SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: June 27, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

FOR COURT REPORTERS: The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have 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

RECORDING IS PROHIBITED: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV421216	Philips Medical Capital, Inc. vs Mark Ryvola	**Order of Examination** (Wells Fargo Bank). No Proof of service on file. If there is no appearance, the matter will be ordered OFF CALENDAR.
LINE 2	2008-1-CV-111840	Columbia Credit Services, Inc. vs T. Hickey	**Order of Examination** (Timothy F. Hickey aka F. Timothy Hickey). A judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a court-appointed referee, and furnish information to aid in enforcement of the money judgment. (Code of Civil Procedure, § 708.110(a).) Information to aid in enforcement of the judgment may include information concerning future employment prospects. The debtor may not be ordered to appear if the judgment is no longer enforceable. (Law Revision Comment to Code of Civil Procedure, § 708.110.) The Order of Examination is to be conducted pursuant to Code of Civil Procedure, §§ 491.110, 708.110, 708.120, and 708.170. Unless the parties agree otherwise, all parties are to appear in Department 18b at 9:00 a.m.

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LAW AND MOTION TENTATIVE RULINGS

LINE 3	21CV390050	Holt-Pacific Associates vs Subway Real Estate, LLC et al	**Demurrer.** Scroll down to Lines 3 and 4 for Tentative Ruling.
LINE 4	21CV390050	Holt-Pacific Associates vs Subway Real Estate, LLC et al	**Motion to Strike**. Scroll down to Lines 3 and 4 for Tentative Ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	21CV387145	MYOUNG HWANG vs JIKHAN JUNG et al	**Motion for Sanctions (Spoliation)**. Plaintiff's motion for sanctions for spoliation of evidence seeks an order striking Defendant Jung's answer and an order rendering a default judgment against Jung. The motion was continued from May 16, 2024, when the court (Hon. Manoukian) ruled that it "is inclined to strike the answer of defendants. However, the Court will continue this motion for 60 days to June 27, 2024 at 9am to learn the outcome of the other discovery motions". The three motions to compel (document requests, requests for admission and form interrogatories) were granted, together with an award of sanctions. Notice of entry was filed and served on June 4, 2024. Defendant paid the sanctions awarded on all three motions into court on June 10, 2024. Defendant Jung is ordered to comply with the three discovery orders by providing the discovery requested therein **within 30 days of June 4, 2024**. This motion for sanctions is continued to July 30, 2024 at 9am in Department 18b. Both parties are to provide updated declarations as to the status of compliance with the discovery orders no later than July 22, 2024. Defendant is strongly encouraged to retain counsel. Plaintiff to prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	23CV412111	Ulises Lopez vs General Motors LLC	**Motion to Compel**. Plaintiff brings a motion to compel the deposition of defendant General Motors LLC's Person Most Qualified and Requests for Production of Documents. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendant has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Moving party meets its burden of proof. Good cause appearing, the Motion is GRANTED. Defendant General Motors LLC shall produce its Person Most Qualified for deposition, at a code compliant location, with the documents that have been requested, within 20 days of this order, or on a date and location agreed between the parties. Moving party to prepare the formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	23CV415836	Jin Zhang vs Zhichao Lu et al	**Motion to Compel (Discovery).** Before the Court is Plaintiff's motion to compel further responses and production from Defendant Lu to request for production set one. This motion is CONTINUED to August 1, 2024 at 9 a.m. in Department 18b (after the hearing of Defendant's motion for stay for forum non conveniens on July 25, 2024). If the motion for stay is denied, the parties shall meet and confer by phone or video conference on July 26, 2024 regarding the discovery in dispute. In the meet and confer, counsel shall address *all* requests in dispute, any stipulated facts and the production of exit and entry and any other records. Moving party shall file an updated declaration by noon on July 29, 2024, as to the status of the further meet and confer efforts and shall identify which discovery requests and issues remain in dispute Moving party to prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	23CV421976	Community Education Foundation, a Delaware Corporation vs George Eshoo et al	**Motion to Compel (Discovery).** This motion will be heard by Judge Helen Williams on August 21, 2024 at 1:30 p.m. in Department 18a. The parties are ordered to further meet and confer by phone or video conference regarding all of the discovery in dispute. Moving party shall file an updated declaration by August 12, 2024, as to the status of the further meet and confer efforts and shall identify which discovery requests and issues remain in dispute. Moving party to prepare the formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	23CV410545	David Martin vs GOOGLE LLC et al	**Motion to Tax**. Defendant Google's demurrer to Plaintiff's Second Amended Complaint was sustained, without leave to amend by order filed December 20, 2023. Google is the prevailing party. Judgment of Dismissal, with prejudice, in favor of Google, was filed on March 27, 2024. Google's Memorandum of costs was filed April 4, 2024 (for filing and motion fees). Plaintiff filed a motion to tax on April 15, 2024, arguing that such costs were not warranted as he was "going to appeal" the court's ruling granting Google's demurrer and he was "not aware of fees that resemble" Google's claim. Plaintiff has not met his burden – he has not provided any competent authority to support his motion or to show that the costs are not recoverable, unnecessary, or unreasonable. Good cause appearing, the motion to tax costs is DENIED. Google is the prevailing party and is entitled to its costs from Plaintiff, as set forth in its Memorandum of Costs. (Code Civ. Proc., §§1032 (a) (4) and 916) Google to prepare formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 10	23CV421040	Kristina Lopez vs Francisco Ramirez et al	**Motion to Withdraw as Attorney**. No Proof of service filed for service on Plaintiff's Guardian ad litem Kristina Lopez. If there is no appearance, the matter will be ordered OFF CALENDAR.
LINE 11	2015-1-CV-280288	Centro Armonia Preschool, Inc. vs B. Holmes	**Claim of Exemption**. Debtor's claim of exemption is GRANTED in part and DENIED in part. The Court orders that $200 per month be garnished. The Court will prepare the formal order.
LINE 12	2014-1-CV-259575	Unifund CCR, LLC vs M. Ahghari	**Claim of Exemption**. Parties to appear.
LINE 13	22CV408126	Brad Thomas et al vs Rita Lechleitner, MD et al	**Order to Show Cause.** Based on the Declaration of Attorney Ryan C. Griffith, filed on June 4, 2024, the Oder to Show cause is VACATED,
LINE 14	21CV377641	Armando Tapia Urrutia vs Julieanne Romualdo Agsalog et al	**Compromise of Minor's Claim (Perla Ruby Tapia Arias)**. The request for an order approving minor's compromise is GRANTED. The Court will use the orders on file.
LINE 15	21CV377641	Armando Tapia Urrutia vs Julieanne Romualdo Agsalog et al	**Compromise of Minor's Claim (Armando Tapia Arias, Jr.)**. The request for an order approving minor's compromise is GRANTED. The Court will use the orders on file.

