Plaintiffs have not "[f]urnished the court with sufficient information to enable it to take judicial notice of the matter," as required by Evid. C. § 453.

Statute of Limitations

Defendants assert again that Plaintiffs' causes of action for fraud (1st cause), intentional concealment (2nd cause) and breach of fiduciary duty (4th cause) are barred by the applicable statutes of limitation.

Plaintiffs do not dispute that the 1st, 2nd and 4th causes of action are subject to a three-year statute of limitation. (CCP § 338(d) (3-year statute of limitations for fraud); and *Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 963 (3-year statute of limitation "for a cause of action for breach of fiduciary duty where the gravamen of the claim is deceit".) Since all three causes of action bear the same statute of limitations and the factual underpinnings of each cause of action are the same, the causes of action are addressed collectively.

A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. (*Boy Scouts of America Nat. Foundation v. Sup. Ct.* (2012) 206 Cal.App.4th 428, 438.) "In order for the bar to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint." (Id. at 438-439.)

As to fraud, "[t]he cause of action...is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (CCP § 338(d).) Thus, the statute of limitations begins to run on a fraud claim when the complaining party "learns, or at least is put on notice, that a representation was false." (*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35.)

A statute of limitation begins to run when a cause of action accrues. (*Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 487.) Generally, a cause of action accrues when the "cause of action is complete with all of its elements." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) However, the "discovery rule" is an exception to the general rule. It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. (Id.)

If the plaintiff "has notice of facts that would put a reasonable person on inquiry or has the reasonable opportunity to obtain information from sources open to investigation, the limitations period begins to run. (*Fuller v. First Franklin Financial Corp.*, supra, 216 Cal.App.4th at 962.) If a demurrer demonstrates that a pleading is untimely on its face, it is plaintiff's burden to establish an exception to the limitations period.

Here, Plaintiffs raise the exception of the "delayed discovery rule." To rely on the delayed discovery rule, a plaintiff must "specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." [Citations.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.'

[Citations.]” (Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 809.)

The 1st, 2nd and 4th causes of action alleged in the SAC arise out of the same basic facts as alleged in the FAC. On September 21, 2015, Amber Chisum, a licensed real estate agent acting on behalf of and employed by Defendants, while acting as a dual agent for Defendants and Plaintiffs, allegedly made various false statements to Plaintiffs and intentionally concealed material information in order to induce Plaintiffs into executing a timeshare purchase agreement and assignment. (SAC, ¶¶ 19-23, 25, 27, 35-36, 39, 47-49, 52-54.)

Plaintiffs were unaware of the “falsity of these representations until October of 2018 when they attempted to reserve a time-share unit at one of [D]efendants’ properties in Monterey, California and were unable to do so in spite of the fact that rooms at the property were still being sold to the general public who had no ownership interest in defendant’s [sic] time-share.” (SAC, ¶ 28.)

Plaintiffs allege new facts concerning their inability to make the discovery earlier despite their diligent efforts. Specifically, Plaintiffs allege that prior to the discovery of Defendants’ fraud, “plaintiffs were diligent in attempting to book vacations and were able to do so.” (Id.) Plaintiffs did not discover the truth of the misrepresentations because they did not have problems booking other resorts. It was only when they attempted to book the Marina Dunes resort in 2018 that they learned facts that made them suspicious, which caused them to act. (SAC ¶¶ 29-29.)

Though the claims are predicated on fraudulent statements and omissions made on September 21, 2015, during Plaintiffs’ meeting with Chisum, almost four years prior to when Plaintiffs’ filed their complaint on July 10, 2019, the allegations of the SAC demonstrate the time and manner of discovery of the alleged fraud, i.e., in October 2018 while making a reservation (SAC ¶ 28), as well as facts evidencing Plaintiffs’ inability to have made the discovery earlier despite reasonable diligence – i.e., Plaintiffs made reservations without problem repeatedly and only learned of the alleged fraud when they attempted to book the Monterey resort in October 2018. (See SAC ¶ 28-29.)

Thus, the allegations of the SAC adequately invoke the delayed discovery rule and Plaintiffs have met their burden.

Defendants’ demurrer to the first cause of action for fraud, second cause of action for fraud in the inducement and fourth cause of action for breach of fiduciary duty is OVERRULED.

Declaratory Relief Cause of Action

Defendants demur to the third cause of action for declaratory relief on the same grounds as before, namely, that there is no actual, ripe controversy. The court disagrees.

Code of Civ. Proc. §1060 provides, in relevant part: “Any person interested under a written instrument...or under a contract...who desires a declaration of his or her rights or duties with respect to another...may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or

her rights and duties...including a determination of any question of construction or validity arising under the instrument or contract..."

