SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding
Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 8/15/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (8/13/2024) you must notify the:

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

TO APPEAR AT THE HEARING: The Court prefers in-person appearances or by Teams. If you must appear virtually, please use video.

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

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

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV383313	Whispering Oaks Residential Care Facility LLC et al vs Cincinnati Insurance Company	Motion: Order to Dismiss Action for Failure to Serve Complaint [CCP 583.410 & 583.420] by Defendant Cincinnati Insurance Company [**continued from 7/23/2024**] Ctrl Click (or scroll down) on Line 1-2 for tentative ruling. The court will prepare the order.
LINE 2	21CV383313	Whispering Oaks Residential Care Facility LLC et al vs Cincinnati Insurance Company	Motion: Quash Service of Summons for Lack of Jurisdiction and to Dismiss Action [CCP 418.010(a)(1)] by Defendant Cincinnati Insurance Company [**continued from 7/23/2024**] Ctrl Click (or scroll down) on Line 1-2 for tentative ruling. The court will prepare the order.

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DATE: 8/15/2024 TIME: 9:00 A.M.

LINE 3	23CV423142	Beverly Hughes vs McDonald's Corporation	Hearing: Motion to Strike Portions of Plaintiff Beverly Hughes' Complaint by Defendant McDonald's Corporation [**continued from 7/23/2024**] Demurrer/Motion to Strike are unopposed. Demurrer is SUSTAINED WITH 15 DAYS LEAVE TO AMEND. Motion to strike is MOOT. Moving party to prepare order for Lines 3 and 4 combined for court signature.
LINE 4	23CV423142	Beverly Hughes vs McDonald's Corporation	Hearing: Demurrer to Plaintiff's Complaint by Defendant McDoanld's Corporation [**continued from 7/23/2024**] Demurrer/Motion to Strike are unopposed. Demurrer is SUSTAINED WITH 15 DAYS LEAVE TO AMEND. Motion to strike is MOOT. Moving party to prepare order for Lines 3 and 4 combined for court signature.
LINE 5	23CV426083	N.R. WATERLOO, LLC et al vs FIRST COMMERCE, LLC et al	Hearing: Demurrer to First Amended Complaint by Defendant First Commerce, LLC [**continued from 7/23/2024**] Ctrl Click (or scroll down) on Lines 5-6 for tentative ruling. The court will prepare the order.
LINE 6	23CV426083	N.R. WATERLOO, LLC et al vs FIRST COMMERCE, LLC et al	Motion: Strike by Defendant First Commerce [**continued from 7/23/2024**] Ctrl Click (or scroll down) on Lines 5-6 for tentative ruling. The court will prepare the order
LINE 7	23CV420692	Andre LaForge et al vs Matthew Leal	Motion: Leave to File and Deem Filed Defendant's Anti-SLAPP Motion, and for Expedited Briefing by Defendant Matthew Leal Ctrl Click (or scroll down) on Line 7 for tentative ruling. The court will prepare the order.
LINE 8	24CV436785	Cameron Moore et al vs Michael Halloran et al	Motion: Order to expunge lis pendens and request for attorneys' fees/costs by Def. Michael Halloran [**continued from 7/23/2024**] Ctrl Click (or scroll down on Line 8 for tentative ruling. The court will prepare the order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
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DATE: 8/15/2024 TIME: 9:00 A.M.

LINE 9	23CV425809	Santa Clara County Federal Credit Union vs Kenny Wong	Motion: Withdraw as attorney. Motion to be relieved as counsel by Paul Brisson as to Defendant Kenny Wong [**continued from 7/23/2024**] Unopposed and GRANTED. Moving attorney to submit **updated** order (with time, date, and Dept., Judge William J. Monahan) for signature by court.
LINE 10			
LINE 11			
LINE 12			

- oo0oo -

Calendar Line 1-2

Case Name: *Whispering Oaks Residential Care Facility LLC, et al. v. Cincinnati Insurance Company*
Case No.: 21-CV-383313

Motion to Quash Service of Summons and Motion to Dismiss for Failure to Serve the Complaint by Defendant Cincinnati Insurance Company

Factual and Procedural Background

This is an insurance coverage action brought by plaintiffs Whispering Oaks Residential Care Facility LLC, Whispering Oaks RFC Management Co. Inc. (collectively, "Whispering Oaks Entities"), and Naren Chaganti ("Chaganti")[1] (collectively "Plaintiffs") against defendant Cincinnati Insurance Company ("Cincinnati").

According to the complaint, the Whispering Oaks Entities owned and operated a business in Missouri. (Complaint at ¶ 1.) Chaganti is the principal and sole officer of the Whispering Oaks Entities and a California resident. (Id. at ¶ 2.)

In July 2008, the Whispering Oaks Entities purchased an all-risk commercial property insurance policy from defendant Cincinnati, an Ohio corporation, to cover property damage and certain other risks associated with the property and business operation of the Whispering Oaks Entities. (Complaint at ¶¶ 3-4.) Such losses included property damage to the building, employee dishonesty, theft, vandalism and business interruption. (Id. at ¶ 10.)

In January, February, July, and December 2010, Plaintiffs notified defendant Cincinnati of certain incidents and requested payment to cover the losses. (Complaint at ¶¶ 15-22, 40-46.) Cincinnati however failed to make payments under the policy. (Id. at ¶¶ 15, 21-22, 42-46.)

On August 19, 2014, Plaintiffs filed suit against defendant Cincinnati in Cole County, Missouri ("Missouri Action"). (Complaint at ¶ 47.) The suit was not prosecuted in part because damages resulting from the losses were incomplete and Cincinnati had no agent for service of process in Missouri and thus process on Cincinnati could not be served. (Ibid.) In October 2015, the Cole County Circuit Court dismissed the Missouri Action without prejudice for failure to prosecute. (Id. at ¶ 48.)

On January 6, 2020, Plaintiffs filed an action in Santa Clara County (case no. 20CV361234) ("First Action") that was later dismissed without prejudice by Judge Takaichi on the ground that Plaintiffs failed to appear at an OSC hearing. (Complaint at ¶ 80.)

On May 28, 2021, Plaintiffs filed the operative complaint against defendant Cincinnati alleging causes of action for:

(1) Breach of Contract;
(2) Vexatious Refusal to Pay;
(3) Bad Faith – Breach of Covenant of Good Faith and Fair Dealing;

[1] Plaintiff Chaganti is also attorney of record for Plaintiffs.

(4) Breach of Confidentiality;
(5) Fraud and Deceit; and
(6) Violation of California Unfair Competition Law.

Currently before the court are defendant Cincinnati's motions to quash service of summons and to dismiss for failure to serve the complaint. Plaintiffs filed written oppositions. Cincinnati filed reply papers. Both sides submitted requests for judicial notice.

Motion to Quash Service of Summons

Defendant Cincinnati moves to quash service of summons as the doctrine of direct estoppel applies to bar Plaintiffs from pursuing this action.

Cincinnati's Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In support of the motion, defendant Cincinnati requests judicial notice ("RJN") of the following:

- Plaintiffs' complaint in the First Action;
- Plaintiffs' first amended complaint in the First Action;
- Cincinnati's RJN filed in support of its motion to quash filed in the First Action;
- Chaganti Declaration filed in the First Action attaching a copy of a second amended complaint;
- Trial Court order granting Cincinnati's motion to quash service of summons in the First Action, filed March 7, 2022;
- The March 13, 2023 opinion issued by the Sixth District Court of Appeal affirming the trial court's order granting Cincinnati's motion to quash in the First Action; and
- The complaint filed by Chaganti, as assignee of the Whispering Oaks Entities against Cincinnati in the Common Pleas Court of Franklin County, Ohio (case no. 24CV002054). (See RJN at Exs. A-G.)