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LAW AND MOTION TENTATIVE RULINGS

LINE 16	23CV412119	Susana Hernandez vs. Alissa Fernandez et al	**Compromise of Minor's Claim (Paula Nayeli Hernandez Lopez.)**. The request for an order approving minor's compromise is GRANTED. The Court will use the orders on file.

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LAW AND MOTION TENTATIVE RULINGS

LINE 17	23CV423952	Santa Clara Valley Transportation Author vs. Lenzen Associates, LLC, a California limited liability company et al	**Application for Withdrawal of Deposit of Probable Just Compensation.** Before the Court is an application by Defendant Lenzen Associates, LLC. to withdraw the probable just compensation of $369,000 deposited in this eminent domain proceeding. In its opposition, Plaintiff Santa Clara Valley Transportation Authority identified *other* defendants that may claim an interest or compensation in this action (those defendants included the City of San Jose, Wells Fargo Bank, Bank of America, PRLAP, Inc., Federal Home Loan Mortgage Corporation and the County of Santa Clara.) On June 6, 2024, the City of San Jose, filed a notice of non-opposition to the application. However, the remaining defendants were not served with the application to allow them to oppose or consent to the application, though they appear to have been served with summons in this action. The Court continued this motion from June 18, 2024 to enable such service of the motion to be effected, but nothing has been filed to confirm that this was done. Parties to appear to explain the lack of service if defendants (other than the City of San Jose).

