**SUPERIOR COURT, STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**

**Department 6**
**Honorable Evette D. Pennypacker, Presiding**
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

**DATE: June 20, 2024 TIME: 9:00 A.M.**

**RECORDING COURT PROCEEDINGS IS PROHIBITED**

**FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:**

**(1) Court by calling (408) 808-6856 and**

**(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling**

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

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

**FOR COURT REPORTERS:** The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

**FOR YOUR NEXT HEARING DATE:** Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

## FREE MCLE Civil Bench Presentation:

***Civil Trials and Civil Motion Practice:***
***Best Practices in Santa Clara County Superior Court***

**Date:** June 20, 2024
**Time:** 12-1:00
**Place:** Microsoft Teams: https://msteams.link/YGLE

| LINE | CASE NO. | CASE TITLE | TENTATIVE RULING |
|---|---|---|---|
| 1 | 18CV335385 | TUSCANY HILLS HOMEOWNERS ASSOCIATION vs BLUE MOUNTAIN CONSTRUCTION SERVICES, INC. | Settled. |
| 2 | 19CV355094 | Persolve Legal Group, LLP vs ISMAIL KANU | Judgment debtor's claim of exemption is DENIED. Court to prepare order. |
| 3 | 21CV382331 | Becky Edwards et al vs Tesla, Inc. et al | The Edwards-Neuhaus-Brunello Plaintiffs' motion for issue, evidentiary, and monetary sanctions against Tesla for evidence spoliation is DENIED. Deletion or non-preservation of evidence is not alone sufficient to support sanctions. Prejudice is required because the information sought may be available through some other means. For example, if electronic copies of an email were inadvertently not maintained, sanctions would not be appropriate if print outs of the same email remained available. The Court understands this is a crude metaphor, and in this example some information such as metadata might be lost, but it is similar in kind to what the Court understands is occurring here. The raw data readable only by a machine is no longer available, but the translated version of that data is available and has already been produced to Plaintiff and government agencies. This, then is not like the case of the box of documents that was destroyed after the producing party selected what the party believed to be relevant. Here, it appears the entire box of documents is still available, just not in its original format. Plaintiffs have not demonstrated otherwise or that (1) there is something likely to be in the raw data that is no longer available to them and would be detrimental to Tesla's defense or (2) that they have exhausted all available alternative means to obtain such information, such as examination of the SD card, a PMQ deposition, or review of OTA data from another car to see if something is indeed missing from their data set for Mr. Brown's Model 3. Thus, this motion is premature at best and is DENIED. Court to prepare formal order. |
| 4 | 21CV385573 | 1200 Partners, LLC vs Golden State Brewery, LLC et al | Plaintiff 1200 Partners, LLC's motion to compel Brian Gomez's responses to form interrogatories (set one), special interrogatories (set one), and request for production (set one) and for requests for admission (set one) to be deemed admitted is GRANTED. A notice of motion for this hearing date and time was served by U.S. mail on April 30, 2024. Defendant did not file an opposition. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) This discovery was also personally served on Defendant on March 27, 2024. To date, Defendant has provided no responses. Accordingly, (1) Defendant is ordered to serve verified code compliant responses to form interrogatories (set one), special interrogatories (set one), and request for production (set one) within 20 days of service of the formal order, (2) the matters set forth requests for admission (set one) are deemed admitted, and (3) Defendant is ordered to pay $2,112 in sanctions to Plaintiff with 30 days of service of the formal order, which formal order the Court will prepare. |

| | | | |
|---|---|---|---|
| 5 | 22CV397651 | Nabil Haidar et al vs Christopher Sciba et al | Nabil Haidar and Seila Haidar's civil Pitchess motion for discovery of peace officer personnel records is GRANTED. The Court finds the narrow category of records sought are related to the litigation. Accordingly, the San Jose Police Department is ordered to appear with the records so that the Court may conduct an in camera review to determine what, if any, records should be produced to Plaintiff. The Court does not have a court reporter to conduct an examination and thus further orders the San Jose Police Department to prepare a declaration setting forth whether the entire personnel file was produced to the Court for review, and, if not, what documents were not produced to the Court and the reason(s) they were not produced. The Court will take the documents under submission for review and hold a further hearing to provide the parties with an order regarding the production of documents. |
| 6 | 22CV404917 | Jane Doe vs Walter Hunter | Lori Costanzo and Tyler Atkinson are ordered to appear at the hearing. No special appearances permitted. |
| 7 | 23CV420188 | MEDTRONIC, INC vs GEORGE TRIADAFILOPOULOS MD INC., | Plaintiff filed a summary judgment motion and then a motion to strike Defendant's answer for failure to obtain counsel, which motion to strike the Court granted by order dated May 31, 2024. The Court will therefore consider Plaintiff's summary judgment motion as a prove up hearing to determine the amount of damages. The Court finds Plaintiff is entitled to judgment in its favor in the amount of $47,385.49. This ruling will be reflected in the minutes. Plaintiff to prepare form of judgment for the Court's review within 10 days of the hearing. |
| 8 | 23CV426978 | Raul Ortega et al vs First American Title Company et al | Defendants' demurrer is SUSTAINED, in part. Scroll to line 8 for complete ruling. Court to prepare formal order. |
| 9 | 24CV432080 | SERENITY MSO LLC et al vs PALO ALTO MIND BODY et al | Defendants' demurrer is SUSTAINED, in part. Scroll to line 9 for complete ruling. Court to prepare formal order. |

**Calendar Line** 8
**Case Name**: *Raul Ortega, et. al. v. First American Title Company, et. al.*
**Case No**.: 23CV426978

Before the Court is Defendants First American Title Company's ("FATC") and First American Title Insurance Company's ("FATIC"), demurrer to Plaintiffs' first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Background

This dispute arises from the alleged breach of an escrow instruction and the related title insurance policy. According to the complaint, in 2014, Plaintiffs sold some undeveloped land they owned in Gilroy ("Property") to the Buyers for $350,000 and carried back a $125,000 promissory note secured by a deed of trust against the Property. (FAC ¶¶ 3-4.) FATC served as the escrow holder and FATIC was the title insurance company. (FAC ¶¶ 6-7.)

