SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20 (will be heard in Department 6)
Honorable Evette D. Pennypacker, Presiding (for Hon. Socrates Manoukian)

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: April 4, 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, please 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: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

LINE #	CASE #	CASE TITLE	RULING

LINE 1	21CV387995	*Los Gatos Trade Line Corp. vs. Jacqueline Chartier*	THE CALENDAR WILL BE CALLED IN DEPARTMENT 6. IF YOU PLAN TO ATTEND REMOTELY, PLEASE USE THE DEPT. 6 TEAMS LINK FROM THE COURT WEBSITE. https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml This motion is premature. The parties are currently in mediation. If the reference clause in the agreement is effective and not waived, it provides that a reference be made only if mediation is unsuccessful. There is no information currently before the Court indicating that the parties' ongoing mediation is unsuccessful. Thus, this motion is DENIED WITHOUT PREJUDICE to being renewed if the parties determine mediation will not be fruitful. This order will be reflected in the minutes.
LINE 2	23CV426357	*Austin Tagle vs. Superior Court County of Santa Clara*	This matter is being reassigned. The court will contact the parties with further instructions.

LINE 3	23CV426357	*Qusay Saeed vs Arch Veterinary Services, Inc.*	THE CALENDAR WILL BE CALLED IN DEPARTMENT 6. IF YOU PLAN TO ATTEND REMOTELY, PLEASE USE THE DEPT. 6 TEAMS LINK FROM THE COURT WEBSITE. https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml Defendant Arch Veterinary Services, Inc. (erroneously sued as Arch Vet)'s demurrer to Plaintiff's complaint is SUSTAINED WITHOUT LEAVE TO AMEND. A notice of motion with this hearing date and time was served on Plaintiff by electronic and U.S. Mail on February 5, 2024. Plaintiff failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) While the Court will not convert this demurrer into a summary judgment motion by considering non-judicially noticeable facts contained in the declarations submitted in support of Defendant's demurrer, the Court may properly consider the contract attached to the complaint and the complaint, neither of which state a claim for relief. "Plaintiffs have the burden to show how they could further amend their pleadings to cure the defects. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 411 [citations omitted] (*Carter*).) He has not done so here. And, while Plaintiff is self-represented, self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Accordingly, Defendant's demurrer is sustained without leave to amend. Defendant is ordered to prepare and file a form of judgment/dismissal within 10 days of service of the formal order, which the Court will prepare.
LINE 4	23CV428212	*Ella Herman et al vs Polynesian Condominium Motel et al*	THE CALENDAR WILL BE CALLED IN DEPARTMENT 6. IF YOU PLAN TO ATTEND REMOTELY, PLEASE USE THE DEPT. 6 TEAMS LINK FROM THE COURT WEBSITE. https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml Please see tentative ruling below.

LINE 5-6, 14	20CV369499	*Eric Kutcher et al vs Vahe Tashjian et al*	Orange Coast Title Company's Motion to Compel Reza Khan's Deposition is continued to April 18, 2024 to be heard by Judge Manoukian in conjunction with the motion to stay set for that same date. The motion to stay was previously continued to April 18, 2024. The Motion to Compel AT&T's Response to Subpoena was withdrawn per moving party.
LINE 7	21CV382651	*Gregory Gilbert, MD vs. Stanford Health Care et. al*	The parties have already spent significant time working on discovery with Judge Manoukian. Thus, Defendants' motion to compel is continued to April 16, 2024 to be heard by Judge Manoukian in conjunction with the motion for appointment of referee.
LINE 8	21CV384329	*Long Venture Partners LP vs Justin Waldron et al*	THE CALENDAR WILL BE CALLED IN DEPARTMENT 6. IF YOU PLAN TO ATTEND REMOTELY, PLEASE USE THE DEPT. 6 TEAMS LINK FROM THE COURT WEBSITE. https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml Plaintiff Long Venture Partners LP's Motion to Compel Further Responses from Playco Global, Inc.'s Request for Production (Set Three) and for Sanctions ($4000) is GRANTED, IN PART. It is apparent from this record that Plaintiff's motion prompted Defendant's efforts to comply with the Code of Civil Procedure's discovery requirements. Thus, the Court finds it appropriate to award Plaintiff sanctions in the requested sum of $4,000. It is also apparent that many more documents and a privilege log have been produced, and the parties have not met and conferred regarding any issues that might remain with this additional production. Accordingly, the parties are ordered to meet and confer either in person or by video conference (letters, emails, or phone calls are not sufficient) and bring any further issues to the court by way of a further noticed motion. Court to prepare formal order.
LINE 9	22CV393267	*Background Images, LLC vs Dan Ellis*	Motion withdrawn by moving party on April 3, 2024.

LINE 10	16CV295730	*Cyrus Hazari vs Mandy Brady*	THE CALENDAR WILL BE CALLED IN DEPARTMENT 6. IF YOU PLAN TO ATTEND REMOTELY, PLEASE USE THE DEPT. 6 TEAMS LINK FROM THE COURT WEBSITE. https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml Dr. Horvath's motion to intervene to oppose amending the judgment to add her as a judgment debtor is GRANTED. Code of Civil Procedure section 387 permits intervention when the non-party has an interest in the litigation of such a direct or immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Here, where Defendant seeks to amend the judgment to add Dr. Horvath as a judgment debtor, there can be no question that Dr. Horvath will be directly impacted by the judgment. The timeliness argument is not persuasive, since until Dr. Horvath was faced with being added as a judgment debtor, she did not have an interest in the outcome of the litigation that would qualify her to intervene. Dr. Horvath's ownership (or lack thereof) of particular property is not the issue; whether she is properly identified as a judgment debtor is the issue. Moving party to prepare formal order.
LINE 12	24CV432555	*Can Do L.P. vs Pinelli's Maintenance Company, Inc.*	Petitioner's petition for release of property from mechanics lien is GRANTED. The Court finds that the allegations and service comply with Civil Code sections 8484 and 8485. No opposition to the petition has been filed. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Accordingly, the petition is GRANTED. This order will be reflected in the minutes. Petitioner to prepare any additional necessary formal orders.
LINE 13	23CV425883	*Andrew Laich et al vs McAfee, LLC*	Defendant's unopposed motion for an extension through April 5, 2024 to respond to the Amended Complaint is GRANTED. Defendant shall up to and including April 5, 2024 to respond to the Amended Complaint. This order will be reflected in the minutes.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 6

191 North First Street, San Jose, CA 95113
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 23CV428212 **Ella Herman et al. v. Polynesian Condominium Motel et al.**

DATE: 4 April 2024 **TIME: 9:00 am** **LINE NUMBER: 4**

Order on Motion to Quash

I. Statement of Facts

Plaintiffs Ella Herman and Erik Cole (collectively, "Plaintiffs") are California residents. (Complaint, ¶¶1-2.) Defendant Polynesian Condominium Motel ("PCM") is a business entity operating in Ocean Shores in the state of Washington. (Complaint, ¶3.) Defendants Fred Smith, John Gaston, David Eagen, Diane Dobson, and Michelle Womack are individuals residing in Ocean Shores, Washington, and together they form PCM's board of directors.[1] (Complaint, ¶¶4-8, 14.)