Calendar Lines 3 and 4
Case Name: *Holt-Pacific Associates v. Subway Real Estate, LLC, et al.*
Case No.: 21CV390050

Before the court is defendants and cross-complainants Subway Real Estate, LLC and Doctor's Associates LLC's demurrer to plaintiff's second amended complaint and motion to strike plaintiff's second amended complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

Plaintiff Holt-Pacific Associates ("Holt") holds fee title to real property located at 375 Saratoga Avenue in San Jose ("Property"). (Second Amended Complaint ("SAC"), ¶1.)

On or about May 16, 2011, plaintiff Holt and defendant Subway Real Estate, LLC ("Subway") entered into a written lease agreement ("Agreement") for lease of the premises located at 375-D Saratoga Avenue in San Jose ("Premises"), effective May 24, 2011. (SAC, ¶13.) The Premises, which comprise about 1,540 square feet, are located in Saratoga Plaza shopping center. (*Id.*) The lease term, as extended, commenced July 1, 2016 and expired on June 30, 2021. (SAC, ¶14.)

On information and belief, plaintiff Holt alleges defendant Subway delegated performance of its obligations under the Agreement to defendant Doctor's Associates, Inc. now known as Doctor's Associates LLC ("Doctor's Associates") who agreed in writing to assume such obligations. (SAC, ¶¶3 and 16.) Defendant Doctor's Associates, in turn, delegated performance of their obligations under the Agreement to defendants Chirayu Patel ("Patel") and Letap Group, LLC formerly known as Letap Group, Inc. (collectively, defendants Chirayu Patel and Letap Group, LLC are hereafter referred to as "Patel Defendants"), who also agreed in writing to assume such obligations. (SAC, ¶¶7, 9, and 17.)

In March and April 2020, defendants notified plaintiff Holt that they were unable to pay the rent due on April 1, 2020. (SAC, ¶18.) Thereafter, except for small sporadic payments and credits, defendants refused to pay any further rent. (*Id.*) The lease term expired on June 30, 2021, at which time defendants surrendered possession of the Premises to plaintiff Holt. (SAC, ¶19.)

The amount of unpaid rent and other charges that accrued during the 15-month period from April 1, 2020 through June 30, 2021 is $83,009.39 (not including late charges or prejudgment interest). (SAC, ¶20.) During this period of time, defendants continued to conduct business operations at the Premises. (*Id.*) Defendants realized a profit or other financial benefit or consideration from their operations at the Premises during this period. (*Id.*) On information and belief, plaintiff Holt alleges defendants had the financial ability at all relevant times to pay rent to plaintiff Holt in accordance with the terms and conditions of the Agreement. (SAC, ¶21.)

On October 14, 2021, plaintiff Holt filed a complaint against defendants Subway, Doctor's Associates, and Patel asserting causes of action for:

(1) Breach of Written Lease

(2) Declaratory Relief

(3) Quiet Title

On December 9, 2021, defendants Subway and Doctor's Associates each separately filed an answer to plaintiff Holt's complaint.

On January 12, 2022, defendant Patel filed a demurrer to plaintiff Holt's complaint.

On January 18, 2022, defendant Patel filed a motion to strike damages from plaintiff Holt's complaint.

On April 5, 2022, plaintiff Holt filed a first amended complaint ("FAC") adding defendant Letap Group, Inc. The FAC asserted causes of action for:

(1) Breach of Written Lease

(2) Breach of the Implied Covenant of Good Faith and Fair Dealing

(3) Unjust Enrichment and Restitution

(4) Quiet Title

On May 10, 2022, defendants Subway and Doctor's Associates each separately filed an answer to plaintiff Holt's FAC.

On May 20, 2022, defendant Patel filed a demurrer to plaintiff Holt's FAC and a motion to strike damages not supported by the FAC.

On June 13, 2022, plaintiff Holt filed an amendment to correct defendant Letap Group, LLC as the true name for previously identified defendant Letap Group, Inc.

On July 25, 2022, defendant Letap Group, LLC ("Letap Group") filed a demurrer to the FAC and a motion to strike damages not supported by the FAC.

On September 13, 2022, the court (Hon. Manoukian) issued an order overruling defendant Patel's demurrer to the FAC and denying defendant Patel's motion to strike.