FATC provided a preliminary report of the title search in early August 2014 and failed to list that the Property was subject to an easement that had been created and recorded in 1991, before Plaintiffs purchased the Property. (FAC ¶¶ 30-35, 39, 40.)

In December 2021 the Buyers filed a lawsuit against Plaintiffs and others based on the nondisclosure of the easement. That lawsuit was settled on November 8, 2023, and as part of the settlement the Buyers assigned all their claims relating to the sale to Plaintiffs, including claims against FATC and FATIC. (FAC ¶¶ 8, 12, 13,46-48.)

Plaintiffs subsequently initiated this action on December 4, 2023, and amended their complaint on February 8, 2024, alleging (1) breach of contract, (2) breach of covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) negligence, (5) constructive fraud, and (6) declaratory relief.

## II. Legal Standard

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

legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id.*)

## III. Analysis

### A. Breach of Contract

To properly state a claim for breach of contract Plaintiffs must allege: (l) the existence of contract; (2) Plaintiff's performance or excuse for nonperformance; (3) Defendant's breach; and (4) damage to Plaintiff resulting from that breach. (*Careau Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

Here, the FAC alleges FATC breached the terms of the escrow instruction/agreement by (1) causing escrow to close without a properly prepared title search, (2) failing to ensure that all the terms and conditions of the agreement were satisfied. (FAC ¶¶ 6, 42, 54, 55, 57.) As to FATIC, title insurer,

the FAC alleges it breached the terms of the title insurance policy by failing to (1) properly perform a title search on the Property, (2) disclose the easement, (3) indemnify and defend Plaintiffs. (FAC ¶¶ 8, 40, 70.)

Defendants contend these allegations are uncertain, insufficient, and not viable because (1) FATC does not have a duty to "police the affairs" of the parties to ensure they comply with their agreement with each other, (2) neither FATC nor FATIC has a duty to ensure a "proper" title search, (3) Plaintiffs fail to allege what escrow instructions and title policy terms are at issue, (4) it is unclear whether Plaintiffs are advancing a claim as assignee of the Buyers or one arising from their status as the sellers, (5) Plaintiffs fail to allege what FATIC was to indemnify Plaintiffs from, when a tender was made, and how it breached its obligation. The Court agrees.

"A written contract may be pleaded either by its terms—set out verbatim in the complaint or a copy of the contract attached to the complaint and incorporated therein by reference—or by its legal effect. [Citation.] In order to plead a contract by its legal effect, plaintiff must allege the substance of its relevant terms. This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions." (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 993, citations omitted.) Here, Plaintiffs did not attach the escrow instructions or the title insurance policy. Plaintiffs have also failed to alternately plead the pertinent terms of the alleged contracts verbatim or by their legal effect. At a minimum, Plaintiffs allegations are unclear and insufficient to establish what contractual terms are at issue and in what capacity Plaintiffs are advancing their claims.

Accordingly, Defendants' demurrer to the first cause of action for breach of contract is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

**B. Breach of 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." (*Hicks v. E.T. Legg & Assoc.* (2001) 89 Cal.App.4th 496, 508. "[T]he scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." (Id. at 509.) "The covenant of good faith and fair dealing . . . exists . . . to prevent one contracting party from unfairly frustrating the other party's right to receive

the benefits of the agreement actually made." (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 349.) "If the allegations for [breach of covenant of good faith and fair dealing] do not go beyond the statement of a mere contract breach and....simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1394.)

Similarly, a covenant of good faith and fair dealing is implied in every insurance contract, including title insurance contracts. (*See White v. Western Title Ins. Co.* (1985) 40 Cal. 3d 870, 885 (citing *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal. 3d 566, 575; *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 Cal. App. 3d 917, 940).) "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Grebow v. Mercury Ins. Co.* (2015) 241 Cal. App. 4th 564, 581 (quoting *Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal. App. 4th 466, 475).)

Here, Plaintiffs' claims for breach of contract and breach of implied covenant of good faith and fair dealing are based on Defendants' alleged breach of the escrow instructions and the title insurance policy and seeking the same damages. Plaintiffs fail to allege any facts beyond those alleged in the breach of contract cause of action and they fail to plead what benefits were withheld under the title insurance policy and why. Conclusory allegations that Plaintiffs acted in bad faith to resolve the dispute are insufficient.

Accordingly, Defendants' demurrer to the second cause of action for breach of covenant of good faith and fair dealing is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

**C. Breach of Fiduciary Duty**

"'The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach.'" (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 932.) The breach of fiduciary duty can be based on either negligence or fraud, depending on the circumstances. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 563.) "A mere contract or debt does not constitute trust or create fiduciary

relationship." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 634; see also *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30-31.)