These exhibits are subject to judicial notice as records of the California superior and appellate courts and Ohio state court under Evidence Code section 452, subdivision (d). (See *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 658 ["Evidence Code section 452, subdivision (d) authorizes judicial notice of court records."]; see also *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) Plaintiffs do not oppose the request. Furthermore, the exhibits are relevant to points raised in support of the motion to quash. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Therefore, the request for judicial notice is GRANTED.

Plaintiffs' Request for Judicial Notice

In opposition, Plaintiffs request judicial notice of the following:

- Santa Clara County Court's notice of availability of hearing dates as of April 15, 2024, as published on the Court's website;
- Santa Clara County Court's notice of availability of hearing dates as of May 6, 2024, as published on the Court's website. (See RJN at Exs. 1-2.)

A court has discretion to take judicial notice of "facts and propositions that are not subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) While not cited specifically by Plaintiffs, this code section allows the court to take judicial notice of these exhibits published on the court's website. Defendant Cincinnati does not oppose the request. And the request is relevant to Plaintiffs' arguments raised in support of the opposition.

Consequently, the request for judicial notice is GRANTED.

Legal Standard

"California's long-arm statute permits a court to exercise personal jurisdiction on any basis consistent with state or federal constitutional principles. [Citations.] The primary focus of the personal jurisdiction inquiry is the relationship of the defendant to the forum state. [Citation.] The 'constitutional touchstone' of this inquiry is whether the defendant 'purposefully established "minimum contacts" in the forum State.' [Citation.]" (*Rivelli v. Hemm* (2021) 67 Cal.App.5th 380, 391 (*Rivelli*).)

" 'Minimum contacts exist where the defendant's conduct in the forum state is such that he should reasonably anticipate being subject to suit there, and it is reasonable and fair to force him to do so.' [Citations.] To comport with constitutional requirements of due process, a California court may assert jurisdiction over a nonresident defendant (who has not consented to suit in the forum) *only* if the defendant's minimum contacts with the forum state are 'such that the maintenance of the suit "does not offend the traditional notions of fair play and substantial justice." ' [Citations.] The minimum contacts test ensures 'a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts' [citation] but only 'where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum state.' [Citation.]" (*Rivelli, supra,* 67 Cal.App.5th at pp. 391-392.)

"When a motion to quash is properly brought, the burden of proof is placed upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. [Citation.] This may be done through presentation of declarations, with opposing declarations received in response." (*Aquila, Inc. v. Super. Ct.* (2007) 148 Cal.App.4th 556, 568.) Where there is a

conflict in the declarations, resolution of the conflict by the trial court will not be disturbed on appeal where the ruling is supported by substantial evidence. (*Ibid.*)

Failure to Comply with Code of Civil Procedure section 418.10, subdivision (b)

As a preliminary matter, Plaintiffs argue the motion to quash should be denied as defendant Cincinnati's motion does not comply with Code of Civil Procedure section 418.10, subdivision (b). That section provides:

> "**The notice shall designate, as the time for making the motion, a date not more than 30 days after filing of the notice**. The notice shall be served in the same manner, and at the same times, prescribed by subdivision (b) of Section 1005. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him or her of a written notice of entry of an order denying his or her motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days." (Code Civ. Proc., § 418.10, subd. (b), emphasis added.)

Here, defendant Cincinnati filed its motion to quash on April 19, 2024 with a hearing date of June 25, 2024. Plaintiffs contend that, at least as of May 6, 2024, the court calendar contained a hearing date on June 18, 2024. (See Plaintiffs' RJN at Ex. 2.) Plaintiffs suggest counsel for Cincinnati intended to select a longer hearing date in order to have the motion heard in a specific department.

Defendant Cincinnati however disputes this contention claiming the court advised its counsel that the earliest available date for hearing was June 25, 2024. In support, Cincinnati submits a declaration from his counsel, W. Eric Blumhardt, who states:

> "When our office contacted the court to reserve May 30 for the motion, we were advised that the earliest available date was now June 25, 2024. We reserved that date for the motion to quash and we [were] able to also schedule the hearing on the motion to dismiss for the same time. I emailed Mr. Chaganti on April 18, 2024 and informed him of the reservation." (Blumhardt Decl. at ¶ 20; Reply at p. 5:3-7.)

This court is inclined to take defense counsel at his word as he did not purposefully intend to select a later hearing date. Furthermore, scheduling a hearing day beyond 30 days is not a basis for denying a motion to quash for lack of personal jurisdiction:

> "[S]cheduling a hearing date beyond 30 days does not invalidate the motion. Nothing in CCP § 418.10 suggests a court must overlook lack of personal jurisdiction or proper service because of a defendant's failure to schedule a hearing date within 30 days." (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1296 (*Olinick*), citing treatise; *Preciado v. Freightliner Custom Chassis Corp.* (2023) 87 Cal.App.5th 964, 969, fn. 4, citing *Olinick* ["A 'tardy hearing date on a motion … under section 418.10' does not 'deprive [] the trial court of jurisdiction to consider the merits of the motion.' "].)

The court therefore considers the merits of the motion to quash.

Direct Estoppel

Direct estoppel originates from the doctrine of res judicata: " 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Mycogen Corp. v. Monsantao Co.* (2002) 28 Cal.4th 888, 896, fn. omitted.) Specifically, direct estoppel precludes relitigation of issues based on the prior decision when the second action is on the same claim. (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 997 (*Sabek*).)

The analysis for direct or collateral estoppel is the same: " ' "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." [Citation.]' [Citation.]" (*Sabek, supra,* 65 Cal.App.4th at pp. 997-998.)

Direct estoppel may apply to prevent a plaintiff from relitigating the personal jurisdiction issue. (*Sabek, supra,* 65 Cal.App.4th at p. 995 ["We hold the issue of personal jurisdiction was precluded by direct estoppel, and therefore affirm the order."]; see also *South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 661 ["[B]ecause the second action was based on the same primary right at issue in the first action, direct estoppel barred relitigation of the personal jurisdiction issue."].)

The party asserting collateral (or direct) estoppel bears the burden of establishing the requirements for the doctrine. (*Lucido v. Super. Ct.* (1990) 51 Cal.3d 335, 341.)

In support of direct estoppel, defendant Cincinnati submits the following timeline of events through its counsel:

- On May 28, 2021, Plaintiffs filed a motion to set aside and vacate the order dismissing the First Action;
- On August 24, 2021, the court heard Plaintiffs' motion to vacate which was granted and set aside the dismissal of the First Action;
- On December 1, 2021, after the court reinstated the case to the civil active list, Cincinnati refiled its motion to quash service of summons based on lack of jurisdiction;
- On March 7, 2022, the court granted the motion to quash and Plaintiffs appealed;
- On March 13, 2023, the Sixth District Court of Appeal affirmed the order quashing service of summons and issued a remittitur on May 16, 2023;
- Thereafter, Plaintiffs filed a petition for review with the California Supreme Court which was rejected. Plaintiffs also filed a petition for certiorari with the United States Supreme Court, which was not accepted; (Blumhardt Decl. at ¶¶ 13-18; see Cincinnati's RJN at Exs. A-F.)