Plaintiff Herman is a financial consultant, and plaintiff Cole is in the business of hotel management. (Complaint, ¶¶12-13.) On 19 October 2022, PCM hired Cole as a hospitality consultant, and Cole and PCM executed an independent contractor agreement. (Complaint, ¶15, Ex. A.) Under this agreement, Cole was to provide consultation and oversight on transactions from management by Vacation Villages to PCM board management, and PCM agreed to pay Cole $12,000 per month and reimburse him for travel and cell phone expenses. (Complaint, ¶¶16-17.)

Under the agreement with Cole, if PCM failed to pay any correct and undisputed sums due, Cole had the option to terminate the agreement by giving written notice. (Complaint, ¶18.) After executing the agreement, Cole began performing the services agreed upon and paid many necessary PCM expenses on his personal credit card. (Complaint, at ¶20.)

In December of 2022, the PCM board voted that Herman was to begin providing financial services as a consultant. (Complaint, ¶21.) PCM initially agreed to pay Herman $7,500 per month and later raised her compensation to $9,000 per month. (*Ibid.*) From January to May 2020, Herman set up and used an accounting system for the purpose of sending invoices for review to the PCM board president, defendant Smith. (Complaint, ¶22.) The cost of setting up this accounting system was $25,000, and this amount was approved and paid in February 2023. (Complaint, ¶23.)

[1] Defendants PCM, Fred Smith, John Gaston, David Eagen, Diane Dobson, and Michelle Womack are collectively referred to in the complaint and this statement of facts as "Defendants." It should be noted that the moving defendants on the instant motion to quash are Michelle Womack, David Eagen, John Gaston, and PCM. (See Notice of Motion and Motion, p. 1: 24-26; court records do not reflect that defendants Fred Smith and Diane Dobson were ever served with summons in these proceedings.)

On 9 April 2023, plaintiff Herman sent defendant Smith a request for approval of her invoice for financial consulting services rendered over the months of February, March, and April. (Complaint, ¶24, Ex. B.) On 10 April 2023, Smith approved the invoice amount of $27,000 in writing. (Complaint, ¶25, Ex. C.) Herman issued a check for payment. (Complaint, ¶26.)

On 26 May 2023, defendant Gaston questioned the invoice previously approved by defendant Smith. (Complaint, ¶27.) On or about 28 May 2023, a group of former members of the PCM board of directors wrote a letter to the current board of directors, communicating concerns with the leadership under defendant Smith. (Complaint, ¶¶29-32.)

On or about 31 May 2023, plaintiffs Herman and Cole had a zoom meeting with the PCM board of directors to explain the $27,000 check Herman issued to herself for her consulting services. (Complaint, ¶33.) On or about 1 June 2023, PCM shut Herman out of its bank accounts at Bank of the Pacific. (Complaint, ¶34.) Plaintiff Cole wrote to defendant Smith to seek clarification of Plaintiffs' roles but did not receive additional clarification. (Complaint, ¶35.)

On or about 2 June 2023, Cole sent a request for payment and update about past due invoices for his services and expenses. (Complaint, ¶¶36-37.) On or about 6 June 2023, the PCM board of directors contacted Bank of the Pacific and advised it that the $27,000 payment to Herman was fraudulent, despite the fact that defendant Smith had approved the payment. (Complaint, ¶38.) Bank of the Pacific is also Herman's personal bank, and defendant Smith's defamatory statements have damaged her relationship with the bank. (Complaint, ¶39.) On or about 7 June 2023, the PCM board of directors removed Herman from its accounting system. (Complaint, ¶40.)

On 9 June 2023, Plaintiffs sent a letter to the Defendants, terminating the agreement between Cole and PCM and demanding that they cease and desist their defamatory statements and pay Plaintiffs the amounts owed to them. (Complaint, ¶41.) During a board meeting on 24 June 2023, defendant Smith stated that Cole had paid Herman a $25,000 bonus. (Complaint, ¶42.) Other defendant board members falsely accused Cole of stealing a carpet cleaning machine. (Complaint, ¶¶43-46.) On 11 October 2023, Plaintiffs sent another letter to the Defendants, demanding that they cease and desist their defamatory statements and pay the amounts owed to them. (Complaint, ¶50.)

In November 2023, Cole learned that PCM was using his name and credit card account to facilitate credit charge backs for PCM customers. (Complaint, ¶51.) When Plaintiffs commenced these proceedings on 22 December 2023, PCM owed the following amounts to Plaintiff for their respective services and expenses: $29,704.57 to Cole; and $28,185.58 to Herman. (Complaint, ¶52, Ex. D.)

On 22 December 2023, Plaintiffs filed a complaint against Defendants asserting causes of action for:

(1) **BREACH OF CONTRACT**
(2) **BREACH OF ORAL CONTRACT**
(3) **COMMON COUNT: SERVICES RENDERED**
(4) **DEFAMATION**
(5) **BREACH OF BAILMENT**
(6) **CONVERSION**

On 20 February 2024, moving defendants Michelle Womack, David Eagen, John Gaston, and PCM (hereinafter, "Defendants") filed a motion to quash service of summons. On 21 March 2024, Plaintiffs filed opposition papers, and Defendants filed a reply on 27 March 2024.

II. Legal Standard

Code of Civil Procedure section 418.10, subdivision (a)(1), authorizes a defendant to file a motion to quash service of summons "on the ground of lack of jurisdiction of the court over him or her." (***Code Civ. Proc.*** § 418.10, subd. (a)(1).)

Once a defendant files a motion to quash, the burden is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. (***Lebel v. Mai*** (2012) 210 Cal.App.4th 1154, 1160; see also ***HealthMarkets, Inc. v. Superior Court*** (2009) 171 Cal.App.4th 1160, 1167 ["A plaintiff opposing a motion to quash service for lack of personal jurisdiction has the initial burden to demonstrate facts establishing a basis for personal jurisdiction."].)

"Evidence of the jurisdictional facts or their absence may be in the form of declarations." (***Elkman v. National States Ins. Co.*** (2009) 173 Cal.App.4th 1305, 1313.) "[W]here the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is subject to personal jurisdiction is one of law." (***Ibid.***)

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

There are 'two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction.'" (***Preciado v. Freightliner Custom Chassis Corp.*** (2023) 87 Cal.App.5th 964, 976 [quoting ***Ford Motor Company v. Montana Eighth Judicial District Court*** (2021) 592 U.S. __, 141 S.Ct. 1017].) Where general jurisdiction exists as a result of a non-resident defendant's "continuous and systematic" activities in the state, the defendant can be sued on causes of action not related to its activities within the state. (***Cornelison v. Chaney*** (1976) 16 Cal.3d 143, 147.)

