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 2, 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	23CV420543	*Jacob Varughese vs. Timothy Chan 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 2	20CV369138	*Chicago Title Company vs 28th St Villa Apts. LLC*	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 4-5	22CV393229	*First Street Holdings, LLC vs Ronald Werner*	This matter is continued to May 2, 2024 at 9 a.m. in Department 20.
LINE 6	22CV402498	*Charles Darque vs Ivan Baev*	This motion to enforce settlement is CONTINUED to May 7, 2024 at 9 a.m. in Department 20.
LINE 7	23CV411285	*Katie Cane vs James Hoover*	Per the March 28, 2024 Notice of Settlement of Entire Case, this matter is off calendar.
LINE 8-9	23CV423546	*Irina Buckvar vs Bernard Buckvar*	Plaintiffs' motion for interlocutory judgment and appointment of a referee is continued to May 2, 2024 at 9 a.m. in Department 20 to be heard in conjunction with the discovery motions pending on that same date.
LINE 10	23CV425731	*Apolina Quiroz vs Kevin Pearson*	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 Kane Moon/R. Handley/C. Garcia's motion to be relieved as counsel is GRANTED. Court to use form of order on file.

LINE 11	22CV399627	*California Drywall Co. vs Athish Rao*	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 Leodis C. Matthews, Zhong Lun Law Firm' LLP's motion to be relieved as counsel is GRANTED. Full Power Construction, Inc., FPC Builders, Inc. and FPP MB LLC cannot proceed without counsel. (See *CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal. App. 4th 1141.) Thus, unless those entities file a substitution of counsel beforehand, those entities are ordered to appear in Department 20 at 10 a.m. on June 7, 2024 and show cause why their answers should not be stricken and default entered against them. This order will be reflected in the minutes. Court to use order on file for motion to be relieved.
LINE 12-14	23CV413315	*Toni Guel vs Marcelino Guel, II*	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 Marcelino P. Guel, II's motion to compel responses to form interrogatories (set one), special interrogatories (set one), request for production of documents (set one) and for monetary sanctions is GRANTED. These motions were served by electronic mail on December 12, 2023. Plaintiff did not oppose the motions. "[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.) Defendant served this discovery on June 15, 2023, followed up by email on August 15, 2023 and December 4, 2023 after receiving no responses, and to date, Plaintiff has made no response. Plaintiff is ordered to (1) serve verified, code compliant responses and (2) pay Defendant $2,205 in sanctions within 20 days of service of this formal order. Moving party to prepare formal order.

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.: 23CV420543 **Jacob Varughese v. Timothy Chan et al.**

DATE: 2 April 2024 **TIME: 9:00 am** **LINE NUMBER: 1**

Order on Demurrer

I. Statement of Facts.

According to his First Amended Complaint (FAC), Plaintiff Jacob Varughese (Plaintiff) is the victim of fraud perpetrated by defendant Timothy Chan and three business entities, defendants: Carrera VII, L.P., Carrera VII (B), L.P., Mantra Ventures, LLC (the "Businesses"). (FAC, ¶1.) Defendants Chan and the Businesses (collectively, "Defendants") convinced Plaintiff to fund an investment portfolio by making various promises and representations. (*Ibid*.)

Defendants promised and represented that for a payment of approximately 15 percent and related fees, they would invest Plaintiff's money for his benefit in securities as his fiduciary, provide him with monthly financial statements and other regular updates about the investment, and disclose and discuss investment opportunities. (FAC, ¶¶1, 18.) Defendants also promised that they would obtain Plaintiff's consent for investment decisions, return his money upon request, and provide other related financial services. (*Id.* at ¶¶1, 18.) Defendants represented that Chan was a licensed broker and was competent in financial management and investment. (*Id*. at ¶¶1, 18.)

At Defendants' direction and based on their representations, Plaintiff deposited $312,033.77 into a financial account controlled by the Defendants. (FAC, ¶¶2, 19.) Plaintiff never received any of the services Defendants represented and promised that he would receive. (*Ibid.*)

Eventually, Plaintiff requested information about his investment and demanded the return of his investment. (FAC, ¶3.) Defendants never responded to Plaintiff's demand. (*Ibid*.) Plaintiff never recovered his money and lost more than approximately $312,033.77 as a result of the fraudulent investment scheme and enterprise of Chan and his Businesses. (*Ibid.*)

On 27 July 2023, Plaintiff filed a complaint in Alameda County Superior Court against Defendants, stating causes of action for:

(1) BREACH OF CONTRACT
(2) INTENTIONAL MISREPRESENTATION
(3) NEGLIGENT MISREPRESENTATION
(4) CONCEALMENT
(5) CONVERSION
(6) NEGLIGENCE
(7) UNJUST ENRICHMENT
(8) PROMISSORY ESTOPPEL

On 20 March 2023, the Alameda County Superior Court (Hon. Evenson) ordered this action transferred to the Santa Clara County Superior Court pursuant to ***Code of Civil Procedure*** section 399, subdivision (a).

