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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

HERMENEGILDO (“JAY”) MARTINEZ, an individual, on his own behalf and on behalf of all others similarly situated,	)	Civil No.: 09cv2883 AJB
	)	
Plaintiff,	)	ORDER GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT
v.	)	
	)	(Doc. No. 128)
THE WELK GROUP, INC.; WELK RESORT GROUP INC.; WELK MUSIC GROUP, INC.; SOLEIL COMMUNICATIONS, INC.; and DOES 1 through 25,	)	
	)	
Defendants.	)	
_____	)	

Presently before the Court is Defendants, the Welk Group, Inc., Welk Resort Group, Inc., Welk Music Group, Inc., and Soleil Communications, Inc., (collectively, “Defendants”), motion for summary judgment, or in the alternative partial summary judgment.<sup>1</sup> [Doc. No. 128.] Plaintiff filed an opposition, [Doc. No. 140.], and Defendants filed a reply, [Doc. No. 143]. On September 25, 2012, the

<sup>1</sup> Defendants also requested that the Court take judicial notice of the Legislative History of the Vacation Ownership and Time-Share Act of 2004, Cal. Bus. & Prof. Code § 11211 *et seq.* See 2004 Cal. Legis. Serv. Ch. 697 (A.B. 2252) § 14, effective July 15, 2005. Under Federal Rule of Evidence 201(b), a court may take judicial notice of facts that are “(1) generally known within the trial court’s territorial jurisdiction; or (2) whose accuracy cannot be easily questioned.” This includes matters of public record and legislative history of state statute. See *Getty Petroleum Marketing, Inc v. Capital Terminal Co.*, 391 F.3d 312, 320 (1st Cir. 2004); *Chaker v. Crogan*, 428 F.3d 1215, 1223 (9th Cir. 2005). Accordingly, the Court grants Defendants’ request for judicial notice.

1 Court issued an order setting a supplemental briefing schedule requesting the parties to address the  
2 fraudulent prong and unfair prong with respect to Plaintiff's fifth cause of action alleging violation of  
3 California's Unfair Competition Law § 17200, *et seq.* ("UCL").<sup>2</sup> On October 9, 2012 Defendants filed  
4 a supplemental brief in support of their motion for summary judgment, [Doc. No. 149], and on October  
5 23, 2012, Plaintiff filed his supplemental reply, [Doc. No. 151]. In accordance with Civil Local Rule  
6 7.1.d.1, the Court finds this motion suitable for determination on the papers and without oral argument.  
7 For the reasons set forth below, the Court **GRANTS** Defendants' motion for summary judgment as to  
8 all causes of action set forth in Plaintiff's Fourth Amended Complaint ("4AC"). [Doc. No. 58.]

### 9 **BACKGROUND**

10 This matter is brought by Plaintiff Hermengildo "Jay" Martinez ("Plaintiff"), alleging various  
11 causes of action stemming from Defendants failure to abate and disclose the presence of mold at the  
12 Welk Resort San Diego (the "Resort").<sup>3</sup> As the factual record in this case is well developed, the Court  
13 relates only those facts essential to the instant motion.<sup>4</sup> Plaintiff initially purchased 120,000 Platinum  
14 Points from Welk Resort Group, Inc. ("Welk") in 2007, which provided him with the opportunity to stay  
15 at Welk resorts around the world or at any other time-share resort that accepts Platinum Points for  
16 vacation stays.<sup>5</sup> Plaintiff then "upgraded" his 2007 Platinum Points interest in April 2009 to 240,000  
17 Platinum Points. [4AC ¶ 23; Ex. A to the 4AC, p. 24; Ex. B to the 4AC, p. 54.]

18 At some point during the sales process, Plaintiff asked Welk if the Resort was safe for his son  
19 (who previously had cancer and needed a clean environment), and the sales agent assured him the  
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21 <sup>2</sup> The Court issued this supplemental briefing schedule to fairly adjudicate all claims before the  
22 Court. Accordingly, the motion hearing scheduled for October 5, 2012 was vacated.

23 <sup>3</sup> This action was originally filed as a class action on December 23, 2009. [Doc. No. 1.]  
24 However, on July 13, 2012, the Court denied Plaintiff's motion to certify the class. [Doc. No. 139.] Only  
25 Plaintiff's individual claims against all Defendants remain.

26 <sup>4</sup> Prior to Defendants instant motion for summary judgment, Defendants moved to dismiss and  
27 strike portions of Plaintiff's Third Amended Complaint ("3AC") and Plaintiff's Fourth Amended  
28 Complaint ("4AC"). The Court granted in part and denied in part Defendants' motion to dismiss and  
29 motion to strike Plaintiff's 3AC, [Doc. No. 57], and granted Defendants' motion to strike and denied  
30 defendants' motion to dismiss Plaintiff's 4AC, [Doc. No. 70.]

31 <sup>5</sup> Defendants have been active in the vacation resort ownership business since 1984, and have  
32 resorts in Maui, Hawaii; Palm Desert, California; Branson, Missouri; Cabo San Lucas, Mexico, and a  
33 "flagship property" at the Welk Resort San Diego in Escondido, California. [Doc. No. 58 at 9.]

1 Resort was clean, safe, and well maintained. [See Warren Decl., Ex. 5, pp. 36:20-37:12, 247:25-248:5.]  
2 Plaintiff purchased his Platinum Points solely for the purpose of staying at the Welk Resort San Diego,  
3 [Martinez Depo., ¶¶ 3-4.], which is located in Escondido, California, and has more than 650 units in  
4 three subdivisions: the Lawrence Welk Resort Villas, the Villas on the Green, and the Mountain Villas.  
5 [Coogan Decl., ¶ 3.]

6 During a visit to the Resort in 2009, Plaintiff notified the front desk that his room smelled musty.  
7 Welk sent a housekeeper, who cleaned a sink, which apparently fixed the problem. [See *id.* at 102:9-  
8 105:6, 123:7-22.] Plaintiff later went looking for fishing bait in an outside utility closet (thinking it to  
9 be a cool, damp location), where he found something that may have been mold, but he could not be  
10 certain.<sup>6</sup> After Plaintiff stayed at the Resort in 2009, his neighbor (a former Welk employee) told him  
11 that there was mold at the Resort. This story troubled Plaintiff because he believed that if mold existed  
12 in one unit at the Resort, all 650 units in the 500-acre Welk complex would be uninhabitable, even if the  
13 mold were removed. [See Warren Decl., Ex. 5, p. 224:8-14.]

14 Subsequent to his 2009 stay at the Resort, Plaintiff decided he would never use his points  
15 again—either at Welk or any other timeshare resort. Additionally, Plaintiff has not attempted, nor is he  
16 willing to attempt, to sell his Platinum Points to another individual, as he does not believe it would be  
17 ethical given his knowledge of the extensive mold issues at the Resort. [Martinez Decl., ¶ 8.]  
18 Consequently, Plaintiff claims his Platinum Points have diminished in value. [See *id.* at 139:7-16,  
19 208:23-209:5; Exh. 4, p. 3:24-26; Exh. 1, p. 12:3-27; Exh. 3, p. 8:12-9:24.] Plaintiff sued Defendants  
20 for breach of contract, breach of fiduciary duty, negligence, nuisance, breach of the implied warranty of  
21 habitability, and for violations of California’s Unfair Competition Law (“UCL”). Defendants now seeks  
22 summary judgment on all claims, or in the alternative for partial summary judgment.

### 23 LEGAL STANDARD

24 Summary judgment is properly granted when there is no genuine issue as to any material fact  
25 such that the moving party is entitled to judgment as matter of law. Fed.R.Civ.P. 56(c). Entry of  
26 summary judgment is appropriate “against a party who fails to make a showing sufficient to establish  
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28 <sup>6</sup> In any event, the closet was not part of the Resort’s living spaces. (*See id.* at 110:4-113:5; Exh.  
2, p. 12:3-5.)