The Court, however, "may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (See Code of Civ. Proc. §1061.)

"An action for declaratory relief is an equitable proceeding and the powers of a court are as broad and extensive as those exercised by such court in any ordinary proceeding in equity (Citation.) It is elementary that questions relating to the formation of a contract, its validity, its construction and effect, excuses for nonperformance, and termination are proper subjects for declaratory relief." (Fowler v. Ross (1983) 142 Cal. App. 3d 472, 478.)

"A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court. [Citations.] If these requirements are met and no basis for declining declaratory relief appears, the court should declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to favorable declaration." (Wellenkamp v. Bank of America (1978) 21 Cal.3d 943, 947.)

"[S]ection 1060 does not require a breach of contract in order to obtain declaratory relief, only an 'actual controversy.' Declaratory relief pursuant to this section has frequently been used as a means of settling controversies between parties to a contract regarding the nature of their contractual rights and obligations." (Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC (2010) 191 Cal. App. 4th 357, 364-65 (citations omitted).)

In the present case, Plaintiffs seek judicial determination of the rights and duties of the parties with respect to the timeshares sold by Defendants. (SAC, ¶ 44.) Specifically, Plaintiffs ask the court to declare as follows:

1. That the timeshare Purchase and financing agreements by their terms preclude Defendants from seeking a deficiency judgment as a result of Plaintiffs default.
2. That the timeshares sold by Defendants are "time-share interests" under Busi. & Prof. C. § 11212(x)(1) and (2);
3. That Defendants' sale of the timeshares is subject to regulation by the CA Dept. of Real Estate; and
4. That the anti-deficiency laws of the State of CA apply, CCP § 580(b), to the timeshare sold to Plaintiffs.

Plaintiffs allege that an actual controversy exists because Plaintiffs "have ceased payments to defendants and are in default under their Purchase Agreement with defendants...As a result of plaintiffs' non-payment the defendants have declared a default, suspended the plaintiffs [sic] membership and refused them access to the time-share property. (SAC ¶ 42.)

Plaintiffs have identified an actual controversy that is ripe for determination.

The Court **OVERRULES** Defendants' demurrer to the 3rd cause of action for declaratory relief.

Defendants' demurrer to all four causes of action in the SAC is **OVERRULED**.

Defendants shall file their Answer to the SAC within 15 days of the Court's ruling on this motion.

Moving parties to give notice.

Future Hearings:

MSC: 3/19/21

Jury Trial: 5/17/21

4 *Saldana vs. County of Orange*

30-2020-01137174

1. Demurrer to First Amended Complaint filed by Defendant County of Orange
2. Motion to Strike filed by Defendant County of Orange

Defendant's demurrer is **overruled**.

Defendant's motion to strike is **granted** as to the five references to CC § 3294 (¶ 30 at 6:12, ¶ 39 at 7:17; ¶ 48 at 8:25; ¶ 55 at 9:25 and ¶ 63 at 11:2) and denied as to the remainder (¶ 84 at 14:9-11 and ¶ 86 at 14:14-18).

DEMURRER

This action arises out of Plaintiff's employment with Defendant County of Orange. According to the allegations of the First Amended Complaint, Plaintiff reported fraud to her management in the fall of 2018. Rather than take action, the County retaliated against Plaintiff by giving her a poor performance review, a demotion and a decrease in pay. Plaintiff then developed anxiety, depression and an adjustment disorder which necessitated an extended leave. When she was cleared to return to work in April 2019, the County informed her they could not accommodate her restrictions. She had a further meeting with the County to discuss restrictions in August 2019. Shortly after that meeting, Plaintiff learned that her employment had been terminated. Based on those allegations, Plaintiff asserts nine causes of action.

Defendant demurs to the 8th cause of action for Violation of Labor Code § 1102.5 and the 9th cause of action for Violation of Labor Code § 98.6. on the ground that Plaintiff failed to timely bring a government tort claim under Govt. Code §§ 911.2 and 945.4.

In addition, Defendant demurs to the 9th cause of action on the ground that Plaintiff cannot bring a whistleblower claim under § 98.6 unless she complained about something "under the jurisdiction of the Labor Commissioner" and Plaintiff's report of alleged fraudulent activities during an audit does not fall within the jurisdiction of the Labor Commissioner.

Government Tort Claim. Under Gov. Code §§ 911.2 and 945.4, a plaintiff has six months from the accrual of an action to bring a tort claim. Defendant argues that Plaintiff's claims arise out of the alleged September/October 2018 whistleblowing and resulting