On 6 October 2023, defendant Chan filed a demurrer to Plaintiff's complaint.

On 4 December 2023, Plaintiff filed the FAC, stating causes of action for:

(1) BREACH OF CONTRACT
(2) INTENTIONAL MISREPRESENTATION
(3) NEGLIGENT MISREPRESENTATION
(4) CONCEALMENT
(5) CONVERSION
(6) NEGLIGENCE
(7) UNJUST ENRICHMENT
(8) PROMISSORY ESTOPPEL
(9) 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[1] 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.

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[1] 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.)

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).

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 complaint OVERRULED.

Defendant Chan's demurrer to the remainder of plaintiff Varughese's first amended complaint is SUSTAINED with 10 days leave to amend.

DATED:

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

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 was not in existence and not registered with the California Secretary of State. (SAXC, ¶17.) Malley and Kirkley knew Bart 2 had not been formed and did not exist. (*Id.*) On or about 1 August 2019, Kirkley signed a Representative Capacity Signature Disclosure ("Disclosure") representing Bart 2 was an entity that existed and that she was a partner of Bart 2. (SAXC, ¶18 and Exh. C.) At the time she signed the Disclosure, Kirkley knew Bart 2 had not been formed and did not exist. (*Id.*) At the time of execution of the PSA and Assignment, Seller had no knowledge that Buyer or Bart 2 had not been formed and was not an existing entity. (SAXC, ¶¶19 – 20.)

The parties to the PSA hired CTC to process escrow. (SAXC, ¶21.) Pursuant to the PSA, the buyer cross-defendants paid $300,000 in earnest money deposit to be applied toward the purchase price of the subject Property. (SAXC, ¶22.) CTC received those deposits between July 2019 and November 2019 as follows: $25,000 from Li[2] (on behalf of Malley dba Buyer) on 31 July 2019; $50,000 from Li (on behalf of Malley dba Buyer) on 31 July 2019; $75,000 from Kirkley dba Roygbiv (on behalf of Kirkley dba Bart 2) on 1 August 2019; $75,000 from Kirkley dba Roygbiv (on behalf of Kirkley dba Bart 2) on 29 October 2019; $75,000 from Malley dba Nobel (on behalf of Malley dba Buyer) on 1 November 2019. (*Id.*) CTC did not inform Seller that it obtained earnest money deposits from third parties Li, Roygbiv, and Nobel even though CTC knew these third parties were not parties to the PSA. (SAXC, ¶23.)

On 31 October 2019, CTC became aware that a check from Nobel was returned for non-sufficient funds, but CTC did not inform Seller. (SAXC, ¶24.) On or about 1 August 2019, CTC sent Third Party Deposit Escrow Instructions to Malley and Kirkley asking they be signed and returned. (SAXC, ¶25.) The Third Party Deposit

[2] The SAXC alleges Li is Malley's wife. (SAXC, ¶7.)

Escrow Instructions state Roygbiv and Li were Third Party Depositors and that checks in the amount of $75,000, $50,000, and $25,000, respectively, were to be applied for the benefit of Buyer. (*Id.*) The documents were never signed and CTC never followed up to obtain signatures despite knowing those signed documents were necessary and material for the transaction and one of the tasks CTC undertook to perform. (*Id.*) CTC also failed to inform Seller that it had not secured those signatures. (*Id.*)

Close of escrow (COE) was to occur on 23 March 2020. (SAXC, ¶26.) On 6 February 2020, Malley dba Buyer, on behalf of the buyers, and Seller signed an amendment to the PSA stating COE would be no later than 22 May 2020. (*Id.* and Exh. E-1.)