1 the existence of an element essential to that party's case, and on which that party will bear the burden of  
2 proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court shall consider all  
3 admissible affidavits and supplemental documents submitted on a motion for summary judgment. *See*  
4 *Connick v. Teachers Ins. and Annuity Ass'n*, 784 F.2d 1018, 1030 (9th Cir.1986).

5 The moving party has the initial burden of demonstrating that summary judgment is proper.  
6 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). To avoid summary judgment, the nonmovant  
7 cannot rest solely on conclusory allegations. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir.1986).  
8 Rather, he must present “specific facts showing there is a genuine issue for trial.” *Anderson v. Liberty*  
9 *Lobby, Inc.*, 477 U.S. 242, 256 (1986). “Finally, if the factual context makes the nonmoving party's  
10 claims implausible, that party must come forward with more persuasive evidence than would otherwise  
11 be necessary to show that there is a genuine issue for trial.” *California Architectural Bldg. Prods. v.*  
12 *Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir.1987), cert. denied, 484 U.S. 1006 (1988).

13 The court may not weigh evidence or make credibility determinations on a motion for summary  
14 judgment. Quite the opposite, the inferences to be drawn from the underlying facts must be viewed in  
15 the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *United States v. Diebold,*  
16 *Inc.*, 369 U.S. 654, 655 (1962). The nonmovant's evidence need only be such that a “fair minded jury  
17 could return a verdict for [him] on the evidence presented.” *Anderson*, 477 U.S. at 255. However, in  
18 determining whether the nonmovant has met his burden, the court must consider the evidentiary burden  
19 imposed upon him by the applicable substantive law. *Id.* If the nonmovant's evidence is “merely  
20 colorable, or is not significantly probative,” summary judgment may be granted. *Id.*

## 21 DISCUSSION

22 Plaintiff’s 4AC alleges five causes of action: (1) breach of contract; (2) breach of fiduciary duty;  
23 (3) negligence; (4) private nuisance; 5) unfair competition in violation of California Business and  
24 Professions Code § 17200 *et seq.*; and (6) breach of the implied warranty of habitability. [Doc. No. 128.]  
25 Defendants contend they are entitled to summary judgment on all claims because Plaintiff cannot prove  
26 he was injured as a result of Defendants’ conduct. Specifically, Defendants argue Plaintiff has failed to  
27 produce any witnesses, any documents, or any evidence to support that his Platinum Points have “lost  
28 value.” [Doc. No. 128, 8:8-13; Martinez Depo., pp. 176-77.]

1 ***I. Breach of Contract***

2 Plaintiff's first cause of action alleges damages stemming from Defendants' alleged breach of  
3 the Purchase and Sale Agreement. Plaintiff contends that because he has satisfied all contractual  
4 obligations to Welk, by paying for time-share ownership points and all associated fees, and Defendants  
5 breached such contract, by failing to abate and disclose the presence of mold, Defendants are liable for  
6 "damages consisting of the cost of repairs and replacement, diminutions in value of the time share  
7 ownership points, and other associated costs." [FAC ¶ 34.] Defendants move for summary judgment  
8 alleging that Plaintiff has failed to identify a specific provision of the Purchase and Sale Agreement that  
9 has been breached, has not—directly or indirectly—paid for repair or replacement costs at the Resort  
10 since 2009, as he has not paid his annual maintenance fees and is currently \$1,480.48 in arrears, [Zorens  
11 Decl. ¶ 7], and even if Plaintiff was excused from paying his annual fees, and thus excused from  
12 performing under the contract, Plaintiff has failed to establish he was injured as a result of Defendants'  
13 conduct.

14 Specifically, Defendants contend Plaintiff has offered no proof to support his contention that his  
15 Platinum Points have diminished in value. In fact, Plaintiff admits that when his Platinum Points "lost  
16 value," he means they lost value to him because he is not using them. [Martinez Depo., pp.208:23-  
17 210:11.] To satisfy their burden under Rule 56, Defendants offer external and internal rating system  
18 data showing that Welk Resort San Diego has maintained its premier rating since 2006 when the system  
19 was implemented, evidencing that Platinum Point Owners have maintained the same trading power  
20 since that time. Under this system, owners of Welk Platinum Points can exchange points for stays at  
21 non-Welk properties through a timeshare exchange company called Interval International (II). [Ellis  
22 Decl., ¶ 5.]<sup>7</sup> In 2007, 90,000 Platinum Points converted to one week on the II exchange market for a  
23 studio unit; 120,000 Platinum Points converted to one week on the II exchange market for a one-bedro-  
24 om unit; and 240,000 Platinum Points converted to one week on the exchange market for a two-bedroom  
25 unit. [*Id.*] The same is true today, as the value of Platinum Points through the exchange program has  
26 not changed since 2007. [*Id.*] Therefore, Defendants assert that Plaintiff's damages are either  
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28 <sup>7</sup> In order to participate in the II Exchange Program, the Owner Services department at a Welk  
Resort department converts Platinum Points into exchange weeks. [*Id.*] The weeks are then deposited  
by Owner Services with the II Exchange Program. [*Id.*]

1 “self-inflicted,”<sup>8</sup> as he is unwilling to use his Platinum Points; or speculative, as he has failed to present  
2 evidence of diminution of value.

3 In response, Plaintiff alleges that his damages are not self-inflicted because “he purchased the  
4 points specifically for the purpose of staying at Welk Resorts San Diego. . . has no interest in staying at  
5 any other locations owned and operated by Welk or using his Platinum Points to stay at other resorts. . .  
6 and purchased the points specifically because he wanted to stay at a place that was clean, safe and well  
7 maintained.” [Martinez Depo., ¶¶ 3-5, 9.] Plaintiff further alleges that even in the absence of a finding  
8 of “actual damages,” summary judgment should be denied because nominal damages are still available  
9 and recoverable where a breach is shown. [Doc. No. 140, 8-9.]

10 In California, “[a] cause of action for breach of contract requires proof of the following  
11 elements: (1) existence of the contract; (2) plaintiff’s performance or excuse for nonperformance; (3)  
12 defendant’s breach; and (4) damages to plaintiff as a result of the breach.” *CDF Firefighters v.*  
13 *Maldonado*, 158 Cal.App.4th 1226, 1239, 70 Cal.Rptr.3d 667 (2008); *Oasis West Realty, LLC v.*  
14 *Goldman*, 51 Cal.4th 811, 821 (2011). To satisfy the damages element a plaintiff must show  
15 appreciable and actual damage, that are clearly ascertainable in both their nature and origin. *See St. Paul*  
16 *Fire and Marine Ins. Co. v. American Dynasty Surplus Lines Ins.*, 101 Cal.App.4th 1038, 1060, 124  
17 Cal.Rptr.2d 818 (2d Dist.2002) (“An essential element of a claim for breach of contract are damages  
18 resulting from the breach.”) (italics omitted); *Patent Scaffolding Co. v. William Simpson Const. Co.*, 256  
19 Cal.App.2d 506, 511, 64 Cal.Rptr. 187 (2d Dist.1967) (“A breach of contract without damage is not  
20 actionable.”); Cal. Civ. Code § 3301 (“No damages can be recovered for a breach of contract which are  
21 not clearly ascertainable in both their nature and origin.”).