Defendant Cincinnati argues the requirements for direct estoppel have been satisfied as both the trial court and appellate court adjudicated the jurisdictional issue presently before this court on the merits with respect to the motion to quash filed in the First Action. The result was a final decision on the merits following an exhaustion of appellate remedies by Plaintiffs to the Sixth District Court of Appeal, the California Supreme Court and the United States Supreme Court. (See *Riverside County Transportation Com. v. Southern California Gas Co.* (2020) 54 Cal.App.5th 823, 838 ["In California, a judgment is not final for purposes of res judicata or collateral estoppel if an appeal is pending or could still be taken."].) Moreover, the parties in both the First Action and the current action are the same.

In opposition, Plaintiffs do not dispute whether the requirements for direct estoppel have been properly set forth by defendant Cincinnati. Instead, Plaintiffs contend a change in the law precludes application of direct estoppel in this case.

"Even when the threshold requirements for issue preclusion are met, one well-settled equitable exception to the general rule holds that preclusion does not apply when there has been a significant change in the law since the factual findings were rendered that warrants reexamination of the issue. [Citation.] As the high court explained more than a half century ago: '[A] judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.' [Citations.] The Courts of Appeal in this state have likewise long recognized that changes in the law may supply a basis for denying a prior determination preclusive effect. [Citations.]" (*People v. Strong* (2022) 13 Cal.5th 698, 716-717; see *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 616 ["Collateral estoppel does not apply where there are changed conditions or new facts which did not exist at the time of the prior judgment, or where the previous decision was based on different substantive law."].)

In support, Plaintiffs direct the court to *Mallory v. Norfolk Southern Ry Co.* (2023) 600 U.S. 122 (*Mallory*), a recent decision from the United States Supreme Court. There, the plaintiff sued his former employer, a defendant railroad, in Pennsylvania state court to recover damages for negligence under the Federal Employers' Liability Act. The plaintiff was not living in Pennsylvania and his injuries did not occur there. Rather, the plaintiff was residing in Virginia. The railroad was also incorporated and had its principal place of business in Virgina but had extensive and regular operations in Pennsylvania.

The Supreme Court held that defendant railroad consented to the general jurisdiction of the state court over claims against it when it registered to do business as a foreign corporation and had appointed an agent to receive service of process in the Commonwealth. The Court constructed its decision on a Pennsylvania statute which provided that the tribunals of the Commonwealth have general personal jurisdiction over an entity based on its "qualification as a foreign corporation under the laws of this Commonwealth," that is one that is "a registered foreign corporation." (See 42 Pa. Cons. Stat. § 5301(a)(2)(i); *Mallory, supra,* 600 U.S. at p. 134.)

The relevant text from the Pennsylvania statute in *Mallory* provides:

(a) **General rule**. – The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction

over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

(2) **Corporations**.

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth. (See 42 Pa. Cons. Stat. § 5301(a)(2)(i).)

Plaintiffs analogize the Pennsylvania statute to California Insurance Code section 1602 which states:

"Any notice provided by law or by a policy, and any proof of loss, summons or other process may be served on such agent in any action or other legal proceeding against the insurer, and such service gives jurisdiction over the person of such insurer."

In doing so, Plaintiffs assert that Insurance Code section 1602 confers personal jurisdiction over defendant Cincinnati by virtue of its registered agent.

As an initial matter, pointed out in reply, the issue raised by the Supreme Court in *Mallory* was not a new one but had been previously resolved by the Court more than 100 years ago:

The question before us is not a new one. In truth, it is a very old question—and one this Court resolved in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.* (1917) 243 U.S. 93. There, the Court unanimously held that laws like Pennsylvania's comport with the Due Process Clause. (*Mallory, supra*, 600 U.S. at p. 128.)

In reply, defendant Cincinnati also persuasively argues that neither Insurance Code section 1602 nor any other California statute includes language similar to the Pennsylvania statute addressed in *Mallory*. Furthermore, "California does not require corporations to consent to general personal jurisdiction in that state when they designate an agent for service of process or register to do business." (*AM Trust v. UBS AG* (9th Cir. 2017) 681 Fed. Appx. 587, 588-589; see *Thomas v. Anderson* (2003) 113 Cal.App.4th 258, 268 ["We have held designation of an agent for service of process and qualification to do business in California alone are insufficient to permit general jurisdiction."].)

Finally, Plaintiffs' opposition undercuts their position as the Court of Appeal has already rejected their claim for personal jurisdiction under Insurance Code section 1602:

"We do not read Insurance Code section 1602 as conferring personal jurisdiction over insurance companies merely through service on their registered agents, independent of whether the companies otherwise have the requisite minimum contacts with California. Whispering Oaks has not identified any authority supporting its interpretation of Insurance Code section 1602, and we are not aware of any. That construction of the statute would also be at odds with the well-established rule that 'a corporation typically is subject to general personal jurisdiction only in a forum where it is incorporated or where it maintains its principal place of business.' [Citations.] **The trial court did not**

have personal jurisdiction over Cincinnati by virtue of Insurance Code section 1602." (See OPP at pp. 5:14-6:3, emphasis added.)

Based on the foregoing, the court finds *Mallory* does not defeat defendant Cincinnati's showing for direct estoppel in support of the motion to quash.

Accordingly, the motion to quash and dismiss the action is GRANTED.

Motion to Dismiss for Failure to Serve Complaint

Having granted the motion to quash and dismiss the action for reasons explained above, the court declines to address the alternative motion to dismiss for failure to serve the complaint.

Disposition

The motion to quash service of summons and dismiss the action is GRANTED.

The court declines to address the motion to dismiss for failure to serve the complaint.

The court will prepare the Order.

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Calendar Line 3

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Calendar line 4

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Calendar Lines 5-6
Case Name: *N.R. Waterloo, LLC et al. v. First Commerce, LLC et al.*
Case No.: 23CV426083

I. Factual and Procedural Background

Plaintiffs N.R. Waterloo, LLC ("Waterloo") and Betty Sha ("Sha")(collectively, "Plaintiffs") bring their First Amended Complaint ("FAC") against defendants First Commerce, LLC ("First Commerce") and Berg Capital Corporation ("BCC").

According to the allegations of the FAC, on or around July 27, 2018, Waterloo entered into a Loan Agreement with Bank of America wherein Waterloo borrowed $12.8 million for a ten-year term to end on August 1, 2028. (FAC, ¶ 2.) To secure the loan, Waterloo pledged its residential apartment complex ("the Property") as collateral. The Property was appraised at $32,500,000. (*Ibid*.) Under the terms of the Loan Agreement, the death of any obligor/guarantor was considered an event of default. (FAC, ¶ 20.) Waterloo performed under the Loan Agreement and made timely monthly payments to Bank of America, and later to First Commerce. (FAC, ¶ 19.)

In April 2021, Nicholas Conway, a member of Waterloo and the guarantor of the loan, passed away. (FAC, ¶¶ 3, 21.) Thereafter, on November 15, 2021, Bank of America declared the loan to be in default and accelerated the loan. (FAC, ¶ 22.)