On or about 11 April 2020, without Seller's knowledge or consent, Malley attempted to unilaterally rescind the Assignment informing CTC that Bart 2 was not a legal entity and claiming the Assignment was invalid. (SAXC, ¶27.) CTC acknowledged the rescission and understood the Assignment to be void and Buyer would be responsible for closing funds. (*Id.*)

On or about 22 April 2020, Kirkley emailed CTC requesting return of her $150,000 earnest money deposit. (SAXC, ¶29.) CTC did not inform Seller of Kirkley's request. (*Id.*) On 24 April 2020, CTC learned the Third Party Deposit Escrow Instructions had not been signed, but did not inform Seller. (SAXC, ¶30.) Kirkley contacted CTC several times in April 2020 demanding her deposit back, but CTC did not inform Seller of these claims. (SAXC, ¶31.) On 27 April 2020, CTC knew Malley did not intend to replace Kirkley's $150,000 deposit, but did not inform Seller. (SAXC, ¶32.) On or about 18 May 2020, CTC sent a letter to the parties informing them it had received conflicting demands regarding the $150,000 deposited by Roygbiv and stating the funds would be interpleaded with the court unless the parties agreed on escrow instructions. (SAXC, ¶33.) This was the first time Seller became aware that $150,000 of the earnest money deposit came from a third party entity, Roygbiv, and that there were conflicting demands to the funds. (*Id.*)

On or about 23 May 2020, Malley dba Buyer, on behalf of buyers, and Seller agreed to extend COE to 27 July 2020 and that Seller had the right to pursue other offers and if Seller accepts another offer, Seller would still have the rights to Buyer's original deposit of $300,000. (SAXC, ¶34 and Exh. E-2.) COE did not occur before 27 July 2020. (SAXC, ¶35.)

On 29 July 2020, in reliance on assurances from buyers and CTC that the transaction was in a position to close and only an extension of time was needed, Seller agreed to another extension for COE to 27 September 2020 with further agreement that Seller had the right to pursue other offers and if Seller accepts another offer, Seller would still have the rights to Buyer's original deposit of $300,000 and the PSA would be null and void due to non-performance. (SAXC, ¶36 and Exh. E-3.) COE did not occur on or before 27 September 2020. (SAXC, ¶37.)

Had Seller known escrow deposits were made by third parties, that there were conflicting demands to the deposit from Kirkley, that CTC had not secured signatures on the Third Party Deposit Escrow Instructions, that any of the legal entities had not been formed, or that there was animosity between the buyers, Seller would not have agreed to multiple extensions of time to perform and would have looked earlier for other potential buyers. (SAXC, ¶40.) Due to cross-defendants' actions, Seller did not pursue other offers until late 2020 and sold the subject Property to another buyer for approximately $2,000,000 less than the agreed upon sale price in the PSA. (SAXC, ¶41.) Buyers refused and continue to refuse to release the $300,000 earnest money deposit. (SAXC, ¶42.)

Seller's SAXC now asserts causes of action for:

(1) DECLARATORY RELIEF [VERSUS BUYER CROSS-DEFENDANTS]
(2) DECLARATORY RELIEF [VERSUS CTC]
(3) FRAUD (INTENTIONAL MISREPRESENTATION) [VERSUS KIRKLEY]
(4) FRAUD (FALSE PROMISE) [VERSUS MALLEY AND BUYER]

(5) INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIP [VERSUS MALLEY AND BUYER]
(6) NEGLIGENCE [VERSUS KIRKLEY, ROYGBIV, AND BART 2]
(7) NEGLIGENCE [VERSUS MALLEY, BUYER, AND LI]
(8) NEGLIGENCE [VERSUS CTC]
(9) BREACH OF FIDUCIARY DUTIES [VERSUS CTC]
(10) BREACH OF IMPLIED-IN-FACT CONTRACT [VERSUS CTC]
(11) BREACH OF DUTY TO PERFORM WITH REASONABLE CARE [VERSUS CTC]
(12) BREACH OF WRITTEN CONTRACT [VERSUS MALLEY, BUYER, AND LI]
(13) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING [VERSUS MALLEY, BUYER, AND LI]
(14) PROMISSORY ESTOPPEL [VERSUS BUYER CROSS-DEFENDANTS]

On 21 March 2022, cross-defendants Malley, Buyer, and Li filed a demurrer to the fifth, twelfth, and thirteenth causes of action of Seller's SAXC.

On 6 April 2022, cross-defendant CTC filed a demurrer to the entirety of Seller's SAXC and also specifically to the second, eighth, ninth, tenth, and eleventh causes of action of Seller's SAXC.

On 11 April 2022, cross-defendants Kirkley and Roygbiv filed an answer to Seller's SAXC and also filed a demurrer to the sixth cause of action of Seller's SAXC.

On 5 August 2022, the court issued an order addressing the demurrers to Seller's SAXC. As to the demurrer filed by cross-defendant CTC, the court sustained demurrers to the second, eighth, ninth, and eleventh causes of action without leave to amend, but overruled as to the tenth [breach of implied-in-fact contract] cause of action.