22 Here, Plaintiff has failed to produce any evidence as to how he has performed all obligations  
23 under the contract or is otherwise excused from performing such obligations. Specifically, although  
24 Plaintiff alleges in the 4AC that he has paid all fees associated with his ownership of Platinum Points,  
25 Plaintiff fails to dispute that he is currently \$1,480.48 in arrears for unpaid annual maintenance fees, or  
26 offer any evidence that such amounts should be excused. Accordingly, because Plaintiff acknowledged  
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28 <sup>8</sup> Defendant contends Plaintiff’s damages are self-inflicted because Plaintiff has decided not to  
use his Platinum Points “at the Welk Resort or any number of *thousands* of spectacular timeshare resorts  
around the world.” (emphasis in original) [Doc. No. 128, 6:18-21.]

1 in his 2009 contract that he is “obligated to pay the Welk Resorts Platinum Owners Association annual  
2 maintenance assessments. . . [and] failure to pay any such assessment may result in the suspension of  
3 use privileges,” Plaintiff has failed to establish an essential element of his breach of contract claim.<sup>9</sup> *See*  
4 *Celotex*, 477 U.S. at 331 (summary judgment is appropriate if the moving party demonstrates that the  
5 nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s  
6 claim).

7         Nevertheless, even if Plaintiff was excused from performing under the contract, he has failed to  
8 allege that he has been damaged as a result of Defendants’ conduct. Specifically, Plaintiff offers no  
9 evidence to rebut Defendants’ proof that his Platinum Points currently have the same value on the II  
10 exchange market as they did when he first purchased his points in 2007. Additionally, Plaintiff fails to  
11 address the depositions of other Resort guests, which state that they enjoy the Resort facilities and  
12 believe that the Resort is well maintained. [Ellis Decl., ¶ 6.] Indeed, although more than 130,000 guests  
13 stay at the Resort each year, Defendants are aware of fewer than 15 complaints regarding mold in the  
14 last 8 years. [See *id.*] Thus, the only evidence Plaintiff produced in support of his claim that his points  
15 decreased in value was his own self-serving testimony as to his personal reasons for refusing to stay at  
16 the Resort, even though Defendants have done nothing to prevent Plaintiff from using his points.  
17 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir.1993); *United States v. One Parcel of Real Property*,  
18 904 F.2d 487, 492 n. 3 (9th Cir.1990) ( finding a conclusory, self-serving affidavit, lacking detailed facts  
19 and any supporting evidence, was insufficient to create a genuine dispute).<sup>10</sup>

20         Furthermore, although Plaintiff cites *Sweet v. Johnson*, 169 Cal.App.2d 630, 337 P.2d 499, 500  
21 (1959), for the proposition that nominal damages are presumed as a matter of law to flow directly from a  
22 breach of contract, such argument was recently rejected by the Ninth Circuit in *Ruiz v. Gap, Inc.*,  
23 wherein the Court specifically held that under the Ninth Circuit, “a breach of contract claim requires a

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25         <sup>9</sup> Plaintiff’s Declaration states that “he was completely unaware” that he is currently \$1,480.48 in  
26 arrears, and has not received any correspondence from Defendants regarding delinquent annual  
27 maintenance fees. [Martinez Decl., ¶ 10.] Although the Court need not consider Plaintiff’s assertion  
28 under Rule 56(c)(3), because it was not cited to in Plaintiff’s moving papers, Plaintiff’s assertion is  
nevertheless unpersuasive because it provides no basis to excuse Plaintiff from his contractual  
obligations.

28         <sup>10</sup> Even more so, Plaintiff states that “my family and I have refused to visit or stay at Welk  
Resort San Diego and will continue to refuse to visit or stay at Welk Resort San Diego.” [Martinez Decl.  
¶ 7.]

1 showing of appreciable and actual damage.” 380 Fed. Appx. 689, 691, 692 (9th Cir. 2010) (rejecting the  
2 holding of *Sweet v. Johnson*). Therefore, because Plaintiff does not put forth any evidence of actual and  
3 appreciable damages, nevertheless rebut Defendants’ evidence of his non-payment of annual  
4 maintenance fees, the Court **GRANTS** Defendants’ motion for summary judgment on Plaintiff’s breach  
5 of contract claim.

## 6 **II. Breach of Fiduciary Duty**

7 Plaintiff’s second cause of action alleges that Defendants owed him a fiduciary duty as a result  
8 of the Purchase and Sale Agreement documents, and Defendants violated this duty when they failed to  
9 maintain the Resort.<sup>11</sup> [4AC ¶¶ 37, 38, 40.] Defendants argue Plaintiff’s breach of fiduciary duty cause  
10 of action is synonymous with his breach of contract cause of action, and must fail because Plaintiff has  
11 failed to establish conduct or circumstances that elevate Defendants’ obligations beyond those existing  
12 by virtue of the Purchase and Sale Agreement documents. [Doc. No. 128, 9:10-12.] Accordingly,  
13 because Plaintiff has failed to prove the existence of a fiduciary relationship, separate and apart from  
14 Defendants’ contractual obligations, Defendants’ maintain Plaintiff has failed to state a claim as a matter  
15 of law. Conversely, Plaintiff argues that a fiduciary relationship can be created either by contract or by  
16 operation of law. Therefore, a fiduciary relationship was created between Plaintiff and Defendants both  
17 by the 2007 purchase agreement<sup>12</sup> and because the Welk employee who sold Plaintiff the Platinum  
18 Points held herself out as Plaintiff’s agent.<sup>13</sup> [Doc. No. 140, 11.]

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21 <sup>11</sup> The Purchase and Sale Agreements provided that Defendants would maintain “[a] fiduciary  
22 duty of utmost care, integrity, honesty, and loyalty” in their dealings with purchasers of real estate,  
23 provide “diligent exercise of reasonable skill and care in performance of the agent’s duties;” uphold “a  
24 duty of honest and fair dealing and good faith;” and fulfill their “duty to disclose all facts known to the  
25 agent materially affecting the value or desirability of the property that are not known to, or within the  
26 diligent attention and observation of, the parties.”

27 <sup>12</sup> However, as the Court noted in its previous Order denying class certification, the 2007  
28 contract was superseded by the 2009 contract when Plaintiff purchases additional Platinum Points.  
[Doc. No. 139, 5.]

29 <sup>13</sup> Plaintiff also asserts in his opposition, while not in his 4AC, that Defendants breached their  
30 fiduciary duties by not advising Plaintiff of the serious water intrusion, mold, mildew and fungus issues  
31 at the Welk Resort San Diego. [Doc. No. 140, 11:13-16.] However, because Plaintiff did not raise these  
32 issues in the 4AC, he may not now raise such arguments. *See Wasco Prods., Inc. v. Southwall Tech.*,  
33 435F.3d 989, 992 (9th Cir. 2006) (“summary judgment is not a procedural second chance to flesh out  
34 inadequate pleadings”)



1 The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary  
2 duty; (2) breach of the fiduciary duty; and (3) resulting damage. *Pellegrini v. Weiss*, 165 Cal.App.4th  
3 515, 524 (2008). A fiduciary relationship is created between parties to a transaction wherein one of the  
4 parties has a duty to act with the utmost good faith for the benefit of the other party. *Gilman v. Dalby*,  
5 176 Cal.App.4th 606, 614. “Absent such a relationship, a plaintiff cannot turn an ordinary breach of  
6 contract into a breach of fiduciary duty based solely on the breach of the implied covenant of good faith  
7 and fair dealing contained in every contract.” *Id*; *Jhaveri v. ADT Sec. Servs., Inc.*, 2012 WL 843315 \*4  
8 (finding that California law rejects the idea that a contractual relationship gives rise to a fiduciary  
9 relationship absent conduct or circumstances that could reasonably elevate the parties conduct above  
10 those present by virtue of the contractual relationship). Moreover, the “relationship of seller to buyer is  
11 not one ordinarily vested with fiduciary obligation, even though sellers routinely make representations  
12 concerning their product, often on the basis of a claimed expert knowledge about its utility and value. In  
13 such transactions, the seller is held to the mores of the marketplace.” *Comm. On Children's Television,*  
14 *Inc. v. Gen. Foods Corp.*, 35 Cal.3d 197, 221 (1983) (superseded by statute on other goods). Thus,  
15 unless a seller has taken on “duties beyond those of mere fairness and honesty in marketing its product,”  
16 the law of fiduciary relationships is ill-suited to deal with such claims. *Id*.