In or around March 2022, Bank of America sold the loan to First Commerce. (FAC, ¶ 4.) First Commerce knew that Waterloo, through Sha, was working to secure financing to pay off the accelerated loan in full. (FAC, ¶ 5.) Rather than work with Plaintiffs, First Commerce threatened to unlawfully foreclose on the Property unless Plaintiffs paid various unsupported and illegal fees. (*Ibid.*) Plaintiffs made multiple requests for information as to how the fees were calculated, but insufficient information was provided. (*Ibid*.) Plaintiffs had no choice but to pay the excessive fees under protest. (*Ibid*.) First Commerce demanded approximately $2 million in excessive fees under the threat of unlawful foreclosure. (*Ibid*.)

On March 1, 2024, Plaintiffs filed their FAC, asserting the following causes of action:

1) Breach of Contract;
2) Conversion;
3) Civil Extortion and Violation of Penal Code § 496;
4) Exaction Pursuant to Civil Code § 1712;
5) Tortious Breach of Contract;
6) Negligence;
7) Violation of Business and Professions Code § 17200 et seq.;
8) Breach of the Implied Covenant of Good Faith and Fair Dealing; and
9) Unjust Enrichment.

On May 6, 2024, First Commerce filed a demurrer and motion to strike portions of the FAC. Plaintiffs oppose both motions. First Commerce has filed replies.[2]

[2] New arguments made on reply for the first time will not be considered. (See e.g., *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not

II. Demurrer

First Commerce demurs to the second through ninth causes of action[3] on the ground they fail to state facts sufficient to constitute a cause of action.

a. Legal Standard

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

b. Second Cause of Action – Conversion

"To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 610.) "The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.)

First Commerce first contends the FAC does not allege that Sha paid or tendered any funds to First Commerce that could have been converted because she voluntarily wired funds to escrow with First American Title Insurance Company and there are no allegations she paid any money to First Commerce. (Demurrer, p. 10:18-22.)

In opposition, Plaintiffs argue First Commerce offers no support for their position that conversion requires a plaintiff to pay the funds directly to the defendant. (Opposition, p. 3:12-14, 18-22, citing *Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 Cal.App.4th 692, 699 (*Irving*).) In *Irving*, the Court of Appeal explained that "[i]n cases where the property changes possession more than once, a plaintiff has a cause of action for conversion if the defendant who is sued for conversion took the property from another converter, and took it with actual or constructive notice that the prior conversion took place." (*Irving, supra*, 129 Cal.App.4th at p. 699 [emphasis added].) Moreover, "[i]t is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 543-44.)

Here, Plaintiffs allege First Commerce intentionally and knowingly overcharged Plaintiffs in fees and interests, when it knew that, under the Loan Agreement, it was not permitted to do so, and knowingly and willfully converted Plaintiffs' funds for its own use to

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consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

[3] First Commerce's notice of demurrer indicates it is demurring to each cause of action. The demurrer's supporting memorandum does not address the first cause of action.

the detriment of Plaintiffs. (FAC, ¶¶ 79, 81, 82.) Additionally, the FAC alleges Sha was forced to pay the illegally charged interest and fees and transferred the amount from Sha's personal account to an escrow account to pay off the loan to First Commerce. (FAC, ¶ 60.) Further, Plaintiffs assert that Sha made the payment "involuntary and under protest" because she stood to lose the Property. (FAC, ¶ 63.)

In reply, First Commerce asserts that in California, there can be no recovery for a voluntary payment of the debt of a third party without request and with no promise of repayment by the third party. (Reply, p. 3:15-18, citing *McMillan v. O'Brien* (1934) 219 Cal. 775, 779 (*McMillan*).) McMillan is distinguishable given that it did not involve a claim for conversion. Here, however, the FAC does not allege that Waterloo requested Sha pay for the debts. Rather, First Commerce was threatening foreclosure and in response, Sha, the sole remaining member of Waterloo, liquidated assets in order to pay Waterloo's debts. (See e.g., FAC, ¶¶ 5, 60, 65.)

First Commerce additionally asserts a sham pleading argument because the initial complaint was amended to remove the language "capital contribution." (Demurrer, p. 11:12-14.) "[W]here a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings," the court may examine the prior complaint to ascertain whether the amended pleading is merely a sham. (*Owen v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.) The Court declines to apply the sham pleading doctrine. Plaintiffs include two entire paragraphs in the FAC explaining why "capital contribution" was removed from the pleading, which the Court will treat as true. (FAC, ¶¶ 61-62.) Thus, Plaintiffs did not intend to allege "capital contribution." Moreover, the Court is confined to the four corners of the pleading and any assertion by First Commerce that Sha's payments were gifts or a loan to Waterloo is not well taken.

Based on the foregoing, the Court finds these allegations are sufficient to state a claim for conversion at the demurrer stage. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [court reviewing propriety of ruling on demurrer is not concerned with the "plaintiff's ability to prove . . . allegations, or the possible difficulty in making such proof"].) As such, the demurrer to the second cause of action is OVERRULED.

c. Third Cause of Action - Civil Extortion and Violation of Penal Code § 496

"While [Penal Code] section 496(a) covers a spectrum of impermissible activity relating to stolen property, the elements required to show a violation of section 496(a) are simply that (i) property was stolen or obtained in a manner constituting theft, (ii) the defendant knew the property was so stolen or obtained, and (iii) the defendant received or had possession of the stolen property." (*Switzer v. Wood* (2019) 35 Cal.App.5th 116, 126, as modified (May 10, 2019), quoting *Lacagnina v. Comprehend Systems, Inc.* (2018) 25 Cal.App.5th 955, 970 [elements of Penal Code § 496]; see also *Siry Investment, L.P. v. Farkhondehpour* (2022) 13 Cal.5th 333, 354-355 (*Siry*).) A criminal conviction is not a prerequisite to seeking damages under section 496. (See Cal. Pen. Code § 496, subd. (c); see also *Bell v. Feibush* (2013) 212 Cal.App.4th 1041, 1043 (*Bell*).)

"Section 496(a) extends to property 'that has been obtained in any manner constituting theft.' Penal Code section 484 describes acts constituting theft. The first sentence of section

484, subdivision (a) states: '*Every person* who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or *who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property*, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, *is guilty of theft.*'" (*Bell, supra,* 212 Cal.App.4th at p. 1048 [emphasis original].)

First Commerce argues: 1) property is not considered stolen when the alleged wrongdoing was authorized by contract; 2) Plaintiffs do not allege First Commerce intended to steal from them and the allegations of the FAC demonstrate that First Commerce had a good faith belief that it was entitled to seek the fees from Plaintiffs; 3) First Commerce did not extort money from Plaintiffs; and 4) Sha does not have standing to bring an extortion claim.

i. Contractual Authorization

First Commerce first asserts that property is not considered stolen when the wrongdoing was authorized by contract and here, the alleged wrongful conduct was charging of fees pursuant to the terms of the parties' contract. (Demurrer, p. 14:13-15.) First Commerce cites *People v. Novelli* (1956) 140 Cal.App.2d 438, 442 (*Novelli*) to support its argument. In *Novelli*, the State sought review of a superior court decision which initially entered judgment against defendant for grand theft but then granted defendant's motion for a new trial after determining that defendant's act of repossessing property was not grand theft and was in accordance with a conditional sales contract. (*Novelli*, *supra,* at p. 440.) On appeal from a motion for new trial, the Court of Appeal determined there was "no evidence that [defendant] did anything more than what he thought his contract authorized him to do." (*Id.* at p. 442.)