On February 21, 2023, the court (Hon. Kulkarni) issued an order overruling defendant Letap Group's demurrer and denying defendant Letap Group's motion to strike.

On October 2, 2023, plaintiff Holt filed a motion for leave to file a SAC.

On February 29, 2024, the court (Hon. Manoukian) issued an order allowing plaintiff Holt leave to file a SAC. In relevant part, the order states, "Plaintiff shall submit the Second Amended Complaint to the clerk via e-filing, and serve the Second Amended Complaint on interested parties, who shall have 20 days leave within which to respond."

On March 5, 2024, plaintiff Holt filed the operative SAC which now asserts causes of action for:

(1) Breach of Written Lease [against all defendants]

(2) Breach of the Implied Covenant of Good Faith and Fair Dealing [against all defendants]

(3) Unjust Enrichment and Restitution [against all defendants]

(4) Quiet Title [against all defendants]

(5) Imposition of Constructive Trust [against defendants Subway and Doctor's Associates]

(6) Money Had and Received [against defendants Subway and Doctor's Associates]

(7) Unjust Enrichment and Restitution [against defendants Subway and Doctor's Associates]

(8) Conversion [against defendants Subway and Doctor's Associates]

On April 4, 2024, defendants Patel and Letap Group jointly filed an answer to plaintiff Holt's SAC.

On May 10, 2024, defendants Subway and Doctor's Associates filed the two motions now before the court, (1) a demurrer to the fifth through eighth causes of action of the SAC and (2) a motion to strike plaintiff Holt's prayer for imposition of a constructive trust and prayer for punitive and exemplary damages.

II. Defendants Subway and Doctor's Associates' demurrer is SUSTAINED.

A. Timeliness.

As a preliminary matter, plaintiff Holt contends defendants Subway and Doctor's Associates' demurrer is untimely as the court's February 29, 2024 order expressly granted only "20 days leave within which to respond" following service of the SAC. Plaintiff Holt contends it served all defendants with the SAC on March 15, 2024 and, thus, defendants had until April 4, 2024 to file this demurrer and since defendants Subway and Doctor's Associates did not file the instant demurrer until May 10, 2024, the motion is untimely.

"Technically, defendants are 'in default' if they fail to file an answer, demurrer or other permitted response within the time allowed by law and without a court order excusing such filing. [] By itself, being 'in default' has no legal consequences because defendant can still appear in the action until the clerk has entered his or her default. [] Thus, even though the time to respond has expired, if no default yet has been entered, defendant can file a pleading or motion." (Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶¶5:2 - 5:3, p. 5-1 citing *Goddard v. Pollock* (1974) 37 Cal.App.3d 137, 141-"it is now well established by the case law that where a pleading is belatedly filed, but at a time when a default has not yet been taken, the plaintiff has, in effect, granted the defendant additional time within which to plead and he is not strictly in default.") "An untimely demurrer may be considered by the court in its discretion." (*Id.* at ¶7:24, p. 7(I)-16 citing *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 750.)

Plaintiff Holt acknowledges the court has discretion but suggests the court should not exercise its discretion in this case for several reasons. The court will not delve into those reasons and instead will exercise its discretion to consider defendants Subway and Doctor's Associates' demurrer on the merits in order to avoid any further delay and waste of judicial

resources, particularly since the demurrer attacks whether plaintiff Holt has sufficiently stated causes of action and such a challenge can be raised by methods other than a demurrer.

B. Further background.

As further background into this dispute, the SAC includes the following relevant allegations: Section 28 of the Agreement states:

> In an event of a default by Tenant, Subway Real Estate, LLC, a Delaware limited liability company, shall be limited in its liability to Landlord to a dollar amount that shall not exceed the lesser of (i) six (6) months of the then current Gross Monthly Occupancy Costs due and payable at the time of default, or (ii) forty thousand and 00/ 100---DOLLARS ($40,000.00) maximum.

(See also SAC, ¶42.)

On or about November 16, 2021 [following expiration of the lease and surrender of the Premises], defendant Subway received the sum of $40,000 from defendants Patel and Letap Group for the purpose of payment of rent due and owing to plaintiff. (SAC, ¶60.) Defendant Subway received said $40,000 on the pretext that it would be paid to plaintiff Holt for the purpose of reducing outstanding rent then due, owing, and unpaid. (*Id.*) The $40,000 ("Converted Funds") was delivered to defendants Subway and Doctor's Associates for the express purpose of payment to plaintiff as and for rent but, instead, was held and used by defendants Subway and Doctor's Associates for their own purposes. (SAC, ¶63.)