The FAC alleges FATC, as the escrow holder, owed a fiduciary duty to Plaintiffs that required strict compliance with the terms of the escrow agreement instructions, and the duty to obtain evidence of all possible liens and easements on the Property. FATC breached its duty when it closed escrow without reviewing the disclosure documents and title search. Reviewing the disclosure documents would have revealed the easement on the Property and prevented escrow closure until the issue was resolved. (FAC ¶¶ 92-98.) As to FATIC, the FAC alleges a fiduciary relationship was created by virtue of its status as the title insurance company and FATIC breached its fiduciary duty when it failed to (1) diligently conduct a title search on the Property, (2) prepare a complete preliminary report, (3) disclose the easement on the Property, and (4) comply with the terms of the title insurance policy. (FAC ¶¶ 101-103, 107.)

Defendants contend Plaintiffs' claim is uncertain and insufficient because it fails to allege what terms in the disclosure documents, the escrow instruction, and the title insurance policy are at issue. Furthermore, the claim is based on the insupportable theory that a title insurer and/or an escrow holder is obligated to locate encumbrances through title search and note them on a preliminary report.

First, a fiduciary relationship is "any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent . . . ." (*Wolf v. Sup. Ct.* (2003) 107 Cal. App. 4th 25, 29.) It is well-established that escrow companies "owe a fiduciary duty to parties to an escrow to properly carry out all escrow instructions." (*Alereza v. Chicago Title Co*. (2016) 6 Cal. App. 5th 551, 561.) While FATC's fiduciary duty to the Plaintiffs is pleaded via their status as the escrow holder, the FAC fails to allege facts establishing a fiduciary relationship with FATIC beyond its general contractual duty.

Second, an "agency created by the escrow is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow." (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 (*Summit*).) "[N]o liability attaches to the escrow holder for [its] failure to do something not required by the terms of the escrow or for a loss incurred while obediently following [the] escrow instructions … ." (*Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160, 163.) "[A]n escrow holder 'has no general duty to police the affairs of its depositors'; rather, an escrow holder's obligations are 'limited to faithful compliance with the parties' instructions.' [Citations.] Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions." (*Summit, supra,* at p. 711.) As explained above, Plaintiffs do not attach the escrow instructions to the FAC or articulate the relevant portions of the instructions that were allegedly breached by FATC. Plaintiffs also fail to allege fraud such that FATC would be required to depart from the parties' unknown instructions.

Accordingly, Defendants' demurrer to the third cause of action for breach of fiduciary duty is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

**D. Negligence**

"The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and (4) the plaintiff's injury." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.)

Plaintiffs' allegations of negligence are against FATIC and Defendant, Maria Tamayo only. The FAC alleges FATIC breached its duty of care by failing to (1) diligently conduct a title search, (2) discover the easement on the Property, and (3) disclose the easement. (FAC ¶ 122.) Defendants contend neither FATC nor FATIC had a duty, as a matter of law, to locate a matter affecting title or to disclose such a matter either in its preliminary reports or its policies of title insurance.

"Title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs. [Citations.] The policy of title insurance, however, does not constitute a representation that the contingency insured against will not occur. [Citations.] Accordingly, when such contingency occurs, no action for negligence or negligent misrepresentation

will lie against the insurer based upon the policy of title insurance alone. [Citations.]" (*Southland Title Corp. v. Superior Court* (1991) 231 Cal.App.3d 530, 537.) Buyers and sellers cannot justifiably rely upon preliminary title reports as an integral part of a sale transaction and such reliance "is done only at a party's peril." (*Ibid.*) "'Insurance Code sections 12340.10 and 12340.11 make 'clear that no reliance may be placed on a preliminary report or a policy of title insurance to show the condition of title.'" (*Id.,* at pp. 537-538.) "The records pertaining to real property are complex and encumbrances may be missed by even the most thorough search. Title insurance is an acknowledgment that errors may have been made. In enacting sections 12340.10 and 12340.11, the Legislature recognized that no reliance should ever be placed on a preliminary report or a policy of title insurance to show the condition of title." (*Siegel, supra,* 46 Cal.App.4th at 1191.) "This is because 'any title search or examination is performed by the insurer solely for the purpose of seeking to evaluate its underwriting decision in issuing the policy, not for the benefit of the insured.' [Citation.]'" (*Id.,* at p. 1192.) Thus, "sections 12340.10 and 12340.11 preclude liability where a title insurer negligently performs a search of the title of the property and fails to discover, or reflect in the preliminary report, an impediment to title." (*Ibid.*)

In opposition, Plaintiffs contend, as the insureds, they can rely on a preliminary report to reflect the scope of the coverage that was offered. Plaintiffs cite *Lee v. fidelity National Title Ins. Co.*, (2010) 188 Cal.App.4th 583 (*Lee*) as dispositive authority. Lee's holding was narrowly tailored to its facts and thus Plaintiff's reliance is misplaced.

In *Lee*, the plaintiffs purchased property identified by two tax assessor parcel numbers. The insurance company issued a preliminary report that "referred repeatedly to both assessor parcels," and that included an assessor's map with arrows pointing to both parcels. (*Id.* at pp. 587-588.) The plaintiffs believed they owned both parcels, and for sixteen years they paid property taxes on both parcels. (*Id.* at pp. 588, 590.) In 2006, the plaintiffs learned from the county assessor that the legal description in their grant deed and the policy of title insurance was correct, but the plaintiffs owned only one of the two parcels. (*Id.* at pp. 591-592.) The title insurance company denied coverage of the plaintiffs' dispute with a neighbor regarding ownership of the second parcel, relying on the fact that the legal description of the property in the preliminary report and policy of title insurance was correct. (*Id.,* at pp. 591-592.) The Court of Appeal reversed the trial court's grant of summary judgment in

favor of the title insurance company and held that "the insured can rely on a preliminary report to reflect the scope of the coverage being offered." (*Id.* at p. 596.) The court explained, "the preliminary report in this case can be reasonably construed as an offer to insure APN 22. The report included APN 22 in the property's address, listed exclusions from coverage that were specific to APN 22, and attached an assessor's parcel map with an arrow pointing to the number 22. Plaintiffs could have reasonably expected, under the circumstances, that they were buying a title insurance policy on APN 22 that would conform to the preliminary report." (*Id*. at pp. 594-595.)