On 26 August 2022, cross-defendant CTC filed its answer to Seller's SAXC.

On 12 January 2024, cross-defendant CTC filed the motion now before the court, a motion for summary judgment/ adjudication of Seller's SAXC.

II. Analysis.

A. Cross-defendant CTC's motion for summary judgment of Seller's SAXC.

"An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition." (3 Miller & Starr, Cal. Real Estate (3d ed. 1989) § 6:1, pp. 2-3 (rev. 9/00); see Fin. Code, § 17003, subd. (a).) An escrow holder is an agent and fiduciary of the parties to the escrow. (*Amen v. Merced County Title Co.* (1962) 58 Cal. 2d 528, 534 [25 Cal. Rptr. 65, 375 P.2d 33] (*Amen*); *Rianda v. San Benito Title Guar. Co.* (1950) 35 Cal. 2d 170, 173 [217 P.2d 25].) The agency created by the escrow is limited [] to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal. App. 4th 668, 674 [86 Cal. Rptr. 2d 490] (*Vournas*); *Schaefer v. Manufacturers Bank* (1980) 104 Cal. App. 3d 70, 77 [163 Cal. Rptr. 402] (*Schaefer*); *Blackburn v. McCoy* (1934) 1 Cal. App. 2d 648, 655 [37 P.2d 153].) ***If the escrow holder fails to carry out an instruction it has contracted to perform, the injured party has a cause of action for breach of contract.*** (*Amen*, at p. 532.)

In delimiting the scope of an escrow holder's fiduciary duties, then, we start from the principle that "[a]n escrow holder must comply strictly with the instructions of the parties. [Citations.]" (*Amen*, *supra*, 58 Cal. 2d at p. 531.) On the other hand, an escrow holder "has no general duty to police the affairs of its depositors"; rather, an escrow holder's obligations are "limited to faithful compliance with [the depositors'] instructions." (*Claussen v. First American Title Guaranty Co.* (1986) 186 Cal. App. 3d 429, 435-436 [230 Cal. Rptr. 749]; see, e.g., *Vournas*, *supra*, 73 Cal. App. 4th at p. 674; *Romo v. Stewart Title of California* (1995) 35 Cal. App. 4th 1609, 1618, fn. 9 [42 Cal. Rptr. 2d 414]; *Schaefer*, *supra*, 104 Cal. App. 3d at pp. 77-78; *Axley v.*

Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d 1, 9 [151 Cal. Rptr. 570].) Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions. (*Lee v. Title Ins. & Trust Co.* (1968) 264 Cal. App. 2d 160, 162 [70 Cal. Rptr. 378]; 3 Miller & Starr, Cal. Real Estate, supra, § 6:26, p. 68.)

(*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 (*Summit*); emphasis added.)

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.)

In the tenth and only remaining cause of action by Seller against cross-defendant CTC, Seller alleges CTC "agreed to undertake the duty to follow escrow instructions, and to advise the parties if any of their instructions were not mutually consistent or could not be carried out." (SAXC, ¶¶21 and 99.) In opposition to cross-defendant CTC's motion for summary judgment/ adjudication, Seller does not dispute that there were, in fact, no written escrow instructions from Buyer or Seller.[3] Thus, the focus turns to Seller's allegation that CTC entered into an agreement (with Buyer and Seller) wherein CTC "agreed to undertake duties to act as escrow and settlement agent based on their advertised services." (SAXC, ¶98.) More specifically, "[t]he tasks and duties [CTC] agreed to undertake in its role as the escrow and settlement agent include, but are not limited to:

- Obtaining, administering, and processing the documents and funds necessary to facilitate the sale of the property;
- Preparing the escrow instructions and required documents in accordance with the terms of the sale;
- Keeping all parties informed of progress on the escrow;
- Obtaining approvals of reports and documents from the parties as required;
- Presenting the documents, statements, loan packages, estimated closing statements and other related documents to the principal(s) for approval and signature, and requesting the balance of the buyer's funds;
- Determining when the transaction will be in the position to close and advising the parties;
- Maintaining security and accountability of monies owed and owing; and
- Delivering the appropriate statements, funds and documents to the principals, agents, and/or lenders.

(SAXC, ¶¶21 and 99.)