If a non-resident defendant's contacts with California are not sufficient for general jurisdiction, the defendant may still be subject to specific personal jurisdiction by the state if it meets a three-prong test: 1) the defendant must have purposefully availed itself of the state's benefits; 2) the controversy must arise out of or be related to the defendant's contacts with the state; and 3) considering the defendant's contacts with the state and other factors, California's exercise of jurisdiction over the defendant must comport with fair play and substantial justice. (***Pavlovich v. Superior Court*** (2002) 29 Cal.4th 262, 269 (***Pavlovich***).)

III. Analysis

Plaintiffs contend defendant PCM is subject to general personal jurisdiction in California courts and that PCM and its defendant board members are also subject to specific personal jurisdiction. In support, plaintiffs submit declarations from plaintiff Erik Cole ("Cole Decl."), plaintiff Ella Herman ("Herman Decl."), and counsel Adam Zaffos. In support of their motion to quash, Defendants submit a declaration from Michelle Womack ("Womack Decl."), who is a named defendant and PCM's board secretary.[2]

A. General Personal Jurisdiction

Plaintiffs argue that defendant PCM is subject to general personal jurisdiction in California, relying largely on plaintiff Cole's declaration. (Opp., pp. 7:6-8:6.) Cole states that he was involved in virtually every aspect of PCM's business during his tenure. (Cole Decl., ¶20.)

[2] Court records indicate that identical versions of Womack's declaration were filed on 13 February 2024 and 20 February 2024.

> That included facilitating the transfer of PCM's advertising contracts and accounts from the former manager to the PCM Board. [sic] Travelnet Solutions, Google Ads, and Sojern for online marketing. Approximately 25% of PCM's advertising was targeted directly to potential guests in California and approximately 10% of PCM's guests were California residents. In addition, I am informed and believe that PCM has or had California residents owning condos at PCM's property.

(*Ibid.*) Plaintiffs also assert because Herman was based in California, virtually every aspect of PCM's finances were run from her location in California. (Opp., p. 7:22-25.) Plaintiffs Herman and Cole contend that PCM is subject to general jurisdiction in California because they "were managing virtually every aspect of PCM's operations *from California*." (Opp., p. 8:4-5, italics original.)

Defendants contend Plaintiffs' evidence fails to show that PCM's contacts with California are substantial, continuous, and systematic. (Reply, p. 3:22-24.) In her declaration, defendant Womack states that PCM (aka, "Polynesian") is a Washington State Corporation with its principal place of business in Ocean Shores, Washington. (Womack Decl., ¶6.)

> Polynesian's sole business is a vacation condominium motel located in Ocean Shores, Washington. Polynesian has no assets in California nor any other state other [than] Washinton. All of Polynesian's business operations and activities are based in the State of Washington and no other state or jurisdiction.

(Womack Decl., ¶7.) In their reply, defendants stress that PCM has no employees in California, noting that Plaintiffs are specifically designated as independent contractors, not employees. (Reply, p. 3:24-27.) Defendants also assert that PCM has no California bank accounts, and its marketing is directed to all fifty states, not just California. (*Ibid*.)

The test for whether a corporate defendant is subject to general jurisdiction "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State." (***Daimler AG v. Bauman*** (2014) 571 U.S. 117, 138-139, internal punctuation and citations omitted (***Daimler***).) "With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction. Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." (***Id.*** at p. 137, internal punctuation and citations omitted.) In ***Daimler***, the high court rejected as "unacceptably grasping" the plaintiffs' request to approve "the exercise of general jurisdiction in every State in which a corporation engages in substantial, continuous, and systematic course of business." (***Id.*** at pp. 137-138.)

Here, Plaintiffs fail to meet their burden of establishing that PCM is subject to general jurisdiction in California. Defendants do not refute the claims that 25% of PCM's advertising is directed at California residents or that the Plaintiffs managed a large portion of PCM's operations from California. Nevertheless, Plaintiffs offer no authority that a corporation may be considered "essentially at home" in a state and thus subject to general personal jurisdiction under such facts alone. Moreover, Defendants' evidence establishes that, under the paradigm bases for general jurisdiction, PCM is at home and subject to general jurisdiction in Washington State because it is both incorporated there and has its principal place of business there. (See Womack Decl., ¶6.)

Accordingly, the Court rejects Plaintiffs' argument that PCM is subject to the general personal jurisdiction of California courts.

B. Specific Personal Jurisdiction

Plaintiffs further contend PCM and its defendant board members are all subject to specific personal jurisdiction in California. (Opp., pp. 8-13.)

If a nonresident defendant's activities in the state are not sufficient to allow the forum state to exercise general jurisdiction for all purposes, the state may nonetheless exercise specific jurisdiction if the defendant purposefully availed himself or herself of forum benefits and the "controversy is related to or 'arises out of' the defendant's contacts with the forum." (***Helicopteros Nacionales de Columbia, S.A. v. Hall*** (1984) 466 U.S. 408, 414; see also ***Burger King Corp. v. Rudzewicz*** (1985) 471 U.S. 462, 472-473 (***Burger King. Corp.***) Once a court decides that a defendant has purposefully established contacts with the forum state and that the plaintiff's cause of action arose out of those forum-related contacts, the final step in the analysis involves balancing the convenience of the parties and the interests of the state in order to determine whether the exercise of personal jurisdiction is fair and reasonable under all of the circumstances. (***Burger King Corp.***, *supra*, 471 U.S. at 477-478; ***Vons Companies, Inc. v. Seabest Foods, Inc.*** (1996) 14 Cal.4th 434, 447-448; ***Pavlovich***, *supra*, 29 Cal.4th 262, 269.)

"Each defendant's contacts with the forum state must be assessed individually. [Citations.]" (***Calder v. Jones*** (1984) 465 U.S. 783, 790 (***Calder***); see also ***Goehring v. Superior Court*** (1998) 62 Cal.App.4th 894, 904 ["jurisdiction over a partnership does not necessarily permit a court to assume jurisdiction over the individual partners"].)

1. Specific Jurisdiction as to defendant PCM

Plaintiffs contend PCM had a contractual relationship with Plaintiffs that involved continuous and wide-reaching contacts with Plaintiffs in California. (Opp., pp. 9:22-23, 10:3-11:22.) Plaintiffs also stress that their common count claim is for services that were rendered in California. (Opp., pp. 11:23-12:4.) Plaintiffs cite ***Anaheim Extrusion Co. v. Superior Court*** (1985) 170 Cal.App.3d 1201, 1203 (***Anaheim Extrusion***) for the proposition that, "[i]n the context of venue, where a defendant's breach is the failure to pay for services, the 'place of performance' is the place where payment is due." (Opp., p. 10:11-13.) Plaintiffs acknowledge that Cole's agreement with PCM contains a Washington choice of law provision but assert that such a clause has no application beyond choice of law issues, citing ***Hunt v. Superior Court*** (2000) 81 Cal.App.4th 901, 909.)