17 In the present case, because Plaintiff has failed to allege, nevertheless refute Defendants’  
18 evidence regarding the existence of a fiduciary relationship above and beyond the contractual  
19 relationship between the parties, his breach of fiduciary duty claim necessarily fails.<sup>14</sup> Moreover,  
20 because summary judgment is not a second opportunity to flush out deficiencies in the pleadings,  
21 Plaintiff cannot now assert for the first time in his opposition that the fiduciary relationship was created  
22 by representations of Defendants’ employee. *See Wasco Prods. Inc. v. Southwall Tech., Inc.*, 435 F.3d  
23 989, 992 (9th Cir. 2006). Accordingly, the Court **GRANTS** Defendants’ motion for summary judgment  
24 with respect to Plaintiff’s second cause of action for breach of fiduciary duty.

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27 <sup>14</sup> To survive a motion for summary judgment, once the moving party has satisfied its initial  
28 burden of production, the burden of proof shifts to the nonmovant to show that there is a genuine issue  
of material fact. *Celotex*, 477 U.S. at 331. Here, Plaintiff has failed to establish *why* the contractual  
provisions create a fiduciary duty.

1 **III. Negligence**

2 Plaintiff's negligence claim alleges Defendants owed a duty to avoid foreseeable damages and  
3 refrain from engaging in tortious conduct. Plaintiff maintains Defendants breached this duty by selling  
4 time-share ownership points for dwellings that suffered from dangerous leaks, water intrusion, mold,  
5 mildew and/or fungus, and failing to maintain and repair those units. [4AC ¶ 43.] Plaintiff further  
6 asserts that under California law, "the same act may be both a breach of contract and a tort." *Perry v.*  
7 *Robertson*, 201 Cal.App.3d 333, 340 (1988). Accordingly, Plaintiff does not dispute that his negligence  
8 claim seeks solely economic damages, but alleges that he should be permitted to go to trial on both his  
9 contract and tort causes of action regardless of the lack of economic injury.

10 Defendants respond, and the Court agrees, that Plaintiff is precluded from pursuing his  
11 negligence claim because it seeks recovery in tort for purely economic loss, and is thus barred by  
12 California's economic loss doctrine. *See KB Home v. Super. Ct.*, 112 Cal.App.4th 1076, 1079, 5  
13 Cal.Rptr.3d 587 (2004) (holding that subject to certain exceptions, the economic loss rule bars recovery  
14 in tort for economic damages arising out of matters governed by contract). Under California law, the  
15 economic loss doctrine bars tort claims based on the same facts and damages as breach of contract  
16 claims. The doctrine "precludes recovery for 'purely economic loss due to disappointed expectations,'  
17 unless the plaintiff 'can demonstrate harm above and beyond a broken contractual promise.'" *Multifamily Captive Grp., LLC v. Assurance Risk Managers, Inc.*, 629 F.Supp.2d 1135, 1146  
18 (E.D.Cal.2009) (quoting *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal.4th 979, 988, 22 Cal.Rptr.3d  
19 352, 102 P.3d 268 (2004)); *see also Cnty. of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292,  
20 328, 40 Cal.Rptr.3d 313 (2006) (stating that the economic loss rule applies unless "the plaintiff can  
21 establish that the fraud exposed the plaintiff to liability"). The rule seeks to "prevent the law of contract  
22 and the law of tort from dissolving one into the other." *Robinson Helicopter*, 34 Cal.4th at 988, 22  
23 Cal.Rptr.3d 352, 102 P.3d 268 (internal quotation marks omitted). Thus, "conduct amounting to a  
24 breach of contract becomes tortious only when it also violates a duty independent of the contract arising  
25 from principles of tort law" and "exposes a plaintiff to liability for personal damages independent of the  
26 plaintiff's economic loss." *Id.* at 989, 993, 22 Cal.Rptr.3d 352, 102 P.3d 268 (internal quotation marks  
27 omitted).  
28

1 Furthermore, Plaintiff's reliance on *Perry v. Robertson* is misguided. In *Perry*, the plaintiff  
2 asserted both breach of contract claims and tort claims, alleging *both* economic loss and bodily injury.  
3 Therefore, at the conclusion of a jury trial awarding Plaintiff her attorneys' fees based on the breach of  
4 the contract claim, the court stated that plaintiff was not required to elect a remedy prior to the request  
5 for attorneys' fees. *Id.* at 342-45. Here, however, because Plaintiff asserts recovery for purely  
6 economic loss, *Perry* is inapplicable. *See e.g., Atlantic Richfield Co.*, 137 Cal.App.4th at 337 ("cost of  
7 repair does not constitute a physical injury"). Accordingly, the Court **GRANTS** Defendants' motion for  
8 summary judgment with respect to Plaintiff's negligence claim.

9 **IV. Private Nuisance**

10 Plaintiff's fourth cause of action alleges Defendants "by their acts, conduct, failure to act, and/or  
11 omissions, created, maintained, exacerbated, and concealed a private nuisance and did not take any  
12 reasonable steps to immediately abate the nuisance, although requested to do so." [4AC ¶ 48.]

13 California law requires a disturbance of rights in land before a plaintiff may maintain a cause of  
14 action for private nuisance. *See Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1549 (2009);  
15 *Venuto v. Owen-Corning Fiberglass Corp.*, 22 Cal.App.3d 116 (1971). As defined by the Restatement  
16 Second of Torts, "[a] private nuisance is a nontrespassory invasion of another's interest in the private  
17 use and enjoyment of land."<sup>15</sup> *People v. McDonald*, 137 Cal.App.4th 521, 534, 40 Cal.Rptr.3d 422  
18 (2006), citing (Rest.2d Torts, § 821D, p. 100). In *San Diego Gas & Electric v. Superior Court*, 13  
19 Cal.4th 893, 938, 55 Cal.Rptr.2d 724, 920 P.2d 669 (1996), the court held that in order to state a claim  
20 for private nuisance a plaintiff must establish three elements: (1) the plaintiff must prove an interference  
21 with his use and enjoyment of his property; (2) "the invasion of the plaintiff's interest in the use and  
22 enjoyment of the land [must be] substantial, i.e., that it cause[s] the plaintiff to suffer substantial actual  
23 damage;" and (3) "[t]he interference with the protected interest must not only be substantial, but it must  
24 also be unreasonable, i.e., it must be of such a nature, duration or amount as to constitute unreasonable  
25 interference with the use and enjoyment of the land." *Id.* *See also* California BAJI Instruction 8.60  
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28 <sup>15</sup> California nuisance law follows the Restatement approach to private nuisance. *See San Diego Gas & Elec. Co. v. Super. Ct.*, 13 Cal.4th 893, 55 Cal.Rptr.2d 724, 920 P.2d 669, 696-97 (1996).