In *Novelli*, the appellate court came to a decision after a review of the relevant evidence before it. Here, on demurrer, this Court is concerned only with allegations of the pleading. The FAC alleges that First Commerce demanded unsupported fees be paid (FAC, ¶ 89); First Commerce forced Plaintiffs to pay these fees despite knowing it was not legally entitled to them (*id.* at ¶¶ 89, 90); and First Commerce's acts were intentional (*id.* at ¶ 93). Thus, unlike in *Novelli*, here Plaintiffs allege First Commerce knowingly did something which it knew the contract did not authorize. As such, *Novelli* is inapposite.

ii. First Commerce's Intent

First Commerce next argues Plaintiffs must show it had an intent to steal. (Demurrer, p. 14:16-17.) First Commerce is correct that "a plaintiff must establish criminal intent on the part of the defendant beyond 'mere proof of nonperformance or actual falsity.'" (*Siry*, *supra,* 13 Cal.5th at pp. 361-362.) Here, the FAC alleges that First Commerce's actions were intentional. (See FAC, ¶¶ 89, 93 94.) First Commerce contends that Plaintiffs' "own allegations demonstrate that FC had a good faith belief that it was entitled to act as Plaintiffs allege." (Demurrer, p. 15:6-7.) First Commerce does not cite any such allegations in the pleading and this assertion contradicts the allegations in the FAC.

iii. Extortion of Money

Next, First Commerce argues that there could have been no threat of extortion because it had a legal right to request fees be paid. (Demurrer, p. 16:8-10.) However, at issue in the pleading is not whether First Commerce was entitled to fees, but whether the fees they ordered Plaintiffs to pay were excessive or unlawful based on the Loan Agreement.

In opposition, Plaintiffs rely on *Leeper v. Beltrami* (1959) 53 Cal.2d 195 (*Leeper*) to argue that similar to that case, the FAC alleges defendants knew that in making a foreclosure threat, they knew their claim was false. In *Leeper*, the plaintiff borrowed money and used his property to secure the loan. Years later, the debt owed was fully discharged and all debts owing were canceled. The Supreme Court reversed the trial court's ruling sustaining defendants' demurrer after concluding the pleading stated a cause of action for economic duress when "defendants wrongfully, with knowledge of the falsity of the claim, attempted to foreclose on a mortgage which had already been satisfied." (*Id.* at pp. 203, 205.) The defendants in *Leeper* had argued "they were merely seeking to foreclose a mortgage, a legal remedy." (*Id*. at p. 202.) The Supreme Court ruled that the complaint alleged more than threat of legal action but it also alleged that in making such threats, defendants knew the claims were false. (*Ibid*.)

In this case, the FAC alleges First Commerce unlawfully threated to foreclose on the Property if Plaintiffs did not pay the demanded unsupported fees, with the intention of forcing Plaintiffs to pay substantial sums of money to which First Commerce knew it was not entitled. (FAC, ¶ 89.) Thus, First Commerce's third argument is not well taken.

iv. Sha's Standing

Finally, First Commerce asserts that Sha does not have standing to bring an extortion claim because she paid no money of her own to First Commerce but instead paid money into escrow for Waterloo so that Waterloo could pay First Commerce. (Demurrer, p. 17:12-15.) In opposition, Plaintiffs argue that Penal Code section 519 includes fear induced by threat to harm the person or property of the individual threatened or a third person and that "person" is defined as both corporations and natural persons. (Opposition, p. 12:13-16.)

Penal Code section 518, subdivision (a) defines extortion as: "the obtaining of property or other consideration from another, with his or her consent, . . . induced by a wrongful use of force or fear . . ." (Pen. Code, §518, subd. (a); see also *Galeotti v. International Union of Operating Engineers Local No. 3* (2020) 48 Cal.App.5th 850, 857 (*Galeotti*).)
"Under Penal Code section 519, 'fear' for purposes of extortion 'may be induced by a threat' to inflict unlawful injury to the person or property of the individual or a third person[.]" (*Galeotti*, *supra*, at p. 857 [emphasis omitted].) A civil cause of action for extortion "is essentially a cause of action for moneys [or other consideration] obtained by duress. . . " (*Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 426; see *Leeper, supra,* 53 Cal.2d at p. 207 [overruled in part on other grounds].) The doctrine "may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person . . . to succumb to the perpetrator's pressure." (*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1157.)

Here, the FAC alleges First Commerce received the funds after Sha liquidated assets for the purpose of paying the fees. Specifically that "Sha complied with this demand out of a

reasonable fear induced by the threat of an illegal and unlawful, wrongful foreclosure . . ." (FAC, ¶¶ 74, 87, 91.) Such allegations are sufficient for pleading purposes.

Therefore, the demurrer to the third cause of action is OVERRULED.

d. Fourth Cause of Action – Exaction Pursuant to Civil Code § 1712

Civil Code section 1712 states:

> One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides.

"California case law is sparse in [addressing Civil Code section 1712], but California defines 'ownership of a thing' as 'the right of one or more persons to possess and use it to the exclusion of others.' . . . Even if consent is initially given, a plaintiff can state a claim for failure to restore things wrongfully acquired under § 1712 if the plaintiff later withdraws consent." (*Snyder & Assocs. Aquisitions LLC v. United States* (9th Cir. 2017) 859 F.3d 1152, 1161 (*Snyder*)[4]; see also *Philpott v. Superior Court of Los Angeles County* (1934) 1 Cal.2d 512, 524 [provides for legal action in a case where a plaintiff, in rescinding a contract, asks for a return of the consideration parted with by reason of the fraud or any other set of facts authorizing recission].)

In support of its demurrer, First Commerce contends the FAC does not allege that it obtained anything from Sha or that she paid anything to First Commerce. (Demurrer, p. 17:27-28.) As noted above, the FAC alleges Sha was forced to pay illegally charged interest and fees and transferred the amount from her personal account to an escrow account to pay off the loan directly to First Commerce. (FAC, ¶ 60.) Thus, Plaintiffs do allege that Sha made a payment to First Commerce. As such, First Commerce's argument is not persuasive and the demurrer to the fourth cause of action is OVERRULED.

e. Fifth Cause of Action – Tortious Breach of Contract

"[A] contractual obligation may create a legal duty and the breach of that duty may support an action in tort. This is true; however, conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. An omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 551 (*Erlich*) [internal citations and quotations omitted].)

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[4] "We observe initially that while federal authority may be regarded as persuasive, California courts are not bound by decisions of federal . . . courts of appeals." (*People v. Uribe* (2011) 199 Cal.App.4th 836, 875) Case law regarding Civil Code section 1712 is minimal and the Court finds *Snyder* to be helpful.

First Commerce contends the fifth cause of action fails because the FAC does not allege an independent wrong other than conduct that is merely a breach of contract. (Demurrer, p. 18:6-7.) Additionally, First Commerce asserts that the conclusory allegations of deceit or fraud lack the requisite specificity required to allege fraud. (*Id.* at p. 19:7-8.) In opposition, Plaintiffs persuasively argue that their conversion and extortion claims support a claim for tortious breach of contract.