Defendants persuasively argue that Plaintiffs have failed to provide sufficient admissible evidence that PCM has purposefully established contacts with California and that the controversy arises out of such contacts. (Reply, pp. 4:24-6:3.) Plaintiffs offer no authority in support of their position that a corporation purposefully avails itself of another state by agreeing to pay an independent contractor for work performed remotely in that state. Plaintiffs' reliance upon ***Anaheim Extrusion*** is misguided because, as Defendants point out, that decision addresses venue rather than specific personal jurisdiction over a corporation. (***Anaheim Extrusion***, *supra*, 170 Cal.App.3d at pp. 1202-1204.)

Likewise, Plaintiffs' contentions regarding PCM's advertising in California and possible ownership of condominiums by one or more California residents are unavailing. As mentioned, Defendants do not contest Plaintiffs' claims that approximately 25% of PCM's advertising was targeted at potential guests in California and approximately 10% of PCM's guests were California residents. But here, Plaintiffs do not bring this action as PCM guests, nor do they allege that their claims arise from PCM's alleged advertising in California. Furthermore, the operative complaint here is unverified, and Cole's assertion "on information and belief" that PCM has or had California residents owning condos at PCM's property carries minimal evidentiary value. (See ***Mihlon v. Superior Court (Murkey)*** (1985) 169 Cal.App.3d 703 ["an unverified complaint has no evidentiary value in determination of personal jurisdiction"]; ***Floveyor Internat., Ltd. v. Superior Court*** (1997) 59 Cal.App.4th 789, 796 [declaration offered to establish jurisdictional criteria but lacking in foundation "amounts to nothing more than inadmissible hearsay"].)

Plaintiffs thus fail to establish by a preponderance of the evidence that this Court may exercise specific jurisdiction over defendant PCM.

2. Specific Jurisdiction as to PCM board members

The fourth cause of action of Plaintiff's complaint is for defamation against defendants Smith, Dobson, and Womack. (Complaint, ¶10:6-12.) Of the three, only Womack is a party to the instant motion to quash, and it appears Smith and Dobson were never served with summons. (See Order, fn. 1.) Plaintiffs contend that Womack knew that defendants were California residents and "made defamatory statements about Plaintiffs both during their tenure with PCM and months after." (Opp., p. 12:20-21.) Plaintiff Cole asserts he learned that Womack had been falsely accusing him of stealing a carpet cleaning machine and called the Portland Hyatt and told them that Cole left PCM "looking deranged." (Cole Decl., ¶¶15-16.) Plaintiff Herman also states that "the PCM Board contacted Bank of the Pacific and told them that the payment I received was actually 'fraudulent'," and that "the PCM Board, and Defendant Smith in particular, continued to make false statements about me and Mr. Cole." (Herman Decl., ¶¶15, 19.)

Plaintiffs' proffered evidence does not establish by a preponderance of the evidence that any of the moving individual board members have purposefully established case-linked contacts with California. Plaintiffs rely upon the "effects test" described in ***Pavlovich***, supra, 29 Cal.4th at pp. 270, 273, arguing that this state's jurisdiction over Womack is proper because her conduct caused foreseeable injury here and she expressly aimed her tortious conduct at California. (Opp., p. 12:8-27.)

However, while Plaintiffs argue that it was clearly Womack's intent to cause harm to Plaintiffs in California, they fail to provide admissible evidence that Womack made any allegedly defamatory statement to anyone in California. (See ***Burdick v. Superior Court*** (2015) 233 Cal.App.4th 9, 20 [to satisfy the effects test, "the plaintiff must show 'the defendant knew that the plaintiff would suffer the brunt of the harm cause by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum' [Citation.]".)

Plaintiffs thus fail to establish by a preponderance of the evidence that this Court may properly exercise jurisdiction over the moving defendants.

IV. Order

The motion by defendants PCM, Michelle Womack, David Eagen, and John Gaston to quash [***Code Civ. Proc.*** § 418.10(a)(1)] is GRANTED.

DATED:

HON. EVETTE D. PENNYPACKER
Judge of the Superior Court
County of Santa Clara

Promissory Estoppel

(1) COMMON COUNTS – MONEY HAD AND RECEIVED

On 30 January 2024, defendant Chan filed a demurrer to Plaintiff's FAC. On 26 February 2024, Plaintiff filed an opposition to the demurrer. On 7 March 2024, defendant Chan filed a reply, and on 20 March 2024, Plaintiff filed a response to the reply.

II. Demurrers in General.

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

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

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

III. Analysis.

Defendant Chan demurs to all nine causes of action stated in Plaintiff's FAC. (Demurrer to First Amended Complaint, pp. 1-2.)

A. Preliminary Issues

1. Timeliness of Demurrer

Plaintiff initially contends the demurrer is untimely and prejudicial, asserting that defendant Chan has delayed this case by requiring transfer and filing multiple demurrers. (Opp., p. 3:9-11.) In reply, defendant Chan points out that he filed a *Declaration of Demurring or Moving Party in Support of Automatic Extension* (Judicial Council form CIV-141) on 9 January 2024 ("Declaration"). (Reply, pp.1:26-2:4.) In the Declaration, counsel for defendant Chan asserts that an automatic extension is warranted because he made a good faith attempt to meet and confer with counsel for Plaintiff, and he was ignored. (Declaration, ¶2.)

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (***Code Civ. Proc.***, § 430.40, subd. (a).) "Demurrers must be set for hearing not more than 35 days following the filing of the demurer or on the first available to the court thereafter. For good cause shown, the court may order the hearing held on an earlier date or later day on notice prescribed by the court." (Cal ***Rules of Court***, Rule 3.1320, subd. (d).) A trial court has broad discretion to consider an untimely demurrer so long as its action does not affect the substantial rights of the parties. (***Jackson v. Doe*** (2011) 192 Cal.App.4th 742, 750.)

> The parties shall meet and confer at least 5 days before the date the responsive pleading is due. If the parties are not able to meet and confer at least 5 days before the responsive pleading is due, the demurring party shall be granted an automatic 30-day extension of time within which to file a responsive pleading, by filing and serving, on or before the date on which a demurrer would be due, a declaration stating under penalty of perjury that a good faith attempt to meet and confer was made and explaining the reasons why the parties could not meet and confer.

(***Code Civ. Proc.***, § 430.41, subd. (a)(2).)

Here, defendant Chan had an automatic 30-day extension within which to file his demurrer because he filed a declaration in compliance with ***Code of Civil Procedure*** section 430.41, subdivision (a)(2), indicating that meet and confer efforts failed because Plaintiff did not respond. Therefore, the demurrer is timely. Even if the demurrer could be considered untimely, the court has discretion to consider it because there is little if any prejudice to the parties. Accordingly, the court rejects Plaintiff's argument that the demurrer is untimely.

2. Meet and Confer

As referenced above, the parties are required to meet and confer at least 5 days before the date the responsive pleading is due. (***Code Civ. Proc.***, § 430.41, subd. (a)(2).) As part of the meet and confer process, the demurring party is to identify the basis of the claimed deficiencies with legal support, and the party who filed the pleading is to provide legal support for its position that the pleading is sufficient or could be amended to cure any deficiency. (***Code Civ. Proc.***, § 430.41, subd. (a)(1).) "A determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (***Code Civ. Proc.***, § 430.41, subd. (a)(4).)