C. Seventh cause of action – unjust enrichment/ restitution.

With the aforementioned allegations in mind, the court turns to defendants Subway and Doctor's Associates' demurrer to the seventh cause of action for unjust enrichment and restitution. There, plaintiff Holt alleges, "By virtue of Defendants SUBWAY and DOCTOR'S ASSOCIATES's receipt of the Converted Funds in the amount of $40,000, as alleged above, said defendants SUBWAY and DOCTOR'S ASSOCIATES, and each of them, were unjustly enriched in the amount of $40,000. Defendants SUBWAY and DOCTOR'S ASSOCIATES, and each of them, have failed and refused to pay Plaintiff the sum of $40,000, or any other amount, notwithstanding Plaintiff's demand therefor." (SAC, ¶¶69 – 70.)

In first demurring to this seventh cause of action, defendants contend this cause of action operates as an "end-run to prevent Subway from asserting its rights under Section 28 of the lease which limits Subway's damages liability under the lease to" $40,000.[1] The court does not agree with this characterization. In this action, plaintiff Holt aims to recover damages for unpaid rent, an amount that plaintiff Holt calculates to be in excess of $83,000. (SAC, ¶25.) Plaintiff Holt's SAC targets a specific identifiable amount of $40,000 originating from defendants Patel/ Letap Group. Whether plaintiff Holt is entitled to this specific identifiable amount and whether defendants Subway and/or Doctor's Associates can enforce a contractual limitation of liability are separate and distinct issues.

The court, however, finds more persuasive defendants' argument that unjust enrichment is not itself a cause of action. In *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793, the court wrote, "[T]here is no cause of action in California for unjust enrichment. "The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." [Citations.] Unjust enrichment is "'a general principle, underlying various legal doctrines and remedies,' " rather than a remedy itself. [Citation.] It is synonymous with restitution."

In *McBride v. Houghton* (2004) 123 Cal.App.4th 379 (*McBride*), the court wrote, "Unjust enrichment is not a cause of action, however, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution. Unjust enrichment has also been characterized as describing the result of a failure to make restitution. [¶] In reviewing a judgment of dismissal following the sustaining of a general demurrer, we ignore erroneous or confusing labels if the complaint pleads facts which would entitle the plaintiff to relief. Thus, we must look to the actual gravamen of [plaintiff's] complaint to determine what cause of action, if any, he stated, or could have stated if given leave to amend. In accordance with this principle, we construe [plaintiff's] purported cause of action for unjust enrichment as an attempt to plead a cause of action giving rise to a right to restitution."

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[1] See page 6, line 28 to page 7, line 2 of defendants Subway and Doctor's Associates' memorandum of points and authorities.

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

(*McBride*, *supra*, 123 Cal.App.4th at pp. 387 – 388; internal citations and punctuation omitted.)

Significantly, "there is no particular form of pleading necessary to invoke the doctrine of restitution." (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1315 [internal quotation marks omitted].) As the *McBride* court instructs, the court should overlook the labels given by the plaintiff and instead focus on whether there is a basis for restitution.

In the SAC, plaintiff Holt alternatively alleges conversion and hints at perhaps fraud as the basis for its unjust enrichment/restitution seventh cause of action. As noted above, the SAC alleges, "Defendant Subway received said $40,000 on the pretext that it would be paid to plaintiff Holt for the purpose of reducing outstanding rent then due, owing, and unpaid." This allegation is further clarified by paragraph 72 wherein plaintiff Holt alleges, "SUBWAY and DOCTOR'S ASSOCIATES came into possession of the Converted Funds by virtue of each of their misrepresentation to Defendants Mr. PATEL and LETAP that said Converted Funds would be delivered to Plaintiff and applied to outstanding rent due."