Unlike here, the holding in *Lee* hinged on interpretation of the title insurer's agreement to insure the title to APN 22 and not the application of the Insurance Code section 12340.11. Indeed, the *Lee* Court acknowledged and reiterated that under the Insurance Code section 12340.11, a title insurer cannot be held liable for negligence in connection with a preliminary report, and that the recipient of the report cannot rely on it to represent the status of title to the property to be insured. (*Id*. at 696.) Even if the Court was to apply the Lee's holding to these facts, the FAC still fails to state a viable claim for negligence because its allegations are based on Defendants' failure to discover and disclose the encumbrance on the Property and not the coverage scope of the title insurance policy.

Accordingly, FATIC's demurrer to the fourth cause of action for negligence is SUSTAINED WITHOUT LEAVE TO AMEND.

**E. Constructive Fraud**

Constructive fraud only occurs when there is a fiduciary or confidential relationship and arises from a breach of duty by a person in that relationship, which induces justifiable by the other person in the relationship. (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131.)

Plaintiffs' claim is against FATIC and Defendants, Maria Tamayo only. The FAC fails to allege facts with the requisite specificity sufficient to constitute a cause of action for constructive fraud. More specifically, and for the above reasons, the FAC fails to allege facts establishing the existence of a fiduciary or confidential relationship with FATIC and its breach. To the extent the FAC alleges that FATIC misled Plaintiffs by its failure to disclose the easement on the Property, the FAC must describe with sufficient particularity what information was concealed, how and to what extent the

information was concealed, and how and to what extent FATIC knew that concealing the truth from Plaintiffs would benefit them as sellers or assignees of the buyer.

Accordingly, FATIC's demurrer to the fifth cause of action for constructive fraud is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

**F. Declaratory Relief**

"The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject. [Citation.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 *(Cotati);* Italics in *Cotati.)* "To qualify for declaratory relief, [a party] would have to demonstrate its action presented two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to [the party's] rights or obligations." [Citation.] (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909.) Importantly, "[t]he declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues... Under Code. Civ. Proc. § 1061 the court may refuse to exercise the power to grant declaratory relief where such relief is not necessary or proper at the time under all the circumstances. The availability of another form of relief that is adequate will usually justify refusal to grant declaratory relief." (*General of America Ins. Co. v. Lilly* (1968) 258 Cal.App.2d 465, 470-471.)

Here, the FAC alleges (1) an actual controversy has risen between the parties concerning their respective rights and obligations relating to the sales of the Property and under the title insurance policy, and (2) Plaintiffs desire a judicial determination and declaration as to the parties' rights under the title insurance policy. (FAC ¶¶ 147-150.) The Court finds that the pleaded controversy is alleged based on the same allegations and issues raised in Plaintiffs' other causes of action. Plaintiffs' assertion that the controversy relates to the escrow agreement, the escrow instructions, title insurance policy, and indemnification simply supports the Court's conclusion. (Opposition p. 14, lines 6-9.)

Accordingly, Defendants' demurrer to the sixth cause of action for declaratory relief is SUSTAINED WITHOUT LEAVE TO AMEND.

**Calendar Line 9**
**Case Name:** *Serenity MSO LLC, et al. v. Palo Alto Mind Body, et al.*
**Case No.:** 24CV432080

Before the Court is Defendants Palo Alto Mind Body's ("PAMB") and Rameen Ghorieshi's ("Rameen") (collectively, "Defendants") demurrer to Plaintiffs' Serenity MSO, LLC ("Serenity") and Reza Ghorieshi's complaint ("Complaint").[1] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

## I. Background

This action arises out of a business dispute between brothers. Reza is the principal owner of Serenity while Rameen is the CEO and principal owner of PAMB. (Complaint, ¶¶ 4-7.) PAMB is a physician practice, which specializes in the care and treatment of mental and behavioral illnesses. (Complaint, ¶ 15.) Reza and Rameen have been involved with PAMB since it started operating. (Complaint, ¶ 16.) In May 2018, Reza began assisting Rameen by utilizing his business acumen and experience to improve aspects of the practice. (Complaint, ¶¶ 17-18.) His advice shifted the practice's focus from offering concierge psychiatry services to facilitating new treatments for new patients suffering from depression and addiction. (Complaint, ¶ 18.) As a result, Rameen's revenue quickly began to increase, in fact, they doubled in their first year working together. (*Ibid.*)

On September 9, 2019, Reza and Rameen agreed that effective January 1, 2020, Reza would continue his business management efforts, in exchange for a base salary plus a bonus of 10% of Rameen's net income (the "2019 Agreement"). (Complaint, ¶ 19.) They also agreed that Rameen would continue as the CEO, principal owner, and handle all clinical aspects of the practice while Reza would be the Chief Operating Officer ("COO") and be responsible for all administrative/operations aspects of the practice. (*Ibid*.) They further agreed that, in the future, Reza would create a separate managed services organization ("MSO") entity to handle business and operational services for PAMB. (*Ibid*.) In January 2020, PAMB commenced business operations and it has since enjoyed much success, which is attributable to the physicians and the elements built and managed by Reza. (Complaint, ¶¶ 20-21.) He formed and trained a high-performance team to obtain multiple levels of

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

medical and network inadequacy authorization to ensure collectability from insurance companies for PAMB's out-of-network provisions of treatment. (Complaint, ¶ 21.) By late 2021, Reza built a team of 25 people who helped PAMB deliver unprecedented access-to-care services to patients, which collected reimbursements for PAMB from insurance companies and as a result, PAMB experienced a 154% increase in revenue from 2020. (Complaint, ¶ 23.)