As stated above, the Court overruled the demurrer to the conversion and civil extortion claims. The Supreme Court has explained that "a tortious breach of contract may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud ***or conversion***; (2) the means used to breach the contract are tortious, involving deceit or ***undue coercion*** or; (3) one party intentionally breaches the contracting intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." (*Erlich, supra*, 21 Cal.4th at pp. 553-554 [emphasis added; internal citations and quotations omitted].)

Accordingly, the demurrer to the fifth cause of action is OVERRULED.

f. Sixth Cause of Action – Negligence

"The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252.)

First Commerce argues the sixth cause of action fails because 1) there is no fiduciary duty between a borrower and a lender and 2) a claim for negligence is barred by the economic loss doctrine. Plaintiffs do not address the sixth cause of action in their opposition. Thus, the Court will treat the demurrer to the sixth cause of action as unopposed and meritorious. (See *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410 [failure to oppose creates inference that motion or demurrer is meritorious].) Further, the Court finds First Commerce's argument that there is a no duty between a lender and borrower to be persuasive. (See *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 206 ["'As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.'"].) Given that Plaintiffs cannot allege a legal duty of care, the demurrer to the sixth cause of action may be sustained without leave to amend. (See *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 535 [court should deny leave to amend where the facts are not in dispute and no liability exists under substantive law].)

The demurrer to the sixth cause of action is SUSTAINED without leave to amend.

g. Seventh Cause of Action – Violation of Business & Professions Code § 17200 et seq.

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices." (*Ibid*.) A plaintiff asserting a claim for violation of section 17200 must allege "'lost money or property'

to have standing to sue." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 323.) A plaintiff must also allege that members of the public are likely to be deceived to state a cause of action for violation of section 17200. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.) Generally, statutory causes of action must be pleaded with particularity. (See e.g., *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1237, fn. 3.)

"A private person now has standing to assert a UCL claim only if he or she (1) 'has suffered injury in fact,' and (2) 'has lost money or property as a result of the unfair competition.'" (*Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 852.) A plaintiff suffers an injury in fact for purposes of standing under the UCL when he or she has: (1) expended money due to the defendant's acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has a cognizable claim. (*Id.* at pp. 854-855.) In addition, a plaintiff must show he or she lost money or property because of the alleged unfair competition. (*Id.* at p. 855.) This causation element requires a showing of a causal connection or reliance on the unlawful, unfair, or fraudulent act. (*Ibid*.)

In opposition, First Commerce asserts the seventh cause of action fails because Plaintiffs seek to recover damages, which are not permitted by private plaintiffs. (See Demurrer, p. 21:1-2, 8-9.) Similar to the sixth cause of action, Plaintiffs do not appear to oppose the demurrer to the seventh cause of action. Therefore, the demurrer to the seventh cause of action is SUSTAINED with 15 days leave to amend.

h. Eighth Cause of Action – Breach of the Implied Covenant of Good Faith and Fair Dealing

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371 [internal quotations omitted].) "In general, the covenant imposes a duty upon a party to a contract not to deprive the other party of the benefits of the contract." (*Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 314.) "[W]here breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 327 (*Guz*); see also *Levy v. Only Cremations for Pets, Inc.* (2020) 57 Cal.App.5th 203, 215.) "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot 'be endowed with an existence independent of its contractual underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz, supra,* 24 Cal.4th at pp. 349-350.)

In opposition, First Commerce argues the eighth cause of action fails because the allegations are related to breach of the express terms of the contract and do not go beyond a contract breach. (Demurrer, p. 22:10-14.) Here, the eighth cause of action alleges First Commerce demanded payments that were unsubstantiated based on the terms of the contract. (FAC, ¶ 128).

Plaintiffs' argument implies that if for some reason the breach of contract claim fails, then they have also pled a claim for breach of the implied covenant of good faith and fair dealing. (Opposition, p. 13:25-26.) However, if the breach of contract claim fails, the eighth

cause of action will fall with it. Here, the breach of contract claim is unchallenged, and while Plaintiffs are allowed to plead alternative claims, it is clear that the breach of covenant claim is predicated solely on the breach of contract cause of action and is therefore superfluous and unnecessary. (*Guz, supra*, 24 Cal.4th at p. 327 ["**Where breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous."];** see also *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1644 fn. 3.)

Accordingly, the demurrer to the eighth cause of action is SUSTAINED with 15 days leave to amend.

i. Ninth Cause of Action – Unjust Enrichment

First Commerce contends that unjust enrichment is not a cause of action and so the ninth cause of action fails to state a claim as a matter of law. (Demurrer, p. 23:18-23.)

"Unjust enrichment is not a cause of action, however, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution. Unjust enrichment has also been characterized as describing the result of a failure to make restitution. In reviewing a judgment of dismissal following the sustaining of a general demurrer, we ignore erroneous or confusing labels if the complaint pleads facts which would entitle the plaintiff to relief. Thus, we must look to the actual gravamen of [plaintiff's] complaint to determine what cause of action, if any, he stated, or could have stated if given leave to amend." (*McBride v. Houghton* (2004) 123 Cal.App.4th 379, 387.) Under California law, restitution "may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct." (*Id.* at p. 388.)

The Court will treat the ninth cause of action as a claim seeking restitution. There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. Alternatively, a restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead seek restitution on a quasi-contract theory (an election referred to at common law as 'waiving the tort and suing in assumpsit'). In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388 [internal citations omitted].)

According to the ninth cause of action, First Commerce was unjustly enriched by benefits from Plaintiffs that included taking funds from them for which it had no legal right and using those funds to earn additional interest on the money received. (FAC, ¶ 133.) Thus, the ninth cause of action is sufficiently pled for pleading purposes and the demurrer is OVERRULED.

III. Conclusion

The demurrer to the second, third, fourth, fifth, and ninth causes of action is OVERRULED. The demurrer to the sixth cause of action is SUSTAINED without leave to

amend. The demurrer to the seventh and eighth causes of action is SUSTAINED with 15 days leave to amend.

IV. Motion to Strike

First Commerce moves to strike Paragraph 11, Pages 3:24-4:13 on the ground it is not drawn in conformity with the laws of California pursuant to Code of Civil Procedure section 436, subdivision (b) because it fails to properly set forth a claim of alter ego.

a. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) Courts do not read allegations in isolation. (*Ibid.*)

b. Analysis

First Commerce moves to strike the entirety of Paragraph 11 which contains alter ego allegations regarding First Commerce and BCC.

In order to establish an alter ego theory, a plaintiff must allege: (1) such a unity of interest and ownership between the corporation and its equitable owner that no separation actually exists, and (2) an inequitable result if the acts in question are treated as those of the corporation alone. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399 (*Leek*); *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523.)

Here, Paragraph 11 alleges there is such a unity of interest between First Commerce and BCC that separate personalities do not exist because there has a been a comingling of funds and assets, both defendants are owned by the same individual, they use the same offices and employees and share a PO Box, and have identical directors and officers. (FAC, ¶ 11.) Thus, Plaintiffs sufficiently allege the first element of an alter ego theory. However, the FAC is devoid of facts showing an inequitable result from the treatment of First Commerce as the sole actor and moreover, there are no allegations that support why BCC should be held liable for First Commerce's wrongdoings. (*Leek, supra*, 194 Cal.App.4th at p. 415.)

Accordingly, the motion to strike Paragraph 11 is GRANTED with 15 days leave to amend.

The Court shall prepare the final order.

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Calendar Line 7

Case Name: Andre LaForge, et al, vs Matthew Reid Leal, et al.