Here, the Declaration submitted by defendant Chan asserts that Plaintiff failed to comply with its meet and confer requirements, and the parties have not actually met and conferred as required. Plaintiff does not appear to rebut this assertion or make any reference to the meet and confer requirements in his moving papers. In view of the statutory language and furtherance of judicial economy, the court will consider the merits of defendant Chan's demurrer. The court reminds all parties that they should not treat the ***Code of Civil Procedure*** section 430.41 as procedural hurdle and should, instead, undertake the obligations set forth therein with sincerity and good faith.

3. Sur-Reply

Court records show that Plaintiff filed a "Response to Reply in Support of Demurrer to First Amended Complaint" on 20 March 2024, which the court considers to be an unauthorized sur-reply. California ***Rules of Court***, Rule 3.1113, does not contemplate the filing of a sur-reply in opposition to a demurrer. The court believes it need not consider the contents of Plaintiff's unauthorized sur-reply. Nevertheless, in an abundance of caution, the court has considered the contents of Plaintiff's 20 March 2024 filing. Plaintiff is admonished to follow the ***Code of Civil Procedure*** and the California ***Rules of Court*** with respect to future filings, as the court may decline to consider future non-compliant filings.

B. Defendant Chan's demurrer to the first cause of action [breach of contract] is SUSTAINED.

Defendant Chan demurs to the first cause of action on the ground that it cannot be ascertained from the pleading whether the contract is written, oral, or is implied by conduct. (***Code Civ. Proc.***, § 430.10, subd. (g).)

"When an action is 'founded upon a contract,' the complaint is subject to demurrer if 'it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct.' (***Code Civ. Proc.***, § 430.10., subd. (g).)" (***Maxwell v. Dolezal*** (2014) 231 Cal.App.4th 93, 98-99; see also ***Weil & Brown***, Cal. Prac. Guide-Civil Procedure Before Trial (The Rutter Group, 2023), §§ 7:59, 7:90, 7:93.)

In opposition, Plaintiff asserts: "Chan's representations and promises were binding and set forth in various writings, orally, and by implication and the conduct of the parties," citing paragraphs 19 and 28 of the FAC. (Opp., p. 7:6-7.) Plaintiff's opposition goes on to repeat allegations from the FAC. (*Id.* at pp. 7-8.) However, review of these allegations shows that defendant Chan's demurrer is well taken. It cannot be ascertained from the pleading whether the alleged contract is written, oral, or implied by conduct because the pleading alleges that the contract is all three. (See FAC, ¶28 ["Defendants' representations and promises were binding and set forth in various writings, orally, and by implication and the conduct of the parties"].)

The court also observes that, while the Defendant has not demurred as to this cause of action on the ground that the pleading does not state facts sufficient to constitute a cause of action, the FAC's allegations do not appear to sufficiently identify the terms, i.e., the parties' respective rights and duties, under the alleged contract.

Accordingly, the demurrer to the first cause of action is SUSTAINED with 10 days leave to amend.

C. Defendant Chan's demurrer to the second [intentional misrepresentation] and third [negligent misrepresentation] causes of action is SUSTAINED.

Defendant Chan demurs to the second and third causes of action on the grounds that the pleading does not state sufficient facts to constitute causes of action [***Code Civ. Proc.***, § 430.10, subd. (e)] for intentional misrepresentation and negligent misrepresentation.

"The elements of fraud that will give rise to a tort action for deceit are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (***Engalla v. Permanente Medical Group, Inc.*** (1997) 15 Cal.4th 951, 974, punctuation and citations omitted.) "All of these elements must be present if actionable fraud is to be found; one element absent is fatal to recovery." (***Okun v. Morton*** (1988) 203 Cal.App.3d 805, 828.)

Similarly, "[t]he elements of a negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. Negligent misrepresentation does not require knowledge of falsity, unlike a cause of action for fraud." (***Tindell v. Murphy*** (2018) 22 Cal.App.5th 1239, 1252, internal punctuation and citations omitted.)

As a general rule, each element in a fraud cause of action must be pleaded with specificity. (***Lazar v. Superior Court*** (1996) 12 Cal.4th 631, 645 (***Lazar***); ***Cadlo v. Owens-Illinois, Inc.*** (2004) 125 Cal.App.4th 513, 519.) The court in ***Lazar*** stated that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' [Citation.]" (***Lazar***, *supra*, 12 Cal.4th 631, 645.)

In this case, defendant Chan contends the FAC fails to identify any specific misrepresentations that the Defendants made and does not allege facts which show how, when, where, or by what means the misrepresentations were made. (Dem., p. 4:4:16-19.) In opposition, Plaintiff contends that the FAC sets forth many representations and promises made to him and proceeds to repeat the FAC's allegations. (Opp., pp. 8:21-22, 10:16.)

The FAC fails to allege the second and third causes of action with sufficient specificity. As Plaintiff points out, the FAC alleges a range of different misrepresentations rather than just one. Though it not expressly stated, it might reasonably be inferred from the FAC that it was defendant Chan himself who made most if not all of the alleged misrepresentations. (See FAC, ¶¶34, 41 ["Chan made these representations with knowledge of their falsity, or with reckless disregard for their truth…"].) But the general nature of allegations in the FAC leaves open the possibility that there may have been someone else allegedly

speaking on behalf of the Defendants: "To make Plaintiff invest his money with Chan and the Business, Defendants represented that they would act as Plaintiff's fiduciary…." (*Id.* at ¶¶34, 41.)

Further, the FAC's allegations are vague regarding the timing of the alleged misrepresentations. Indeed, the court is unable to locate a single date, let alone an approximate year, relative to the Defendants' alleged misconduct. Plaintiff may not recall exact dates, particularly if the alleged misrepresentations were made orally. But certainly, it would seem well within Plaintiff's means to ascertain and allege *when* "he deposited $312,033.77 into a financial account controlled by Defendants." (FAC, ¶2.) Likewise, Plaintiff should seemingly be able to allege who made the particular misrepresentations in question, by what means they did so, and whether a particular alleged misrepresentation occurred before or after Plaintiff transferred this large sum of money to the Defendants.

In short, the FAC's allegations regarding intentional and/or negligence misrepresentations are insufficiently specific. Accordingly, the demurrer to the second and third causes of action is SUSTAINED with 10 days leave to amend.

D. Defendant Chan's demurrer to the fourth cause of action [concealment] is SUSTAINED.

Defendant Chan demurs on the grounds that the pleading does not state sufficient facts to constitute a cause of action [***Code Civ. Proc.***, § 430.10, subd. (e)] for concealment.