1 Here, Defendants assert, and the Court agrees, that Plaintiff has failed to prove an interest in real  
2 property and thus his private nuisance claim must fail.<sup>16</sup> As stated in the Department of Real Estate  
3 Public Report for the Welk Resort Group, (“Public Report”), the Platinum Points program provides a  
4 “multi-location, points-based, time-share use plan with a nonspecific time-share interest.” [Doc. No.  
5 128-7, p. 5.] Moreover, even though the Association manages the program for the use and benefit of the  
6 owners, the “owners do not receive an interest in real property.”<sup>17</sup> [*Id.*] In reply, Plaintiff does not  
7 refute Defendants’ argument, but rests solely on the Court’s previous order denying Defendants’ motion  
8 to dismiss the instant claim.<sup>18</sup> [Doc. No. 70; Doc. No 140, pp. 16-17.] Although the Court denied  
9 Welk’s previous motion, when ruling on a motion for summary judgment, the court considers all the  
10 evidence in support or against the claim to determine if there is a genuine dispute.<sup>19</sup> Therefore, the  
11 nonmoving party cannot simply rest on naked assertions in the complaint or unsupported declarations.  
12 *See e.g., LeBlanc v. Salem*, 196 F.3d 1, 2 (1st Cir.1999) (stating that when ruling on a motion for  
13 summary judgment the court must restrict its inquiry to facts supported by the record. It does “not give  
14 credence to empty rhetoric . . . but credit[s] only those assertions that are supported by materials of  
15 evidentiary quality”); *Nelson v. Pima Cmty. College*, 83 F.3d at 1081-82. (“[M]ere allegation and  
16 speculation do not create a factual dispute for purposes of summary judgment.”).

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18 <sup>16</sup> *See Trinkle v. Cal. State Lottery*, 71 Cal.App.4th 1198, 84 Cal.Rptr.2d 496, 500 (1999)  
19 (rejecting private nuisance claim where plaintiff owned vending machines installed in third-party  
business establishments but had no interest in the real property of those businesses).

20 <sup>17</sup> Defendants also provided the Court with the Legislative history to the Vacation and  
21 Ownership Act of 2004, wherein the Legislature amended California Business and Professions Code  
22 section 11004.5, to state that “time-share plans. . . are not subdivisions or subdivided lands subject to  
this chapter.” (internal quotations omitted).

23 <sup>18</sup> In pertinent part, the Court’s previous order stated, “In light of the Judge Anello’s previous  
24 order denying Defendant’s motion to dismiss Plaintiff’s fourth cause of action for private nuisance [Doc.  
25 No. 57 at 11], and the fact that Plaintiff did not solely allege a personal property interest consisting only  
of points in the 4AC [Doc. No. 58 at 7; Doc. No. 62 at 6–7], as Defendant contends [Doc. No. 61 at 5],  
the 4AC still *alleges enough facts to survive a motion to dismiss.*” (emphasis added)

26 <sup>19</sup> The moving party has the initial burden of production for showing the absence of any material  
27 fact. *Celotex*, 477 U.S. at 331. The moving party can satisfy this burden in two ways, (1) by submit  
28 affirmative evidence that negates an essential element of the nonmoving party's claim, or (2)  
demonstrating to the Court that the nonmoving party's evidence is insufficient to establish an essential  
element of the nonmoving party's claim.” *Id.* Once the moving party has satisfied its initial burden of  
production, the burden of proof shifts to the nonmovant to show that there is a genuine issue of material  
fact. *Id.*

1           Accordingly, the Court finds Defendants have submitted sufficient evidence to establish that  
2 Plaintiff's ownership of Platinum Points do not constitute a real property interest. Therefore, the burden  
3 shifts to Plaintiff to assert there is a genuine dispute with respect to the characterization of his interest.  
4 However, after searching the record for evidence to support Plaintiff's contentions, the Court finds none,  
5 and instead finds additional evidence in support of Defendants' claim.<sup>20</sup> Moreover, even if the Court  
6 found that Plaintiff had a real property interest in his Platinum Points, Plaintiff has failed to present  
7 specific facts as to how the interference was both substantial and unreasonable.<sup>21</sup> *Anderson v. Liberty*  
8 *Lobby, Inc.*, 477 U.S. 242, 256 (1986) (finding the nonmovant must not rest on conclusory allegations  
9 and must present "specific facts showing there is a genuine issue for trial."); *San Diego Gas & Elec.*  
10 *Co.*, 13 Cal.4th at 938 (to sustain a cause of action for private nuisance there must be substantial and  
11 unreasonable interference with plaintiff's enjoyment of his land). Accordingly, the Court **GRANTS**  
12 Defendants' motion for summary judgment on Plaintiff's private nuisance claim.

13 ***V. Unfair Competition in Violation of California Business and Professions Code § 17200, et seq.***

14           California's UCL prohibits unfair competition by means of any unlawful, unfair or fraudulent  
15 business practice. Cal. Bus. & Prof. Code §§ 17200-17210. Because the statute is written in the  
16 disjunctive, it prohibits three separate types of unfair competition: (1) unlawful acts or practices, (2)  
17 unfair acts or practices, and (3) fraudulent acts or practices. *Cel-Tech*, 20 Cal. 4th at 180; *Kearns v.*  
18 *Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir.2009). Here, Plaintiff's fifth cause of action alleges  
19 Defendants violated all three sub-parts of the UCL. [Doc. No. 58, p. 16.] Defendants assert Plaintiff's  
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22           <sup>20</sup> Plaintiff's own deposition testimony acknowledges that his time-share interest is not his  
23 personal property because he can't do what he wants with it, as he has to share time with other people.  
24 [Martinez Depo, 221:1-17.] Moreover, attached to Plaintiff's moving papers is the Public Report,  
whereby it specifically states Plaintiff did not receive an interest in real property. These materials could  
not properly be considered by the Court at the motion to dismiss stage.

25           <sup>21</sup> Plaintiff's own deposition testimony, which was not refuted in Plaintiff's moving papers, states  
26 that Plaintiff enjoyed his room, and although he did complain about a "musty" smell, he never requested  
27 to change rooms. [Martinez Depo., 98-105.] Plaintiff's only evidence in support of his claim is that  
28 "[fo]llowing our stay at Welk Resort San Diego in 2009 and our discovery of the mold issues at the  
Welk Resort San Diego property, my family and I have refused to visit or stay at Welk Resort San  
Diego and will continue to refuse to visit or stay at Welk Resort San Diego." [Martinez Depo., ¶ 7.]  
Because such evidence is "merely colorable, [and] is not significantly probative," summary judgment is  
appropriate. *Anderson*, 477 U.S. at 255.

1 UCL claim fails for a multitude of reasons, including lack of standing and failure to proffer sufficient  
2 evidence to support a violation under the unlawful, unfair, or fraudulent prong.

3 **1. Standing Under the UCL**

4 Defendants first argue Plaintiff lacks standing to sue under the UCL. Specifically, Defendants  
5 contend that Plaintiff (1) has not suffered “injury in fact” because he has not experienced any physical  
6 injuries and the value of his Platinum Points have not diminished in value; (2) has not suffered a legally  
7 cognizable injury because he is still able to use his Points; and (3) even if Plaintiff had evidence that his  
8 Platinum Points had diminished in value, there is no casual connection between Defendants’ alleged  
9 wrongdoing and Plaintiff’s speculation as to the value of his Platinum Points. [Doc. No. 128, 14:15-25.]  
10 Conversely, Plaintiff relies on *Kwikset Corporation v. Superior Court*, in which the California Supreme  
11 Court stated that there are “innumerable ways in which economic injury from unfair competition may be  
12 shown” including: (1) when a plaintiff surrenders more in a transaction than he otherwise would have;  
13 (2) has a present or future property interest diminished; (3) is deprived of money or property to which he  
14 has a cognizable claim; or (4) is required to enter into a transaction, costing more money or property,  
15 that would otherwise have been unnecessary. 51 Cal.4th 310, 323 (2011). Thus, Plaintiff argues that  
16 just as the plaintiff in *Kwikset* would not have bought the padlock if the seller had disclosed where it  
17 was really made, he would not have purchased Platinum Points from Welk had he known of the mold  
18 issues at the Resort. [Martinez Decl., ¶ 7.]