On April 25, 2022, Rameen and Reza came to an agreement (the "2022 Agreement") where Reza would handle PAMB's administrative and management side, in exchange for an adjusted profit allocation of 55/45 (i.e., 55% for PAMB/Rameen and 45% for Serenity/Reza) after priority distribution of the first $1 Million to Rameen of PAMB's profits. (Complaint, ¶ 27.) They further agreed the allocation would be effective from January 1, 2022, and continue for all authorizations, billings and collections Plaintiffs assisted in procuring. (*Ibid*.) Reza continued to provide the services to PAMB and as a result, PAMB's revenues increased by 36% in 2022. (Complaint, ¶¶ 28-34.)

In January 2023, Rameen accused Serenity and Reza of receiving more than it should have under the 2022 Agreement and stopped paying Serenity until PAMB's CPA could complete an accounting and true-up the revenues and the adjusted profit allocation for 2022. (Complaint, ¶ 36.) In February 2023, Rameen promised that Serenity would be paid all amounts owed under the 2022 Agreement, thus, Plaintiffs continued to provide services. (*Ibid*.) On June 2, 2023, the CPA completed an accounting for 2022 and for PAMB's accrued profits through April 30, 2023, which showed Serenity was underpaid and owed $14,487.26 from Defendants. (Complaint, ¶ 37.) Defendants refused to pay Plaintiffs the amounts owed for 2022 or the outstanding amounts for services provided in 2023, and on August 30, 2023, Rameen terminated Plaintiffs' business relationship with PAMB. (Complaint, ¶¶ 38-40.) Despite Plaintiffs' follow-up requests for payment, Defendants refused to pay Plaintiffs. (Complaint, ¶ 42.)

On February 29, 2024, Plaintiffs filed their Complaint, asserting (1) breach of contract, (2) quantum meruit, (3) restitution/unjust enrichment, (4) accounting, (5) conversion, (6) promissory fraud, and (7) violation of Penal Code, § 496. On April 24, 2024, Defendants filed the instant motion, which Plaintiffs oppose.

## II. Request for Judicial Notice

Defendants request judicial notice of: (1) the First Amended Complaint for *Reza Ghorieshi v. John Mansfield, et al.*, filed in Georgia State Court, County of Fulton (Case No. 18EV002022), and (2) the Defendants' answer and defenses in Case No. 18EV002022.

Court records are proper items of judicial notice. (Evid. Code, § 452, subd. (d).) However, "with respect to any and all court records, the law is settled that the court will not consider the truth of the document's contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375.) Moreover, only relevant material may be judicially noticed. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 (*Gbur*) [information subject to judicial notice must be relevant to the issue at hand].) Further, "[a] court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 114-115.)

The Georgia case is not relevant to the instant matter. Thus, Defendants' request for judicial notice is DENIED.

## III. Legal Standard

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

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual

allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendants demur to each cause of action on the grounds they are uncertain and fail to allege facts sufficient to state their claim. (Code Civ. Proc., § 430.10, subd. (e).)

**A. Uncertainty**

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (*Khoury*).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Ibid*.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Defendants identify uncertainty as a basis for demurrer as to each cause of action, but they only argue the first cause of action is uncertain because Plaintiffs did not identify who the contracting parties are. However, the complaint alleges: "about April 25, 2022, Rameen and Reza agreed that Plaintiffs would handle PAMB's administrative and management side of the business, including insurance authorizations, billings and collections, in exchange for an adjusted profit allocation." (Complaint, ¶ 44.) Plaintiffs also allege alter ego liability. (Complaint, ¶ 8.) Therefore, the claim is not so uncertain that Defendants cannot reasonably respond to it. (*Khoury, supra,* 14 Cal.App. 4th at p. 616.) Thus, the demurrer based on uncertainty is OVERRULED.

**B. First Cause of Action: Breach of Contract**

Plaintiffs appear to seek to hold Rameen personally liable under alter ego liability and liable as the CEO of PAMB.

**1. Alter Ego Liability**

"To recover on an alter ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 415 (*Leek*) [complaint alleging individual defendant was owner of all stock of defendant corporation and personally made all its business decisions was not sufficient for alter ego liability]; *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 235 [plaintiff sufficiently alleged unity of interest by alleging corporate entity was inadequately capitalized, failed to "abide by the formalities of corporate existence," and was dominated, controlled, and used by defendant as a "mere shell and conduit"].)

Plaintiffs allege, on information and belief, that PAMB was and is Rameen's alter ego and there exists a unity of interest and ownership between Defendants such that any separateness between them has ceased to exist in that Rameen completely controlled, dominated, managed, and operated PAMB as his instrumentality so as to suit his convenience. (Complaint, ¶ 8.) Plaintiffs further allege, on information and belief, that Rameen:

(1) Controlled the business and financial affairs of PAMB;

(2) Commingled the funds and assets of the business, and diverted business funds and assets for his own personal use;

(3) Disregarded legal formalities and failed to maintain an arm's length relationship with the business;

(4) Inadequately capitalized or withdrew excessive capital from PAMB, especially considering its liabilities and debts, including but not limited to the money at issue in this case;

(5) Used the business as a mere shell, instrumentality or conduit for his individual or personal affairs;

(6) Used the business to procure labor, services, or merchandise for himself individually or for another person or other entities;

(7) Manipulated the assets and liabilities of his personal affairs and the business so as to concentrate the assets in one and the liabilities in another;

(8) Used the business to conceal his ownership, management, and financial interests and/or personal business activities; and

(9) Used the business to try to shield against personal obligations, including the obligations as alleged in this Complaint.