"The elements of fraudulent concealment are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if the plaintiff had known of the concealed or suppressed fact; and (5) as a result of the concealment of suppression of the fact, the plaintiff sustained damage." (***Burch v. CertainTeed Corp.*** (2019) 34 Cal.App.5th 341, 348, citing ***Bigler-Engler v. Breg, Inc.*** (2017) 7 Cal.App.5th 276, 310-311 (***Bigler***).) "With respect to concealment, there are four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. The latter three circumstances presuppose the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. This relationship has been described as a transaction, such as that between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement." (***Id.*** at pp. 349-350, internal quotations and citations omitted.)

As with fraudulent misrepresentation, the elements of concealment must be pleaded with specificity, but less particularity is required. It is much more difficult to plead with particularity in a case of non-disclosure because, as one court explained, "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (***Alfaro v. Community Housing Imp. System & Planning Ass'n., Inc.*** (2009) 171 Cal.App.4th 1356, 1384.) Where a claim involves fraudulent concealment, courts generally look to whether the allegations provide the defendant with sufficient notice of the claims alleged against them. (***Id.*** at pp. 1384-1385; see also ***Jones v. ConocoPhillips Co.*** (2011) 198 Cal.App.4th 1187, 1200.)

When courts refer to the requirement of specificity with respect to allegations of fraudulent concealment, they are generally concerned that allegations regarding the facts giving rise to a duty to disclose material facts are pleaded with particularity. (See ***Linear Technology Corp. v. Applied Materials, Inc.*** (2007) 152 Cal.App.4th 115, 132-133.) Where there is no fiduciary relationship, the duty to disclose generally presupposes a relationship grounded in "some sort of transaction between the parties." (***Bigler***, *supra*, 7 Cal.App.5th at p. 311.) Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement. (***OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.*** (2007) 157 Cal.App.4th 835, 859.)

In this case, Defendants contend the FAC does not plead with particularity any facts showing that Chan owed Plaintiff a duty or when the fraudulent concealment occurred. (Dem., p. 5:22-26.) They further argue the FAC does not identify any facts that Chan concealed and that they are no facts alleging that Plaintiff was harmed. (*Ibid.*) Plaintiff counters that "Defendants made many representations and promises to Plaintiff." (Opp., p. 12:10; FAC, ¶46.)

The Defendants' alleged duty to disclose does not arise from a fiduciary relationship because the FAC alleges that "the purpose of and services provided by Defendants with respect to Plaintiff's investment were not fiduciary in nature." (FAC, ¶47.) The FAC alleges: "Chan instructed Plaintiff to withdraw approximately $312,033.77 from Plaintiff's account and to deposit it in a separate account controlled by the Defendants," and that "Plaintiff did so." (*Id.* at ¶19.) While this could describe a contractual relationship or transaction giving rise to a duty to disclose, as discussed previously, the contract allegations here are defective for failing to state whether the contract was written, oral, or implied by conduct. Further, the FAC does not sufficiently allege the existence of a contract, regardless of its form.

The concealment allegations here are too general to sufficiently give the Defendants notice of the nature of the claim. The FAC alleges that "Chan concealed the true facts," and that "Plaintiff did not learn this information until recently." (*Id.* at ¶¶47, 48.) But these allegations do not make clear what specific material fact or facts the Defendant suppressed which, if the Plaintiff had known, would have changed his course of action. (See ***Burch***, *supra*, 34 Cal.App.5th 341.) Though the FAC alleges that Chan was not a licensed broker, it does not make clear that Defendants concealed this fact, and that Plaintiff only entrusted his money with the Defendants because they concealed the fact that Chan was unlicensed.

Therefore, the demurrer to fourth cause of action is SUSTAINED with 10 days leave to amend.

E. Defendant Chan's demurrer to the fifth cause of action [conversion] is OVERRULED.

Defendant Chan demurs on the grounds that the pleading does not state sufficient facts to constitute a cause of action [***Code Civ. Proc.***, § 430.10, subd. (e)] for conversion.

"Conversion is the wrongful exercise of dominion over the property of another. 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. Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." (***Los Angeles Federal Credit Union v. Madatyan*** (2012) 209 Cal.App.4th 1383, 1387, internal quotations and citations omitted.)

"The basis of a conversion action rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action." (***Ibid.***, see also ***CACI*** No. 2100.)

Defendants assert the conversion cause of action is duplicative of the breach of contract cause of action because both causes of action are based on the claim that Defendants failed to return $312,033.77 entrusted to them by Plaintiff. (Dem., p. 6:1-11.) Defendants contend that "a mere contractual right of payment, without more, will not suffice" to state a claim for conversion, citing ***Farmers Ins. Exch. v. Zerin*** (1997) 53 Cal.App.4th 445, 452. Defendants further argue that "the simple failure to pay money owed does not constitute conversion," citing ***Voris v. Lampert*** (2019) 7 Cal.5th 1141, 1151-1152.

Here, Plaintiff persuasively argues that he may plead in the alternative. (Opp., p. 13:1-20.) As Plaintiff points out, "the same wrongful act may constitute both a breach of contract and an invasion of an interest protected by the law of torts. [Citations.]" (***Erlich v. Menezes*** (1999) 21 Cal.4th 543, 551.) The authorities Defendant cites[3] are distinguishable because the FAC alleges more than the simple failure to pay money; it alleges that Defendants directed Plaintiff to transfer money to them and then refused to return it or even respond when Plaintiff demanded its return. (FAC, ¶¶2-3, 54.)

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

F. Defendant Chan's demurrer to the sixth cause of action [negligence] is SUSTAINED.

Defendant Chan demurs on the grounds that the pleading does not state sufficient facts to constitute a cause of action [***Code Civ. Proc.***, § 430.10, subd. (e)] for negligence.

"The elements of a cause of action for negligence are well-established. They are (a) a *legal duty* to use due care; (b) a *breach* of such legal duty; and (c) the breach was the *proximate* or *legal cause* of the resulting injury. [Citation.]" (***Ladd v. County of San Mateo*** (1996) 12 Cal.4th 913, 917, italics original, internal punctuation omitted; see also ***CACI*** No. 400.) "In short, to recover on a theory of negligence, Plaintiffs must prove duty, breach, causation, and damages. [Citation.]" (***Truong v. Nguyen*** (2007) 156 Cal.App.4th 865, 875)

Here, Defendants persuasively contend this cause of action fails because the FAC does not allege facts demonstrating that they owed Plaintiff a duty of care. (Dem., p. 6:17-20.) Defendants further argue that the FAC does not indicate the acts or omissions alleged to be negligently performed. (*Ibid.*) As discussed previously, the alleged duty in this matter arises from the contractual or otherwise transactional relationship between the parties, and the nature of this contract or transaction has not been sufficiently alleged. The FAC also fails to identify facts concerning the alleged breach, instead alleging that "Defendants were negligent in their representations and conduct related to Plaintiff and their use and control of Plaintiff's money." (FAC, ¶56.) Such conclusionary allegations without factual support cannot withstand demurrer. (***Ankeny***, *supra*, 88 Cal.App.3d at p. 537 ["a pleading must allege facts and not conclusions"].)

Therefore, the demurrer to the sixth cause of action is SUSTAINED with 10 days leave to amend.