19 To have standing under the UCL, as amended by Proposition 64, a plaintiff must establish that  
20 he has (1) suffered an injury in fact; and (2) lost money or property as a result of the unfair competition.  
21 Cal. Bus. & Prof.Code § 17204; *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir.2009).  
22 The “as a result of” language in Section 17204 requires the plaintiff to show a causal connection  
23 between the defendant’s alleged UCL violation and Plaintiff’s injury. *See Rubio v. Capital One Bank*,  
24 613 F.3d 1195, 1204 (9th Cir. 2010). “In approving Proposition 64, the California voters declared their  
25 intent to prohibit private attorneys from filing lawsuits for unfair competition where they have no client  
26 who has been injured in fact under the standing requirements of the United States Constitution.”  
27 *Buckland v. Threshold Enters., Ltd.*, 155 Cal.App.4th 798, 814, 66 Cal.Rptr.3d 543 (Cal.Ct.App.2007)  
28 (internal quotations omitted). Thus, to plead a UCL claim, a plaintiff must show he has suffered a

1 distinct and palpable injury as a result of the alleged unlawful or unfair conduct. *Buckland*, 155  
2 Cal.App.4th at 814, 66 Cal.Rptr.3d 543 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372,  
3 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)) (internal quotation marks omitted). The requisite injury must be  
4 “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or  
5 imminent, not conjectural or hypothetical.” *Buckland*, 155 Cal.App.4th at 814, 66 Cal.Rptr.3d 543  
6 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992))  
7 (internal quotation marks omitted).

8 Cases decided since Proposition 64 have concluded that a plaintiff suffers an injury in fact for  
9 purposes of standing under the UCL when he or she has:

10 (1) Expended money due to the defendant's acts of unfair competition. *See e.g.*, *Aron v.*  
11 *U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 802-803, 49 Cal.Rptr.3d 555  
12 (plaintiff alleged he was required to purchase excess fuel when returning rental truck);  
13 *Monarch Plumbing Co. v. Ranger Ins. Co.*, 2006 WL 2734391 (E.D.Cal., Sept. 25, 2006)  
14 (plaintiff alleged he paid higher insurance premiums because of defendant insurer's  
15 settlement policies); *Witriol v. LexisNexis Group*, 2006 WL 4725713 \*6-7 (N.D.Cal., Feb.  
16 10, 2006) (plaintiff incurred costs to monitor and repair damage to his credit caused by  
17 defendants' unauthorized release of private information]; *Southern Cal. Housing v. Los*  
18 *Feliz Towers Homeow.*, 426 F.Supp.2d 1061, 1069 (C.D.Cal.2005) (housing rights center  
19 lost financial resources and diverted staff time investigating case against defendants);  
20 *Laster v. T-Mobile USA, Inc.*, 407 F.Supp.2d 1181, 1194 (S.D.Cal.2005) (defendants  
21 advertised cellular phones as free or substantially discounted when purchased with cellular  
22 telephone service, but plaintiffs were required to pay sales tax on the full retail value of the  
23 phones);

24 (2) Lost money or property. *See e.g.*, *Huntingdon Life Sciences, Inc. v. Stop Huntingdon*  
25 *Animal Cruelty USA, Inc.*, 129 Cal.App.4th 1228, 1240, 1262 (2005) (plaintiff's home and  
26 car were vandalized by animal rights protestors); or

27 (3) Been denied money to which he or she has a cognizable claim. *See e.g.*, *Progressive*  
28 *West Ins. Co. v. Super. Ct.*, 135 Cal.App.4th 263, 269-270, 285, fn. 5 (2005) (insurance  
company paid insured's medical bills, then sued to recover that money when insured  
collected damages from the third party who caused his injuries; insured had standing to  
bring UCL claim against insurance company); *Starr-Gordon v. Mass. Mut. Life Ins. Co.*  
2006 WL 3218778, \*1, \*6-7 (E.D.Cal., Nov. 7, 2006) (plaintiff challenged the process by  
which defendant terminated her disability benefits).<sup>22</sup>

Therefore, after *Kwikset*, “plaintiffs who can truthfully allege they were deceived by a product’s label  
into spending money to purchase the product, and would not have purchased it otherwise, have ‘lost  
money or property’ within the meaning of Proposition 64 and have standing to sue.” *Kwikset*, 120  
Cal.Rptr.3d 741, 246 P.3d at 881.

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<sup>22</sup> *See Hall v. Time*, 158 Cal.App.4th 847, 854-55 (2008) (cataloging cases discussing standing  
under the UCL after Proposition 64).

1 Here, the Court finds Plaintiff's claim fails as a matter of law because he has failed to meet the  
2 standing requirement under the UCL. Specifically, the Court finds Plaintiff's reliance on *Kwikset*  
3 misguided as the facts and circumstances in *Kwikset* are distinguishable from the instant case. Whereas  
4 the court in *Kwikset* found that consumers had suffered injury in fact when certain locksets were labeled,  
5 "Made in America," when in fact they were not, here, although Plaintiff alleges that an employee of  
6 Welk stated that the Resort was "clean, safe, and well-maintained," he offers no proof to support the  
7 assertion that these statements were in fact false. [Martinez Decl., ¶ 7.] For example, other than his  
8 own self-serving declaration, Plaintiff's only proof to support his contention are several emails between  
9 Wade Brent, the Chief Engineer of Welk, and Sean Coogan, Welk's General Manager, wherein the two  
10 discussed mold remediation and terminate issues in several units. *See e.g., Hansen v. United States*, 7  
11 F.3d 137, 138 (9th Cir.1993); *United States v. One Parcel of Real Property*, 904 F.2d 487, 492 n. 3 (9th  
12 Cir.1990) (finding a conclusory, self-serving affidavit, lacking detailed facts and any supporting  
13 evidence, is insufficient to create a genuine issue of material fact). However, although Plaintiff offers  
14 this email evidence to support his argument, he fails to refute statements by Sean Coogan, wherein  
15 Coogan states that the Resort has from time to time found mildew or mold growth, but upon discovery,  
16 takes immediate steps to implement appropriate remedial measures.<sup>23</sup> [Coogan Decl. ¶ 9.] Thus,  
17 Plaintiff's evidence supports the argument that when Welk was made aware of mold issues at the Resort,  
18 it dealt with such issues in a timely fashion.

19 Accordingly, unlike in *Kwikset*, where it was undisputed that *all* the locksets were not in fact  
20 "Made in America," here, Plaintiff has failed to offer proof that the Resort is not otherwise "clean, safe,  
21 and well-maintained," or that *all* units at the Resort are infested with mold. Therefore, as Plaintiff is not  
22 barred from using his Platinum Points at the Resort or any other non-Welk facility, he has not shown  
23 that he has "lost money or profits" within the meaning of Proposition 64. Nevertheless, even if the  
24 Court found Plaintiff had standing under the UCL, Plaintiff has failed to produce sufficient evidence to  
25 prove Defendants actions were unlawful, fraudulent, or otherwise constituted unfair business practices  
26 under the UCL.

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28 <sup>23</sup> Coogan also states that mold or mildew growth is common in buildings with bathrooms and  
kitchens. [Coogan Decl., ¶ 9.]



1                                   **2.       Unlawful Business Practices**

2                   By proscribing “any unlawful” business practices Section 17200 “borrows” violations of other  
3 laws and treats them as unlawful practices that the unfair competition law makes independently  
4 actionable. *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d  
5 548, 561, 973 P.2d 527 (1999). Thus a “violation of almost any federal, state, or local law may serve as  
6 the basis for a[n] [unfair competition] claim.” *Plascencia v. Lending 1st Mortg.*, 583 F. Supp.2d 1090,  
7 1098 (N.D. Cal. 2008) (citing *Saunders v. Super. Ct.*, 27 Cal. App. 4th 832, 838–39 (1994)).  
8 *Progressive West Ins. Co. v. Yolo County Super. Ct.* (2005) 135 Cal.App.4th 263, 287, 37 Cal.Rptr.3d  
9 434 (“An unlawful business practice under [Business and Professions Code] section 17200 is an act or  
10 practice, committed pursuant to business activity, that is at the same time forbidden by law.”) (internal  
11 quotations omitted).