(*Ibid*.)

These allegations are sufficient to allege a unity of interest and ownership. (*Rutherford Holdings, supra,* 223 Cal.App.4th at pp. 235-236 [Plaintiff required to allege only "ultimate rather than evidentiary facts" and "less particularity is required where the defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by the plaintiffs"].) However, Plaintiffs fail to allege that an unjust result would occur if the corporation is treated as the sole actor. (See *Leek, supra,* 194 Cal.App.4th at p. 415.) Thus, Plaintiffs fail to allege sufficient facts to establish alter ago liability.

**2. Sufficiency of the Allegations**

To allege a cause of action for breach of contract, a plaintiff must allege (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921 (*Bushell*).)

Plaintiffs allege the 2022 Agreement, their performance, Defendants' breach, and the resulting damages. (Complaint, ¶¶ 44-48.) Plaintiffs specifically allege, "about April 25, 2022, Rameen and Reza agreed that Plaintiffs would handle PAMB's administrative and management side of the business, including insurance authorizations, billings and collections, in exchange for an adjusted profit allocation." (Complaint, ¶ 44.) Therefore, it is clear that PAMB and Reza are parties to the 2022 Agreement. However, Plaintiffs fail to allege facts that Rameen personally entered into the contract and they fail to sufficiently allege alter ego liability. Therefore, the demurrer is SUSTAINED as to Rameen with 20 days leave to amend and OVERRULED as to PAMB.

**C. Second Cause of Action: Quantum Meruit**

> A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. See, e.g., 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, sections 12, page 47; 91, pages 122-123; 112, pages 137-138. However, *it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation*. *Willman v. Gustafson* (1944) 63 Cal. App. 2d 830 (there can be no implied promise to pay reasonable value for services when there is an express agreement to pay a fixed sum). See also 55 California Jurisprudence Third, Restitution, sections 19, page 328 et seq.; and 58, and pages 375-376 (no ground to imply payment obligation in conflict with express contract).
>
> …
>
> *When parties have an actual contract covering a subject, a court cannot--not even under the guise of equity jurisprudence--substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract.* [Footnote omitted.]

(*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419 – 1420; emphasis added.)

A plaintiff is permitted at the pleading phase to plead inconsistent causes of action for breach of contract and quantum meruit in the alternative. (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1222-1223.) To alternatively plead inconsistent claims for breach of contract and quasi-contract, the quasi-contract cause of action must deny the existence or enforceability of the earlier pleaded contract. (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1389.)

The 2022 Agreement governs the parties' agreement for services, therefore, Plaintiffs do not have an equitable basis for an implied-in-law promise. Plaintiffs argue Defendants dispute the validity of any contract, however, it appears Defendants dispute whether the 2022 Agreement is sufficiently alleged, not the validity of it. While Plaintiffs are allowed to plead inconsistent claims at this stage, Plaintiffs fail to deny the existence or enforceability of the 2022 Agreement. Therefore, Plaintiffs are

precluded from asserting this claim against Defendants. (See *California Medical Association v. Aetna U.S. Healthcare of California* (2001) 94 Cal.App.4th 151, 173-174.) Thus, the demurrer to the second cause of action SUSTAINED with 20 days leave to amend.

**D. Third Cause of Action: Restitution/ Unjust Enrichment**

There appears to be a split of appellate authority as to whether California recognizes an independent cause of action for unjust enrichment. (See *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 ("There is no cause of action in California for unjust enrichment[;]" it "is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself.") (internal quotations omitted); *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117 (same); *Elder v. Pacific Bell Telephone Co*. (2012) 205 Cal. App. 4th 841 ("This allegation satisfies the elements for a claim of unjust enrichment: receipt of a benefit and unjust retention of the benefit at the expense of another." (internal citations and quotations omitted); *Lectrodryer v. Seoulbank* (2000) 77 Cal. App. 4th 723 (affirming judgment for plaintiff on unjust enrichment claim).

However, this Court falls under the Sixth Appellate District, and that court of appeal unequivocally held in a 2020 decision:

> [Plaintiff's] complaint includes a cause of action entitled unjust enrichment. Summary adjudication of that claim was proper because California does not recognize a cause of action for unjust enrichment. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 [131 Cal. Rptr. 2d 347] [the phrase "unjust enrichment" does not describe a theory of recovery; it is a general principle underlying various legal doctrines and remedies].)

(*Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal. App. 5th 323, 336.)

Accordingly, Defendant's demurrer to this cause of action is SUSTAINED WITHOUT LEAVE TO AMEND..

**E. Fourth Cause of Action: Accounting**

An action for an accounting is equitable in nature. It may be brought to compel the defendant to account to the plaintiff for money or property, (1) where a fiduciary relationship exists between the parties, or (2) where, even though no fiduciary relationship exists, the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable. (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 401 (*Los Defensores*).) "A cause of action for an accounting requires a

showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) "An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing. Equitable principles govern, and the plaintiff must show the legal remedy is inadequate… some underlying misconduct on the part of the defendant must be showing to invoke the right to this equitable remedy." (*Prakashpalan v. Engstrome, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136-1137 (*Prakashpalan*).)