In other words, defendants Subway and Doctor's Associates acquired the $40,000 from defendants Patel and Letap Group by falsely representing to defendants Patel and Letap Group that the money would be applied to the outstanding rent. Plaintiff Holt contends defendants Subway and Doctor's Associates have been unjustly enriched at plaintiff Holt's expense. However, on these allegations, the unjust enrichment is at defendants Patel and Letap Group's

expense, not plaintiff Holt's. It is Patel and Letap Group who parted with $40,000 and who were lied to. With regard to the $40,000 (Converted Funds), a claim for unjust enrichment (based upon either conversion or fraud) belongs to defendants Patel and Letap Group, not to plaintiff Holt.

Accordingly, defendants Subway and Doctor's Associates demurrer to the seventh cause of action of plaintiff Holt's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for unjust enrichment/ restitution is SUSTAINED with 10 days' leave to amend.

D. Fifth cause of action – imposition of constructive trust.

> "A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner. [Citations.] The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing. [Citations.] [P] The principal circumstances where constructive trusts are imposed are set forth in Civil Code sections 2223 and 2224. Section 2223 provides that '[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.' Section 2224 states that '[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.' Under these statutes and the case law applying them, a constructive trust may only be imposed where the following three conditions are satisfied: (1) the existence of a res (property or some interest in property); (2) the *right* of a complaining party to that res; and (3) some *wrongful* acquisition or detention of the res by another party who is not entitled to it." (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal. App. 4th 980, 990 [41 Cal. Rptr. 2d 618], italics in original.) "[A] constructive trust may be imposed in practically any case where there is a

wrongful acquisition or detention of property to which another is entitled." (*Weiss v. Marcus* (1975) 51 Cal. App. 3d 590, 600 [124 Cal. Rptr. 297].)

(*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1069.)

As discussed above, the right to the $40,000 belongs to Patel/ Letap Group as they are the victims of the wrongful acquisition (conversion/ fraud) alleged to be perpetrated by defendants Subway and Doctor's Associates.

Accordingly, defendants Subway and Doctor's Associates demurrer to the fifth cause of action of plaintiff Holt's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for imposition of a constructive trust is SUSTAINED with 10 days' leave to amend.

E. Sixth cause of action – money had and received.

"A cause of action for money had and received is stated if it is alleged [that] the defendant 'is indebted to the plaintiff in a certain sum "for money had and received by the defendant for the use of the plaintiff." ' " (*Farmers Ins. Exchange v. Zerin*, *supra*, 53 Cal.App.4th at p. 460, quoting *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623 [33 Cal. Rptr. 2d 276].) The claim is viable " 'wherever one person has received money which ***belongs*** to another, and which in equity and good conscience should be paid over to the latter.' " (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 937 [125 Cal. Rptr. 3d 210], quoting *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599 [124 Cal. Rptr. 297].)

(*Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454; emphasis added.)

In demurring to this sixth cause of action, defendants Subway and Doctor's Associates rely upon a provision found in the sublease of the Premises from defendant Subway to defendant Patel. Based on that provision of the sublease, defendants Subway and Doctor's Associates contend the $40,000 belongs to them and not to plaintiff Holt. Defendants Subway and Doctor's Associates requests the court take judicial notice of this sublease which is found attached to Subway's cross-complaint against Patel. Although the cross-complaint is a court record, the court does not take judicial notice of the truth of matters asserted therein.[2] As such,

[2] Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders,

defendants Subway and Doctor's Associates' request for judicial notice is an improper attempt to insert extrinsic facts into the instant pleading and, consequently, DENIED.

Nevertheless, as discussed above, the $40,000 belonged to defendants Patel/ Letap Group. On the facts alleged, the $40,000 was had and received by defendant Subway and Doctor's Associates for the use of ***Patel/ Letap Group*** to pay down the past due rent. Here, we have a situation where there are two joint debtors and the first joint debtor gives the second joint debtor money based upon the representation by the second joint debtor that he will pay the money over to the creditor, but the second joint debtor keeps the money for himself. In such a scenario, the action for money had and received is by the first joint debtor against the second joint debtor. The amount the creditor is owed remains the same and the creditor has not suffered any additional injury. Any cause of action the creditor had against the joint debtors remains the same.

Accordingly, defendants Subway and Doctor's Associates demurrer to the sixth cause of action of plaintiff Holt's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for money had and received is SUSTAINED with 10 days' leave to amend.