12                   Plaintiff alleges that Defendants engaged in “unlawful” conduct by violating: (1) California Civil  
13 Code § 2079 (failure of a real estate broker or salesperson to a prospective purchaser of residential real  
14 property to conduct a visual inspection of the property offered for sale and to disclose to that prospective  
15 purchaser all facts materially affecting the value or desirability of the property); (2) California Civil  
16 Code § 1102.6 (failure to provide an accurate and current “Real Estate Transfer Disclosure Statement”);  
17 and (3) California Civil Code § 1710 (fraudulently suppressing information about the existence of  
18 mold).<sup>24</sup> However, because Sections 2079 and 1102.6 apply only to the purchase of real property  
19 comprised of four units or less, and the Court has already found that ownership of Platinum Points do  
20 not constitute an interest in real property, nevertheless that Welk Resort San Diego has over 650 units—  
21 more than the statutory maximum—such violations cannot constitute predicate acts under the UCL  
22 unlawful prong.<sup>25</sup> Similarly, because Section 1710 only defines “deceit,” and does not provide an  
23 applicable violation, such provision cannot be the basis of Plaintiff’s claim.<sup>26</sup> *See Samura v. Kaiser*

24 \_\_\_\_\_  
25                   <sup>24</sup> Plaintiff’s 4AC originally contained a violation of California Civil Code Section 1929.  
26 However, the Court granted Defendants’ motion to strike as to that violation. [Doc. No. 70.]

27                   <sup>25</sup> Plaintiff did not refute the non-application of sections 2079 and 1102.6. [Doc. No. 140, pp. 15-  
28 16.]

<sup>26</sup> Plaintiff did not oppose Defendants assertion that section 1710 could not be a basis of UCL  
liability under the unlawful prong.

1 *Found. Health Plan. Inc.*, 17 Cal.App.4th 1284, 1301 (1993) (finding that various code sections  
2 detailing legislative purpose and setting forth disclosure requirements could not be enjoined under the  
3 UCL”). Accordingly, the Court **GRANTS** Defendants’ motion for summary judgment under the  
4 unlawful prong alleging violations of California Civil Code Sections 2079, 1102.6, and 1710.

### 5 **3. Fraudulent Business Practices**

6 Plaintiff’s allegations under the fraudulent prong fail for similar reasons. To state a claim for  
7 fraud under the UCL a plaintiff must show that “reasonable members of the public are likely to be  
8 deceived” by the alleged unfair business practice. *Rubio v. Capital One Bank*, 613 F.3d 1195, 1204 (9th  
9 Cir.2010) (internal quotations omitted).<sup>27</sup> Deception can be “based on representations to the public  
10 [that] are untrue, and also those which may be accurate on some level, but will nonetheless tend to  
11 mislead or deceive.” *Mass. Mutual Life Ins. Co. v. Super. Ct.* (2002) 97 Cal.App.4th 1282, 1289-90,  
12 119 Cal.Rptr.2d 190; *Prata v. Super. Ct.* (2001) 91 Cal.App.4th 1128, 1137, 111 Cal.Rptr.2d 296. The  
13 determination as to whether a business practice is deceptive is based on the likely effect such practice  
14 would have on a reasonable consumer.<sup>28</sup> *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496,  
15 507, 129 Cal.Rptr.2d 486. *Puentes*, 72 Cal.Rptr.3d at 909 (“Unless the challenged conduct targets a  
16 particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable  
17 consumer.”).

18 “[I]n order to be deceived, members of the public must have had an expectation or an assumption  
19 about” the matter at hand. *Bardin v. DaimlerChrysler Corp.*, 136 Cal.App.4th 1255, 39 Cal.Rptr.3d  
20 634, 639–48 (2006). Although “surveys and expert testimony regarding consumer assumptions and  
21 expectations may be offered,” they are not required. Nevertheless, isolated examples of actual

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22 <sup>27</sup> Fraud under Section 17200 does not refer to the common law tort of fraud, but only requires a  
23 showing that members of the public “are likely to be deceived.” *Puentes v. Wells Fargo Home Mortg.,*  
24 *Inc.*, 160 Cal.App.4th 638, 72 Cal.Rptr.3d 903, 909 (2008). “This distinction reflects the UCL’s focus  
25 on the defendant’s conduct, rather than the plaintiff’s damages, in service of the statute’s larger purpose  
of protecting the general public against unscrupulous business practices.” *Morgan v. AT&T Wireless*  
*Servs, Inc.*, 177 Cal.App.4th 1235, 1255 (2009).

26 <sup>28</sup> Nevertheless, claims arising under the UCL’s fraudulent prong must be pleaded with  
27 particularity under Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.2009); *Swartz v.*  
28 *KPMG LLP*, 476 F.3d 756, 764 (9th Cir.2007) (stating that a plaintiff “must include a description of the  
time, place, and specific content of the false representations as well as the parties to the  
misrepresentations”).

1 deception are insufficient to state a claim under the UCL’s fraudulent prong. *See Clemens v.*  
2 *DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008). Moreover, where a plaintiff alleges that  
3 the defendant failed to disclose material facts, the plaintiff must first establish that the defendant had a  
4 duty to disclose those facts. *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal.App.4th 1544, 1557, 62  
5 Cal.Rptr.3d 177 (2007) (“Absent a duty to disclose, the failure to do so does not support a claim under  
6 the fraudulent prong of the UCL.”).

7 Here, Plaintiff alleges Defendants violated the fraudulent prong by failing to disclosure to  
8 consumers that time-share dwellings at the Resort suffered from dangerous leaks, water intrusion, mold,  
9 mildew, and/or fungus; failed to truthfully respond to inquiries by time-share point owners regarding the  
10 condition of the resort; and disseminated false and misleading statements regarding the condition of  
11 time-share dwellings. (Doc. No. 58, p. 16:19-28-17:1-3.) Moreover, Plaintiff alleges that the “Welk  
12 Defendants had a duty to disclose the mold issues in light of the fact that (i) Plaintiff advised the Welk  
13 Defendants about the specific reason for his purchase; and (ii) the Welk Defendants assured Plaintiff, in  
14 light of Plaintiff’s stated reasons for the purchase, that the Resort was safe.” [Doc. No. 151, p. 3:20-24.]  
15 Conversely, Defendants contend they were under no legal duty to disclose the presence of naturally  
16 occurring substances, and nevertheless, Plaintiff presented no evidence that the Resort was not safe and  
17 or well-maintained.