G. Defendant Chan's demurrer to the seventh cause of action [unjust enrichment] is SUSTAINED WITHOUT LEAVE TO AMEND.

Defendant Chan demurs on the grounds that the pleading does not state sufficient facts to constitute a cause of action [***Code Civ. Proc.***, § 430.10, subd. (e)] for 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).

[3] See defendant Chan's memorandum of points and authorities in support of demurrer at p. 6:1-6, citing: ***Nguyen v. Stephne Inst.*** (N.D. Cal. 2021) 529 F.Supp.3d 1047, 1058; ***Farmers Ins. Exch. v. Zerin*** (1997) 53 Cal.App.4th 445, 452; ***Voris v. Lampert*** (2019) 7 Cal.5th 1141, 1151-1152.)

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.

H. Defendant Chan's demurrer to the eighth cause of action [promissory estoppel] is SUSTAINED.

Defendant Chan demurs on the grounds that the pleading does not state sufficient facts to constitute a cause of action [***Code Civ. Proc.***, § 430.10, subd. (e)] for promissory estoppel.

"The required elements for promissory estoppel in California are … (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (***Laks v. Coast Fed. Sav. & Loan Assn.*** (1976) 60 Cal.App.3d 885, 890 (***Laks***); see also ***US Ecology, Inc. v. State of California*** (2005) 129 Cal.App.4th 887, 901 (***US Ecology***).).) "The party claiming the estoppel must specifically plead all facts relied on to establish its elements. [Citations.]" (***Smith v. City and County of San Francisco*** (1990) 225 Cal.App.3d 38, 48.)

"The doctrine of promissory estoppel is set forth in section 90 of the Restatement of Contracts. It provides: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" (***Signal Hill Aviation Co. v. Stroppe*** (1979) 96 Cal.App.3d 627, 637 (***Signal Hill***).) "California recognizes the doctrine. 'Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." (***Signal Hill***, *supra*, 96 Cal.App.3d at p. 637.) "Cases have characterized promissory estoppel claims as being basically the same as contract actions, but only missing the consideration element." (***US Ecology***, *supra*, 129 Cal.App.4th at p. 903.) "[P]romissory estoppel claims are aimed solely at allowing recovery in equity where a contractual claim fails for a lack of consideration, and in all other respects the claim is akin to one for breach of contract." (*Id.* at p. 904; see also ***Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*** (2000) 23 Cal.4th 305, 310—"Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' [Citation.]")

Here, Defendants persuasively argue that the FAC does not plead all the elements of this cause of action with the requisite specificity. (Dem., p. 7:7-9.) While the FAC makes various generalized allegations about the Defendants' promises and representations, it does not allege "a promise clear and unambiguous in its terms." (***Laks***, *supra*, 60 Cal.App.3d at p. 890.) The FAC also does allege facts supporting the conclusion that Plaintiff's reliance on the Defendants' promise or promises was both reasonable and foreseeable.

Accordingly, the demurrer to the seventh cause of action is SUSTAINED with 10 days leave to amend.

I. Defendant Chan's demurrer to the ninth cause of action [common count – money had and received] is SUSTAINED.

Defendant Chan demurs on the grounds that the pleading does not state sufficient facts to constitute a cause of action [***Code Civ. Proc.***, § 430.10, subd. (e)] for common count – money had and received.

"A common count alleges in substance that the defendant became indebted to the plaintiff in a certain stated sum, for some consideration such 'money had and received by the defendant for the use of the plaintiff[;]' and that no part of the sum has been paid. [Citations.]" (4 ***Witkin***, California Procedure (6th ed. 2023) Pleading, § 565.)

"In California, it has long been settled the allegation of claims using common counts is good against general or special demurrers. [Citation.]" (***Farmer Ins. Exchange v. Zerin*** (1997) 53 Cal.App.4th 445, 460.) "The only essential elements of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' [Citation.]" (***Ibid.***) "A cause of action for money had and received is stated if it is alleged the defendant is indebted to the plaintiff in a certain sum for money had received by the defendant for the use of the plaintiff. [Citation.]" (***Ibid.***, quotation marks omitted.)

> Although our case law permits the use of common counts, nevertheless the courts recognize that where the common counts follow a count wherein all of the fact on which plaintiff's demand is based are specifically pleaded [e.g., a breach of contract claim] and the common counts upon their face make it clear that they are based upon the same set of facts, the common counts are to be considered not as different causes of action, but as alternative methods of pleading the plaintiff's right to recover the money judgment he seeks.

(***Maselli v. E.H. Appleby & Co.*** (1953) 117 Cal.App.2d 634, 637)

Here, the common count appears to be based upon the first cause of action for breach of contract. The common count alleges that the money Plaintiff transferred to Defendants "was intended to be used for Plaintiff's benefit," but was not. (FAC, ¶69.) This allegation appears to reference an agreement between the parties, as alleged in the first cause of action. Because the court has found the first cause of action is defective, and recovery under the common count is based on the same set of facts pleaded in support of the first cause of action, it follows that the common count is subject to demurrer.

Therefore, the demurrer to the ninth cause of action is SUSTAINED with 10 days leave to amend.

IV. Order.

Defendant Chan's demurrer to fifth cause of action [conversion] is of plaintiff Varughese's first amended comp

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 6

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(For Clerk's Use Only)

CASE NO.: 20CV369138 **Chicago Title Company v. 28th St Villa Apts LLC, et al.**

DATE: 2 April 2024 **TIME: 9:00 am** **LINE NUMBER: 2**

ORDER ON PLAINTIFF AND CROSS-DEFENDANT CHICAGO TITLE COMPANY'S MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, SUMMARY ADJUDICATION

I. Statement of Facts.

First Amended Complaint

In the operative first amended complaint ("FAC"), plaintiff Chicago Title Company ("CTC") alleges on or about 27 July 2019, defendant 28th St Villa Apts, LLC ("Buyer") and defendant Green Villa Apartments, LP ("Seller") entered into an agreement for the sale of real property located at 1319 Tripp Avenue in San Jose ("Property") from Seller to Buyer. (FAC, ¶¶9 – 10.) Between July 2019 and November 2019, plaintiff CTC received several deposits for a combined total of $300,000 from defendants Hui Jun Li ("Li"), Roygbiv Real Estate Development LLC ("Roygbiv"), and Nobel Homes LLC ("Nobel") for the subject sale and purchase transaction. (FAC, ¶11.)

The sale and purchase transaction was never consummated and $300,000 of defendants' deposit remains in escrow. (FAC, ¶12.) Plaintiff CTC received conflicting claims from defendants regarding the escrow funds. (FAC, ¶13.) On or about 24 May 2020, plaintiff CTC sent a letter to defendants Buyer and Seller advising of the conflicting demands and that in the event plaintiff CTC did not receive mutually signed instructions regarding disbursement, the funds would be submitted to legal counsel for filing of an interpleader action. (FAC, ¶14.) As of 5 August 2020, plaintiff CTC has not received mutual instructions regarding disbursement of the funds and a dispute has arisen between the parties concerning their disposition. (FAC, ¶15.) Plaintiff CTC is unable to determine who should receive the disputed funds. (*Id.*) Plaintiff CTC claims no interest in the funds except for attorneys' fees and costs incurred in having to file this action. (*Id.*)

On 5 August 2020, plaintiff CTC filed a complaint in interpleader against defendants Buyer, Seller, Li, Roygbiv, and Nobel.