Case No.: 23CV420692

Defendant Mathew Reid Leal ("Defendant")'s motion for leave of court to file Defendant's Anti-Slapp Motion is GRANTED.

The court exercises its discretion under all the facts and circumstances in this case to allow Defendant to file his proposed Code of Civil Procedure ("CCP") section 425.16(e)(1)(2) and (4) motion to strike allegations and causes of actions 1-6 to plaintiffs second amended complaint pursuant to CCP section 425.16(f) which states *"[t]he special motion may be filed* within 60 days of the service of the complaint or, *in the court's discretion, at any later time upon terms it deems proper*" (emphasis added), as follows:

Defendant shall have LEAVE TO FILE his Notice of Motion and Special Motion to Strike Causes 1-6 of Plaintiff's [Second Amended] Complaint ("Defendant's Anti-Slapp Motion") WITHIN 5 DAYS OF THIS ORDER.

Defendant's Anti-Slapp Motion will be heard on **9/12/2024 at 9:00 am in Dept. 3**.

Defendant shall promptly serve Defendant's Anti-Slapp Motion and file the proof of service WITHIN 5 DAYS OF THIS ORDER.

The briefing schedule shall be per the CCP and California Rules of Court based on the hearing date.

Defendant's motion to have his Anti-Slapp motion deemed filed as of 8/4/2024 is DENIED as MOOT.

Defendant's motion for expedited briefing is DENIED as MOOT.

The court will prepare the order.

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Calendar Line 8
Case Name: Cameron Moore et al vs Michael Halloran et al.
Case No.: 24CV436785

Judge William J. Monahan disclosed in his tentative ruling that he has an inactive real estate broker's license.

Defendants Michael P. Halloran and Cheryl A. Halloran, Trustees under an Agreement of Revocable Trust DTD March 29, 2000 (collectively "Defendants") motion for an order expunging the Notice of Pendency of Action recorded by plaintiffs Cameron Moore and Melissa Moore (collectively "Plaintiffs") on April 30, 2024 with respect to the property located at 18940 Ojai Drive Los Gatos, California 95030 (the "Subject Property") pursuant to Code of Civil Procedure ("CCP")[5] section 405.32 is DENIED.

Plaintiffs have met their burden of proof of the "probable validly" of their alleged "real property claim" by a preponderance of the evidence. (CCP §§ 405.31; 405.32.)

Defendants' request pursuant to CCP section 405.35 for the attorneys' fees and costs the Defendants have incurred as a result of having to file this motion against Plaintiffs and their counsel (in the amount of $22,513 or any other amount) is DENIED.

Defendant's request for judicial notice filed 6/21/2024 pursuant to Evidence Code section 452(d) of [Plaintiffs'] Complaint for Specific Performance or, Alternatively, Breach of Contract filed on April 25, 22024 (Ex. A thereto) and [Plaintiffs'] Notice of Pendency of Action recorded in the Santa Clara County Recorder's office on April 30, 2024 (Ex. B thereto) is GRANTED.

Plaintiffs' request (as the prevailing parties) pursuant to CCP section 405.350 for the attorneys' fees Plaintiffs have incurred to oppose this motion against Defendants in the reasonable amount of $6,480 is GRANTED. Defendants shall pay that amount in full to Plaintiffs within 15 days of this order.

Motion to expunge lis pendes

A lis pendens—also called a notice of pendency of action—is a document filed with a county recorder that provides constructive notice of a pending lawsuit affecting the real property described in the notice. (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 647 (*Kirkeby*); *Bishop Creek Lodge v. Scira* (1996) 46 Cal.App.4th 1721, 1733.) Any party may record a lis pendens when the lawsuit involves a "real property claim." (§ 405.20; *Kirkeby, supra*, at p. 647.) Section 405.4 defines a "'[r]eal property claim'" to mean "the cause or causes of action in a pleading which would, if meritorious, *affect … title to, or the right to possession of, specific real property*." (Italics added.) A lis pendens gives notice that the judgment will be binding on persons later acquiring an interest in that property. (*Bishop Creek Lodge, supra*, at p. 1733.)

[5] Unspecified statutory references are to the CCP.

(*Shoker v. Superior Court* (2022) 81 Cal.App.5th 271, 275 ("*Shoker*").)

> A court shall order a notice of lis pendens expunged if it determines (1) that the pleading on which the notice is based does not contain a real property claim (§ 405.31); (2) that the claimant has not established, by a preponderance of the evidence, the probable validity of a real property claim (§ 405.32); or (3) that adequate relief can be secured by an undertaking. (§ 405.33.)

(*Shoker, supra,* 81 Cal.App.5th at p. 277.) Here, Defendants' motion only raises the first two grounds. They don't' assert that adequate relief can be secured by an undertaking.

> Unlike most motions, the party opposing a motion to expunge bears the burden to show the existence of a real property claim. (§ 405.30; *Kirkeby, supra,* 33 Cal.4th at p. 647.) In considering whether the burden has been met, the court engages in "a demurrer-like analysis." (*Kirkeby, supra,* at pp. 647–648.) The trial court and the reviewing court both review the complaint to determine if a real property claim has been properly pleaded. (*Ibid.*)

(*Shoker, supra,* 81 Cal.App.5th at pp. 277-278.)

Plaintiffs' complaint for specific performance "is a real property claim"

Here, Plaintiffs' first cause of action for specific performance of the contract to purchase the Subject Property "is a real property claim (§ 405.31)—that is, a cause of action that 'would, if meritorious, affect … title to, or the right to possession of, specific real property.' (§ 405.4.)" (*Shoker, supra,* 81 Cal.App.5th at p. 278.) "A buyer's suit seeking specific performance of a real property purchase and sale agreement is obviously a real property claim." (*Ibid.*)

CCP section 405.32

Defendants' motion was made pursuant to CCP section 405.32 on the grounds that Plaintiffs cannot meet their burden of proof to show the "probable validity" of any alleged "real property claim" by a preponderance of the evidence.

CCP section 405.32 states:

> In proceedings under this chapter, the court shall order that the notice be expunged if the court finds that the claimant has not established *by a preponderance of the evidence* the probable validity of the real property claim. The court shall not order an undertaking to be given as a condition of expunging the notice if the court finds the claimant has not established the probable validity of the real property claim.

(CCP § 405.32 [emphasis added].) Plaintiffs have the burden to prove the probable validity of their real property claim by a preponderance of the evidence. (*Id.*)

The NBP was delivered prematurely, thus is void pursuant to the express terms of the Purchase Agreement

On or about March 21, 2024, Plaintiffs Cameron Moore and Melissa Moore, as buyers agreed to purchase from Defendants Michael Halloran and Cheryl Halloran, as sellers, the Subject Property for $9,000,000.

Plaintiffs spent over $200,000 improving the Subject Property with the expectation of completing construction, closing escrow, and moving into the Subject Property. (Decl. Cameron Moore ¶ 7.) They also sold their current residence in anticipation of closing escrow and moving into the Subject Property. (Decl. Cameron Moore ¶ 5.)

Here, both sides agree that a complete copy of the Purchase Agreement is attached as Exhibit A to the Declaration of Michael P. Halloran in support of the present motion ("Purchase Agreement" or "RPA"). (See Opp., p. 1 fn. 1.)