18 Although Plaintiff does not need to present evidence that he was “actually deceived” by  
19 Defendants conduct, to prevail, Plaintiff must produce evidence showing “a likelihood of confounding  
20 an appreciable number of reasonably prudent purchasers exercising ordinary care.” *See Clemens*, 534  
21 F.3d 1017 at 1026. Plaintiff has failed to met this burden. For example, similar to *Daugherty v.*  
22 *American Honda Motor Company*, 144 Cal.App.4th 824, 830, 51 Cal.Rptr.3d 118 (2006), wherein the  
23 California Court of Appeal found the public was not likely to be deceived because “[t]he only  
24 expectation buyers could have had about [a particular] engine was that it would function properly for the  
25 length of [the manufacturer]’s express warranty,” here, the only expectation buyers of Platinum Points  
26 could have had with respect to the maintenance and cleanliness of the Resort, even taking into account  
27 Defendants’ representations, was that its would be clean, safe, and well maintained. Thus, even though  
28 Defendants may have assumed a duty to Plaintiff by voluntarily responding to his inquiries regarding

1 the maintenance and suitability of the Resort for his son, aside from Plaintiff’s bare allegations, he has  
2 produced no evidence to suggest that a reasonable consumer would have expected or assumed that the  
3 entire Resort was, and has always been, free of any mold, mildew, or water intrusion. *See e.g., In re*  
4 *sony Grand Wega KDF-E A10/A20 Series Rear projection HDTV Tel. Litig.*, 758 F.Supp.2d 1077, 1089  
5 (S.D. Cal. 2010) (dismissing plaintiff’s claims for failing to allege actual misstatements about “absolute  
6 characteristics of the televisions”). This is only further compounded by the fact that Plaintiff has not  
7 shown that Defendants made “affirmative misrepresentations” as to the safety and maintenance of the  
8 Resort. Accordingly, the Court **GRANTS** Defendants’ motion for summary judgment under the  
9 fraudulent prong.

#### 10 **4. Unfair Business Practices**

11 Unfair business practices are not defined under the UCL. *Davis v. HSBC Bank Nevada, N.A.*,  
12 691 F.3d 1152, 1169 (9th Cir. 2012). Accordingly, there are two opposing lines of California appellate  
13 court opinions defining what constitutes an “unfair” business practices for purposes of the UCL. *See,*  
14 *e.g., Morgan v. Harmonix Music Sys., Inc.*, 2009 WL 2031765, at \*4 (N.D.Cal. July 7, 2009) (noting the  
15 split in authority); *Bardin v. DaimlerChrysler Corp.*, 136 Cal.App.4th 1255, 39 Cal.Rptr.3d 634, 639–48  
16 (Ct.App.2006) (same). “One line defines ‘unfair’ as prohibiting conduct that is immoral, unethical,  
17 oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the  
18 utility of the defendant's conduct against the gravity of the harm to the alleged victim.” *Id.* (citing *Smith*  
19 *v. State Farm Mut. Auto. Ins. Co.* 93 Cal.App.4th 700, 113 Cal.Rptr.2d 399, 415 (Ct.App.2001). “The  
20 other line of cases holds that the public policy which is a predicate to a consumer unfair competition  
21 action under the ‘unfair’ prong of the UCL must be tethered to specific constitutional, statutory, or  
22 regulatory provisions.” *Bardin*, 39 Cal.Rptr.3d at 636 (citing *Scripps Clinic v. Super. Ct.*, 108  
23 Cal.App.4th 917, 134 Cal.Rptr.2d 101, 116 (2003)).

24 Here, Plaintiff’s allegations under the unfair prong fail under either test. First, the undisputed  
25 evidence in this case shows that although the Resort is not immune to mold, mildew, and/or water  
26 intrusion issues, when these conditions occur, the Resort takes steps to immediately remedy the  
27 problem. [Doc. No. 128, Coogan Decl., ¶ 9.] Moreover, although Plaintiff is entitled to know about the  
28 presence of mold, mildew, or water intrusion issues at the Resort, failure to disclose such issues without

1 inquiry does not constitute “unfair” conduct. *See e.g., Clemens*, 534 F.3d 1017 at 1027 (citing  
2 *Daugherty*, 144 Cal.App.4th at 839, 51 Cal.Rptr.3d 118) (“[T]he failure to disclose a defect that might,  
3 or might not, shorten the effective life span of an automobile part that functions precisely as warranted  
4 throughout the term of its express warranty cannot be characterized as causing a substantial injury to  
5 consumers, and accordingly does not constitute an unfair practice under the UCL.”). Second, because  
6 the Court has already found that Plaintiff’s alleged violations under the unlawful prong fails, Plaintiff  
7 cannot properly tether his “unfair” allegations to an applicable statutory violation. Accordingly, the  
8 Court **GRANTS** Defendants’ motion for summary judgment under the unfair prong.

9 **VI. Breach of the Implied Warranty of Habitability**

10 Plaintiff’s sixth cause of action alleges Defendants breached the implied warranty of habitability  
11 by (1) allowing water to intrude into the time-share dwellings and Resort; (2) failing to repair, in a  
12 timely and reasonable manner, the defective conditions in and around the time-share dwellings and the  
13 Resort; (3) failing to abate the mold, mildew and/or fungus throughout the time-share dwellings and  
14 Resort; and, (4) failing to notify Plaintiff of the presence of mold, mildew and/or fungus and the health  
15 risks associated with such conditions.<sup>29</sup> [4AC ¶ 66.] Defendants argue that because Plaintiff is not  
16 Welk’s tenant, Plaintiff’s claim fails as a matter of law. [Doc. No. 128, p. 16.] The Court is inclined to  
17 agree.

18 “There is a common law implied warranty of habitability in residential leases in California. . .”  
19 *Fairchild v. Park*, 90 Cal. App. 4th 919, 924 (2001) (quoting *Green v. Superior Court*, 10 Cal. 3d. 616,  
20 619 (1974)). Accordingly, a landlord has a “duty to maintain leased premises in a habitable condition  
21 during the term of the lease.” *Green*, 10 Cal.3d at 623. Violations of the implied warranty of  
22 habitability are tethered to violations of the state’s housing codes. *See Green*, 10 Cal.3d at 719.  
23 Accordingly, “substantial compliance with applicable building and housing code standards, which  
24 materially affect health and safety, will suffice to meet the landlord’s obligations under the common law  
25 implied warranty of habitability.” *Id.*

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26  
27 <sup>29</sup> In addition to the common law implied warranty of habitability, a landlord has a “statutory  
28 obligation under California Civil Code Section 1941, to keep residential property in a condition fit for  
[human] occupation, and repair all subsequent dilapidations therefore.” *Fairchild*, 90 Cal. App.4th at  
925 (quoting Cal. Civ. Code § 1941). Plaintiff has also alleged violation of Section 1941.


1 Here, however, because Plaintiff has failed to present any evidence to rebut Defendants'  
2 argument that Plaintiff's Platinum Points are not in the nature of a lease, as they do not constitute an  
3 interest in real property, the Court finds Plaintiff has failed to present a genuine dispute. *See Fairchild,*  
4 *90 Cal. App.4th at 924 (holding the implied warranty is implied in all residential leases in California)*  
5 (emphasis in original). To present a genuine dispute, and thereby survive summary judgment, Plaintiff  
6 cannot hang his hat on the Court's ruling at the motion to dismiss stage. *See Jiminez v. Accounts*  
7 *Receivable Mgm't, Inc., 2010 WL 5829206 \*4 (C.D. Cal. 2010)* (additional evidence is required once  
8 the Plaintiff proceeds past the pleading stage). Moreover, even if Plaintiff could prove that ownership of  
9 Platinum Points gave rise to a claim for breach of the implied warranty of habitability, Plaintiff has  
10 failed to provide evidence that the Resort is not in compliance with applicable housing codes. To the  
11 contrary, the only evidence Plaintiff presents is that there were mold problems at the Resort in 2009, and  
12 when such problems were uncovered, the Resort took steps to remedy the issue. Accordingly the Court  
13 **GRANTS** Defendants' motion for summary judgment with respect to Plaintiff's sixth cause of action  
14 alleging breach of the implied warranty of habitability.

15 **CONCLUSION**

16 For the reasons set forth above, the Court **GRANTS** Defendants' Motion for Summary Judgment  
17 in its entirety. The Clerk of the Court is instructed to enter judgment accordingly.

18  
19 **IT IS SO ORDERED.**

20  
21 **DATED: October 30, 2012**

22   
23 **Hon. Anthony J. Battaglia**  
24 **U.S. District Judge**