F. Eighth cause of action – 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. …' [Citation.]" (*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387 [147 Cal. Rptr. 3d 768]; see CACI No. 2100; *Gruber v. Pacific States Sav. & Loan Co.* (1939) 13 Cal.2d 144, 148 [88 P.2d 137] [conversion is the wrongful exercise of dominion "over another's personal property in denial of or inconsistent with his rights therein"].)

(*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.)

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statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Woodell* (1998) 17 Cal.4th 448, 455.)

In demurring, defendants argue plaintiff Holt has not alleged ownership or right to possession of the $40,000. The court agrees for the reasons already discussed above.

Accordingly, defendants Subway and Doctor's Associates demurrer to the eighth cause of action of plaintiff Holt's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for conversion is SUSTAINED with 10 days' leave to amend.

G. Doctor's Associates.

Doctor's Associates separately demurs to the fifth through eighth causes of action on the ground that there is a defense disclosed on the face of the pleading. Namely, there is a provision in the Agreement which limits defendant Doctor's Associates' liability. At section 29 of the Agreement, it states, in relevant part, "it is expressly understood and agreed that there will not be any liability whatsoever against (A) [Doctor's Associates, Inc.], its shareholders, directors, officers, employees, and/or agents, … Such exculpation of liability shall be absolute and without any exception whatsoever."

As the court previously recognized, "[L]imitation of liability provisions have long been recognized as valid in California." (*Markborough Cal. v. Superior Court* (1991) 227 Cal.App.3d 705, 714; see also *Lewis v. YouTube, LLC* (2015) 244 Cal.App.4th 118, 125.)

In opposition, plaintiff attempts to overcome this express limitation of liability by asserting that liability against defendant Doctor's Associates is vicarious under an alter ego theory. However, this is not enough to overcome the plain contract language here which states, "that there will not be any liability ***whatsoever*** against" defendant Doctor's Associates.

For this additional reason, defendant Doctor's Associates' demurrer to the fifth through eighth cause of action of plaintiff Holt's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend.

III. Defendants Subway and Doctor's Associates' motion to strike is GRANTED.

A. Imposition of constructive trust.

In light of the court's ruling above with regard to plaintiff Holt's fifth cause of action, defendants Subway and Doctor's Associates motion to strike plaintiff Holt's prayer for imposition of a constructive trust is GRANTED with 10 days' leave to amend.

B. Punitive/ exemplary damages.

In light of the court's ruling above with regard to plaintiff Holt's eighth cause of action, plaintiff Holt cannot rely on its claim of conversion as the basis for seeking punitive/ exemplary damages. As explained earlier, the alleged fraud related to the $40,000 was directed at defendants Patel and Letap Group, not at plaintiff.

Plaintiff Holt also relies on allegations of fraud found at paragraph 48 that defendants "falsely represent[ed] to Plaintiff several different times that they intended to surrender possession of the Premises to Plaintiff before the expiration of the lease term on June 30, 2021. … Defendants never had any intention of surrendering possession of the Premises to Plaintiff at any time prior to expiration of the lease term … [Defendants] misrepresented and concealed their true intentions in order to induce and dissuade Plaintiff from taking any action to evict them."

However, such allegations are contained within plaintiff Holt's second cause of action for breach of the implied covenant of good faith and fair dealing. Plaintiff Holt has not pleaded a stand-alone cause of action for fraud. Outside of the insurance context, a breach of a commercial contract cannot be the basis for punitive damages. (Civ. Code, § 3294, subd. (a); *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516 (*Applied Equipment*); *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 698 (*Foley*).) The law eschews inquiry into a breaching party's motives; whether acting in good faith or bad faith, a party that breaches a commercial contract must pay only contract damages. (*Applied Equipment*, at p. 516; *Foley*, at p. 699; see *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 82 ["The imposition of tort remedies for 'bad' breaches of commercial contracts is a substantial deviation from the traditional approach which was blind to the motive for the breach"].)

Accordingly, defendants Subway and Doctor's Associates motion to strike plaintiff Holt's prayer for punitive/ exemplary damages is GRANTED with 10 days' leave to amend.

The Court will prepare the order after hearing.

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