On April 10, 2024, Defendants send Plaintiffs a notice to buyer ("NBP") to waive three contingencies (1) Review of Seller Documents, including Disclosures and Reports (Paragraph 8D) (2) Title: Preliminary Title Report (Paragraph 8E) and (3) Condominium/Planned Development Disclosures (HOA or OA (Paragraph 8F) ("CI Disclosures"). (Ex. A to Decl. Berta Moreno.)

Defendants *unpersuasively* contend the NBP was timely and that the two-day NBP period expired on April 12, 2024 [which according to the RPA was at 11:59 pm]. (See NBP; RPA ¶ 25 I (3) ["All calendar days are counted in determining the date upon which performance must be completed, ending at 11:59 p.m. on the last day for performance ('Scheduled Performance Day')"].)

Defendants point to the language of the Purchase Agreement in paragraph **3 L**(4)-(6) in arguing that the time period specified for Review of Seller Documents, Preliminary ("Title) Report and CI Disclosures was "17 (or _____) Days after Acceptance or 5 Days after Delivery, whichever is later." (RPA ¶ 3 L(4)-(6).) Defendants contend the Preliminary Title Report was given to Paul Bertoldo (Plaintiffs' agent) on March 24, 2024, and that the CI Disclosures were contained therein. (Decl. Darlene Marquez ¶ 3; Ex. A.) Accordingly, Defendants Reply argues the time to remove those two contingencies expired either Friday April 5, 2024, or Monday April 8, 2024. (See Reply p. 3, fn.1.)

However, Defendants were *premature* in delivering the NBP on April 10, 2024, as it relates to Seller Documents and Disclosures because Defendants hadn't yet delivered the required documents and disclosures to Plaintiffs.[6] (Decl. of Tami Lantis ¶9; Decl. of Paul Bertoldo ¶11.) Here, Defendants failed to comply with their *disclosure requirements* with respect to the Delivery of the Sellers Documents at the time the NBP was delivered on April 10, 2024, which did not occur until **April 11, 2024**. (Decl. of Tami Lantis ¶ 9 ["I first received the [Sellers'] Property documents and Disclosures by email on April 11, 2024."]; ¶ 11 [On April 11, 2024, I returned the disclosures signed by the [Plaintiffs]."])

[6] Paragraph 3N(1) of the RPA required Defendants to deliver the Property Documents and Disclosures within 7 days after the contract Acceptance. (RPA ¶ 3N(1).) Although not discussed in the opposition, paragraph 11L(1) of the RPA also required Defendants to deliver the CI Disclosures "within the time specified in **paragraph 3N(1)"** which was 7 days after the contract Acceptance. (RPA ¶¶ 11L(1); 3N(1).)

Paragraph 8(I)(2) of the RPA clearly states:

> For the contingencies for review of [1] Seller Documents, [2] *Preliminary Report*, and [3] Condominium/Plan Development Disclosures, Buyer shall, within the time specified in **paragraph 3L** *or* ***5 days*** *after Delivery of Seller Documents* or CI Disclosures, *whichever occurs later*, remove the applicable contingency in writing or cancel this Agreement.

(RPA ¶ 8(I)(2) [emphasis added.] [7]

"If Buyer does not remove a contingency within the time specified, Seller, after first giving Buyer a Notice to Buyer to Perform (C.A.R. Form NBP) shall have the right to cancel this Agreement." (RPA ¶ 8(I)(3).)

With regards to interpretation of written contracts, "'[t]he intention of the parties is to be ascertained from the writing alone, if possible.' (Civil Code §1639.) If a contract's language is clear and unambiguous, intent is determined solely by the language within the four corners of the contract." (*Filtzer v. Ernst* (2022) 79 Cal.App.5th 579, 584, citing *Brown v. Goldstein* (2019) 34 Cal.App.5th 418.)

The plain language of paragraph 8(I)(2), provides an extension to Buyers (Plaintiffs) for the three contingencies listed in the Sellers (Defendants") NBP to [at least] 5 days after the April 11, 2024, Delivery of Sellers Documents or **April 16, 2024**, to remove these three contingencies.[8]

Plaintiffs clearly established that the Sellers (Defendants) Disclosures and Documents were not disclosed until April 11, 2024. (Decl. of Tami Lantis ¶9; Decl. of Paul Bertoldo ¶11.) The Plaintiffs had [at least] until April 16, 2024, to remove the three contingencies listed in the *premature* NBP. (RPA ¶ 8(i)(2).) Accordingly, Defendants' notice of termination on April 15, 2024, at 4:40 pm was *premature*, and Plaintiffs *timely* removed all three of these contingencies on April 15, 2024, at approximately 7:56 pm. (See Ex. D to Decl. Berta Moreno.)

Plaintiffs have met their burden of proving the probable validity of their real property claim by a preponderance of the evidence. (CCP §§ 405.31, 405.32.)

Defendants' objection to evidence are OVERRULLED to the extent they refer to any evidence cited in this ruling; otherwise, Defendants' objections to evidence are MOOT because they do not affect the outcome of this motion. To the extent that Defendants' OVERRULLED objections relied on Evidence Code section 352, the court exercises its discretion and finds that "its probative value was [NOT] substantially outweighed by the probability that its admission

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[7] This language plainly provides [for the three contingencies listed in the Defendants' NBP] that if Sellers (Defendants) haven't complied with their RPA paragraph 3N(1) delivery of Seller Documents [by the time of the NBP], the Buyers get an extension until 5 days after Delivery of the *of Seller Documents* or CI Disclosures, *whichever occurs later.*

[8] Accordingly, it is unnecessary to decide whether the CI Disclosures were given in the Preliminary Title Report as contended by Defendants or never given as contended by Plaintiffs. The outcome of this motion would be the same.

will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, [or] of confusing the issues…." (Evid. Code § 352.)

Requests for attorneys' fees and costs

CCP section 405.38 states:

> The court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless [1] the court finds that the other party acted with substantial justification or [2] that other circumstances make the imposition of attorney's fees and costs unjust.

(CCP § 405.38.)

Such an award is to be made against the losing party only, not counsel. (*Doyle v. Superior Court* (1991) 226 Cal.App.3d 1355, 1359.) Plaintiffs (as the prevailing party on this motion) are entitled to recover their reasonable attorneys' fees in the amount of $6,480 for opposing this motion by Defendants. (See Decl. Eric Gravink.)

Defendants' request for attorneys' fees and costs pursuant to CCP section 405.350 is DENIED. They were not the prevailing party on this motion (Plaintiffs were).

Plaintiffs' request (as the prevailing parties) pursuant to CCP section 405.350 for the attorneys' fees Plaintiffs have incurred to oppose this motion against Defendants in the reasonable amount of $6,480 is GRANTED. Defendants shall pay that amount in full to Plaintiffs within 15 days of this order.

Conclusion

Defendant's request for judicial notice is GRANTED.

Plaintiffs have met their burden of proof of the "probable validly" of their alleged "real property claim" by a preponderance of the evidence. (CCP §§ 405.31; 405.32.)

Defendants' motion to expunge lis pendens is DENIED.

Defendants' request for attorneys' fees and costs is DENIED.

Plaintiffs' request (as the prevailing parties) pursuant to CCP section 405.350 for the attorneys' fees Plaintiffs have incurred to oppose this motion against Defendants in the reasonable amount of $6,480 is GRANTED. Defendants shall pay that amount in full to Plaintiffs within 15 days of this order.

The court will prepare the order.

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