All the defendants (except Li) filed answers to plaintiff CTC's complaint by 17 November 2020.

On 8 April 2021, plaintiff CTC filed a motion for leave to file an amended complaint.

On 19 April 2021, defendant Seller filed a cross-complaint naming Buyer, Roygbiv, Nobel, Li, Greg Malley ("Malley"), Loida Kirkley ("Kirkley"), and 28th Street Bart 2, LLC ("Bart 2") as cross-defendants. On that same date, defendant Seller also filed a motion for leave to file a cross-complaint against plaintiff CTC.

On 12 July 2021, the court issued an order granting plaintiff CTC leave to file a FAC. Plaintiff CTC filed the operative FAC on that same date.

Also on 12 July 2021, the court issued an order granting defendant Seller leave to file a cross-complaint against plaintiff CTC. On 13 July 2021, defendant/cross-complainant Seller filed an amendment to its cross-complaint substituting CTC for a fictitiously named Roe cross-defendant.

On 21 July 2021, defendants Nobel, Li, and Buyer filed an answer to plaintiff CTC's FAC.

On 2 August 2021, defendant Seller filed an answer to plaintiff CTC's FAC.

First Amended Cross-Complaint

On 11 August 2021, defendant/cross-complainant Seller filed a first amended cross-complaint ("FAXC") which alleges that on or about 27 July 2019, cross-defendant Malley doing business as Buyer entered into a purchase agreement ("PSA") with Seller for sale of the subject Property. (FAXC, ¶15.) The same date, cross-defendant Malley doing business as Buyer and cross-defendant Kirkley doing business as Bart 2 signed an Assignment of Agreement Addendum ("Assignment") whereby cross-defendant Malley doing business as Buyer assigned all interest in the PSA to cross-defendant Kirkley and Bart 2. (FAXC, ¶16.) At the time of the assignment, Bart 2 was not in existence and not registered with the California Secretary of State, facts which cross-defendants Malley and Kirkley were aware of. (FAXC, ¶17.) On 1 August 2019, cross-defendant Kirkley signed a Representative Capacity Signature Disclosure in which she represented Bart 2 was an entity that existed of which she was a partner. (FAXC, ¶18.) At the time, Kirkley knew Bart 2 had not been formed and did not exist. (*Id.*) Cross-complainant Seller had no knowledge at the time of execution of the PSA and Assignment that Buyer and Bart 2 had not been formed and were not in existence. (FAXC, ¶¶19 – 20.)

Pursuant to the PSA, cross-defendants paid $300,000 in earnest money deposit to be applied to the purchase price of the subject Property. (FAXC, ¶22.) Plaintiff/cross-defendant CTC received these deposits between July 2019 and November 2019. (*Id.*) Plaintiff/cross-defendant sent Third Party Deposit Escrow Instructions to cross-defendants Malley and Kirkley identifying cross-defendants Roygbiv and Li as third party depositors whose deposits were to be applied for the benefit of Buyer. (*Id.*) These documents were never signed and CTC did not follow up to obtain signatures. (*Id.*) CTC failed to inform Seller that the documents were not executed. (*Id.*)

Close of escrow ("COE") was scheduled to occur on 23 March 2020. (FAXC, ¶24.) In or around January 2020, the buyers expressed a need to extend COE to June 2020. (*Id.*) On 6 February 2020, Malley dba Buyer, on behalf of buyers, and Seller signed an amendment to PSA which stated COE would be no later than 22 May 2020. (*Id.*) The same parties signed additional amendments on 23 May 2020 and 29 July 2020 which extended COE to 27 September 2020 and giving Seller the right to pursue other offers and if Seller accepted another offer, Seller would have the rights to Buyer's deposit of $300,000 and the PSA would be considered null and void due to non-performance. (*Id.*)

In or around April 2020, cross-defendant Malley attempted, without Seller's knowledge or consent, to unilaterally rescind the Assignment informing CTC that Bart 2 was not a legal entity and claiming the Assignment was invalid. (FAXC, ¶27.) Around the same time, cross-defendant Kirkley requested the $150,000 she paid toward the purchase price of the subject Property be returned to her. (FAXC, ¶28.)

On or about 5 August 2020, CTC filed the complaint interpleading the $150,000 paid by cross-defendants Kirkley doing business as Roygbiv in earnest money deposit for the purchase of the subject Property. (FAXC, ¶29.) In the FAC, CTC interpleaded the remaining $150,000 paid by buyer cross-defendants. (*Id.*)

Based on the above allegations, Seller's FAXC asserted the following causes of action:

(1) DECLARATORY RELIEF

(2) FRAUD (INTENTIONAL MISREPRESENTATION) [AGAINST CROSS-DEFENDANT KIRKLEY]
(3) FRAUD (FALSE PROMISE) [AGAINST CROSS-DEFENDANTS MALLEY AND BUYER]
(4) INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIP [AGAINST CROSS-DEFENDANTS MALLEY AND BUYER]
(5) NEGLIGENCE
(6) BREACH OF FIDUCIARY DUTIES [AGAINST CROSS-DEFENDANT CTC]
(7) PROMISSORY ESTOPPEL [AGAINST ALL BUYER CROSS-DEFENDANTS]

On 28 September 2021, cross-defendant CTC filed a demurrer to the first, fifth and sixth causes of action in defendant/cross-complainant Seller's FAXC.

On 4 November 2021, cross-defendants Kirkley and Roygbiv filed an answer to cross-complainant Seller's FAXC.

On 19 November 2021, cross-defendants Buyer, Li, and Malley filed a demurrer to the first, third, fifth, and seventh causes of action in defendant/cross-complainant Seller's FAXC.

On 21 January 2022, the court sustained cross-defendant CTC's demurrer to the first, fifth, and sixth causes of action in Seller's FAXC. The court also sustained cross-defendants Buyer, Li, and Malley's demurrer to the fifth cause of action, but otherwise overruled cross-defendants Buyer, Li, and Malley's demurrer.

Second Amended Cross-Complaint

On 7 February 2022, defendant/ cross-complainant Seller filed the operative second amended cross-complaint ("SAXC") which alleges on or about 27 July 2019, Malley dba Buyer and/or assignees entered into an agreement (PSA) with Seller for a sale of the subject Property. (SAXC, ¶15 and Exh. A.) Also on or about 27 July 2019, Malley dba Buyer and Kirkley dba Bart 2 signed an Assignment of Agreement Addendum ("Assignment") whereby Malley dba Buyer assigned all of their interest in the PSA to Kirkley and Bart 2. (SAXC, ¶16 and Exh. B.)

At the time Malley and Kirkley signed the Assignment, Bart 2 w