Defendants contend an accounting is a remedy, not a cause of action. However, an accounting may be pleaded as a cause of action. (See *Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1413.) Therefore, the demurrer cannot be sustained on this basis.

Plaintiffs allege a relationship exists between the parties where there is a balance due to Plaintiffs based on the 2022 Agreement. (Complaint, ¶ 63.) Plaintiffs allege the exact amount is believed to be substantial but is currently uncertain and can only be ascertained through a complete review and accounting. (Complaint, ¶ 64.) However, Plaintiffs fail to allege that ordinary legal action demanding a fixed sum is impracticable. (See *Los Defensores, supra,* 223 Cal.App.4th at p. 401.) Based on the 2022 Agreement, Plaintiffs are owed 45% of the profit allocation. (See Complaint, ¶ 27.) Thus, the demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend.

**F. Fifth Cause of Action: Conversion**

Conversion is the wrongful exercise of dominion over the property of another. (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 45.) The elements of a conversion are (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. (*Ibid*.) "Conversion requires affirmative action to deprive another of property, not a lack of action." (*Spates v. Dameron Hospital Assn* (2003) 114, Cal.App.4th 208, 222.) It 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, 544.) "Money can be the subject of an action for conversion if a specific sum capable of identification is involved." (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 452 (*Farmers Ins. Exchange*).) A generalized claim for money is not actionable as conversion. (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235.) A mere contractual right to money does not constitute conversion. (*Farmers Ins. Exchange*, *supra*, 53 Cal. App. 4th at p. 452.) Nor does the defendant's simple failure to pay money owed to Plaintiff. (*Voris v. Lampert* (2019) 7 Cal. 5th 1141, 1151 (*Voris*).)

Plaintiffs do not identify the specific sum owed, although, it appears one can be identified through the 2022 Agreement. Plaintiffs allege they are the rightful owners of all substantial funds wrongfully stolen/withheld by Defendants. (Complaint, ¶ 68.) They further allege Defendants substantially interfered with Plaintiffs' right to these funds by knowingly and intentionally taking possession of them, and now refusing to pay the money for the services rendered by Plaintiffs. (Complaint, ¶ 69.) As a result, Plaintiffs have been harmed. (Complaint, ¶¶ 71-72.)

Defendants contend this is a case of "failure to pay money owed." Defendants rely on *Voris, supra,* 7 Cal.5th 1141, 1151-1152. In *Voris*, the plaintiff worked with the defendant to launch three startup ventures, partly in return for a promise of later payment of wages. (*Id*. at p. 1144.) He was fired after a falling out and he never received the promised compensation. (*Ibid*.) He sued the companies, won, and then sought to hold the defendant personally liable for unpaid wages under a conversion claim. (*Ibid*.) The Supreme Court concluded that conversion was not proper for the wrong alleged by the plaintiff. (*Id*. at p. 1145.) It noted that "cases recognizing claims for the conversion of money typically involve those who have misappropriated, commingled, or misapplied specific funds held for the benefit of others." (*Id*. at 1152.) The court stated an employee's claim to earned wages is that the employer failed to reach into its own funds to satisfy its debt. (*Id*. at p. 1153.) It further stated that the plaintiff claimed a right to money that did exist but was squandered and rejected the plaintiff's argument that the claim should have been treated like a conversion of property, not as a failure to satisfy a "mere contractual right of payment." (*Ibid.*) The court explained:

> But to accept this argument would require us to indulge in a similar fiction" namely, that once [the plaintiff] provided the promised services, certain identifiable monies in

> his employer's accounts became [the plaintiff's] personal property, and by failing to turn them over at the agreed-upon time, his employers converted his property to their own use.

(*Ibid*.)

The court distinguished the plaintiff's case which simply sought satisfaction of a monetary claim against an employer from matters involving the failure to turn over commissions, which "were earmarked for a specific person before being misappropriated and absorbed into another's coffers." (*Id*. at p. 1156.) Plaintiffs allege they have a right to possess the funds and Defendants failed to distribute them. Moreover, Plaintiffs allege that Defendants failed to distribute the owed 2022 funds *after the accounting* and any funds owed for services received in 2023. (See Complaint, ¶¶ 37-39.) Therefore, the Court is not persuaded by Defendants reliance on *Voris,* because Plaintiffs allege more than a "failure to pay money owed."

Plaintiffs rely on *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027 (*Sanowicz*), which involved a real estate agent who accepted commissions on behalf of himself and a business partner, but then refused to give the partner his share. (*Id*. at p. 1042.) The court found the allegations that he converted the commission when he refused to pay the partner and thus, exercised dominion and control over the funds to his partner's exclusion sufficient to state a conversion claim. (*Id*. at p. 1042.) In *Sanowicz*, the parties had an agreement to share commissions earned by either of them on certain real property sales. (*Id*. at p. 1030.) Thus, the plaintiff had a right to possession of the funds at the time of the conversion. (*Id*. at p. 1042.) A profit allocation agreement is similar to a commission sharing agreement. However, it is unclear to the Court whether Plaintiffs allege their funds were converted in January 2023, when Rameen caused PAMB to stop paying Serenity in January 2023 or after the accounting was concluded and he continued his refusal to pay Serenity. (Complaint, ¶¶ 36-38.) At the very least, it appears after the accounting, Plaintiffs had a right to possess the money owed to them. Therefore, the demurrer cannot be sustained on this basis. (See *PH II, Inc. v. Superior Court*

(1995) 33 Cal.App.4th 1680, 1682 ["a demurrer does not lie to a portion of a cause of action"].) Thus, the demurrer to the fifth cause of action is OVERRULED.

**G. Sixth Cause of Action: Promissory Fraud**

The elements of fraud are (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. (*Lazar v. Superior Ct.* (1996) 12 Cal.4th 631, 638 (*Lazar*).) Every element of a fraud claim must be pleaded with particularity, conclusory allegations will not suffice. (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157 (*Tarmann*).)

"'Promissory fraud' is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973 – 974; see also CACI, No. 1902.) In *Tarmann, supra*, 2 Cal.App.4th at p. 159, the court explained, "To maintain an action for deceit based on a false promise, one must specifically allege and prove, among other things, that the promisor did not intend to perform at the time he or she made the promise and that it was intended to deceive or induce the promisee to do or not do a particular thing."

> [T[he facts essential to the statement of a cause of action in fraud or deceit based on a promise made without any intention of performing it are: (1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent at the time of making the promise; (3) the promise was made with intent to deceive or with intent to induce the party to whom it was made to enter into the transaction; (4) the promise was relied on by the party to whom it was made; (5) the party making the promise did not perform; (6) the party to whom the promise was made was injured.

(*Muraoka v. Budget Rent-A-Car* (1984) 160 Cal.App.3d 107, 119.)

Plaintiffs allege "Rameen, on behalf of PAMB, made a false promise to Plaintiffs that PAMB would pay all amounts owed under the parties' agreement to an adjusted profit allocation." (Complaint, ¶ 75.) They further allege the promise was false and Rameen did not intend to fully

perform at the time he made the promise. (Complaint, ¶ 76.) However, this is contradicted by Plaintiffs' allegations that they "were allocated most of its 45% shares of PAMB accrued profits in 2022 consistent with the agreed-upon ratio." (Complaint, ¶ 35.) Based on the allegations, Plaintiffs cannot sufficiently allege Rameen did not intend to perform at the time he made the 2022 Agreement. As a result, Plaintiffs' claim rests upon Rameen's alleged February 2023 affirmation of his intent to pay Plaintiffs "all amounts owed under the parties' agreement after PAMB completed its accounting and true-up of the revenues and the profit allocation for 2022." (Complaint, ¶ 75.) But Plaintiffs fail to allege specific facts as to the February 2023 representation, such as how, where, to whom, and by what means the representations were tendered. (See *Lazar, supra,* 12 Cal.4th at p. 645.) Moreover, Plaintiffs fail to allege any *facts* to support their allegation that Rameen did not intent to fully perform at the time he made the alleged promise. (See Complaint, ¶ 76; *Tarmann, supra,* 2 Cal.App.4th at p. 159.) Plaintiffs also fail to allege the promise was made with the intent to deceive Plaintiffs. (*Tarmann, supra,* 2 Cal.App.4th at p. 159; *Laza, supra,* 12 Cal.4th 631, 638.) Thus, Plaintiffs fail to allege sufficient facts to state this claim and the demurrer to the sixth cause of action is SUSTAINED with 20 days leave to amend.

**H. Seventh Cause of Action: Violation of Penal Code section 496**

Penal Code section 496, subdivision (a), provides that,"[e]very person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of section 1170… *A principal in the actual theft* of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property." (Pen. Code section 496, subd. (a) [emphasis added].) Penal Code section 484 defines theft, i.e., the taking of money, labor, or real or personal property of another, to include theft by fraudulent representation and false pretense. (Pen. Code, § 484, subd. (a); *People v. Gomez* (2008) 43 Cal.4th 249, 255, fn. 4.) Section 496, subdivision (c) states, "[a]ny person who has been injured by a violation of subdivision (a) or (b) may bring an

action for three times the amount of actual damages, if any, sustained by the plaintiff, cost of suit, and reasonable attorney's fees." (Pen. Code Section 496, subd. (c).)

"[T]he elements required to show a violation of section 496, subdivision (a), are simply that (i) property was stolen or obtained in a manner constituting theft, (ii) the defendant knew the property was 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 (*Switzer*).) "Not all commercial or consumer disputes alleging that a defendant obtained money or property through fraud, misrepresentation, or a breach of a contractual promise will amount to theft." (*Siry Investment LP v. Farkenhondehpour* (2022) 13 Cal.5th 333, 361 (*Siry Investment*).) Statutory causes of action must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*).)

Defendants rely on *Siry Investment, supra,* which states criminal intent is required to prove theft, beyond "mere proof of nonperformance or actual falsity." (*Id*. at p. 362.) However, *Siry Investment* was beyond the pleading stage and considered the entire record. On demurrer, the Court does not consider whether Plaintiffs can prove theft, only whether they can adequately allege the claim. Defendants do not provide any authority which requires Plaintiffs to allege criminal intent to state this claim, therefore, the demurrer cannot be sustained on this basis.

Plaintiffs allege Defendants refused and continue to refuse to pay the funds to Plaintiffs pursuant to their 2022 Agreement and/or promise to do so. (Complaint, ¶ 82.) They further allege Defendants unlawfully converted and used substantial funds for their own exclusive benefit with the intent to deprive Plaintiffs of their use of this money and such actions constitute theft under Penal Code section 496, subdivision (a). (Complaint, ¶¶ 85-86.) However, Plaintiffs fail to allege any facts in support of their allegations and as a result, Plaintiffs fail to allege this claim with the requisite particularity. (See *Covenant Care, supra,* 32 Cal.4th at p. 790.) Plaintiffs also fail to allege Defendants knew the funds were obtained in a manner constituting theft. (*Switzer, supra,* 35 Cal.App.5th at p. 126.) Thus, the demurrer to the seventh cause of action is SUSTAINED with 20 days leave to amend.