Seller alleges CTC "breached its agreement to provide its advertised escrow services by:

- Failing to obtain, administer, and process the documents and funds necessary to facilitate the sale of the property, including the Third Party Deposit Escrow Instructions;
- Failing to prepare the escrow instructions and required documents in accordance with the terms of the sale;

[3] See Separate Statement of Undisputed Material Facts Submitted by Plaintiff and Cross-Defendant Chicago Title Company in Support of its Motion for Summary Judgment, or Alternatively, Summary Adjudication ("CTC UMF"), Fact No. 5. See also Green Villa Apartment LP's Response to Chicago Title Separate Statement of Undisputed Material Facts ("Seller's Response UMF"), Fact No. 5. See also page 7, lines 26-27, of Green Villa Apartment LP's Opposition to Chicago Title Company's Motion for Summary Judgment, or Alternatively Summary Adjudication ("Seller's MPA").
In opposition, Seller filed "Objections to Evidence Submitted by Plaintiff/ Cross-Defendant Chicago Title Company in Support of its Motion for Summary Judgment." With one exception, Seller's evidentiary objections fail to comply with California Rules of Court, rule 3.1354, subdivision (b)(3) which states, in relevant part, "Each written objection must quote or set forth the objectionable statement or material." As such, the court declines to rule on Seller's evidentiary objections. "Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).) As to Seller's objections to paragraph 10 of the Declaration of Lisa Tyler, the objections are OVERRULED.

- Failing to advise SELLER regarding the progress of the escrow and that the transaction was not in a position to close by the parties' agreed upon date for COE;
- Failing to determine when the transaction would be in the position to close and advising the parties of the same;
- Failing to maintain accountability of monies owed and owing; and
- Failing to deliver appropriate statements, funds and documents to SELLER.

(SAXC, ¶102.)

1. No implied-in-fact contract.

> An implied-in-fact contract is based on the conduct of the parties. (Civ. Code, § 1621.) Like an express contract, an implied-in-fact contract requires an ascertained agreement of the parties. (*Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773 [97 P.2d 798]; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 102, p. 144.)

(*Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 636.)

> As to the basic elements, there is no difference between an express and implied contract. While an express contract is defined as one, the terms of which are stated in words (Civ. Code, § 1620), an implied contract is an agreement, the existence and terms of which are manifested by conduct (Civ. Code, § 1621). As the cases explain, both types of contract are identical in that they require a meeting of minds or an agreement (*Desny v. Wilder* (1956) 46 Cal.2d 715, 735 [299 P.2d 257]). Thus, it is evident that both the express contract and contract implied in fact are founded upon an ascertained agreement or, in other words, are consensual in nature, the substantial difference being in the mode of proof by which they are established (*Caron v. Andrew* (1955) 133 Cal.App.2d 412, 417 [284 P.2d 550]). While an implied in fact contract may be inferred from the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise. As the court put in *Mulder v. Mendo Wood Products, Inc.* (1964) 225 Cal.App.2d 619, 632 [37 Cal.Rptr. 479], "*The true implied contract consists of obligations arising from* a mutual agreement and *intent to promise* where the agreement and promise have not been expressed in words." (Italics added.)

(*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268, 275.)

CTC initially moves for summary judgment of Seller's tenth cause of action by arguing that there was no implied-in-fact contract as alleged. CTC acknowledges that it was selected to serve as the neutral stakeholder for the transaction [between Seller and Buyer defendants], and upon receipt of the PSA, CTC opened escrow for the Purchase Transaction of the Subject Property and assigned Escrow No. 98202485-982.[4] Pursuant to the PSA, Buyer and Seller agreed to prepare and execute escrow instructions, but during the time CTC served as the stakeholder, the parties failed to provide escrow instructions, either written or oral.[5] CTC received a total of $300,000 into Escrow for the Purchase Transaction.[6] Despite extensions to close escrow, the Purchase Transaction never closed, and the monies remained in Escrow.[7] CTC received conflicting claims regarding where to disburse the $300,000 remaining in escrow after cancellation.[8] On or about 14 May 2020, CTC sent a letter to both the Buyer and Seller advising that CTC was in receipt of conflicting demands regarding the disputed funds, and that in the event CTC did not receive mutually signed instructions regarding disbursement by 25 May 2020, CTC would file an interpleader action.[9]

On the issue of whether there was an implied-in-fact contract as alleged by Seller, CTC contends that to the extent the implied-in-fact contract is based upon an advertisement of services, CTC proffers evidence that the particular

[4] See CTC UMF, Fact No. 2.
[5] See CTC UMF, Fact Nos. 3 – 5.
[6] See CTC UMF, Fact No. 6.
[7] See CTC UMF, Fact No. 7.
[8] See CTC UMF, Fact No. 8.
[9] See CTC UMF, Fact No. 9.

advertisement is not an advertisement by CTC, but rather by Chicago Title Insurance Company ("CTIC"), a separate legal entity which provides a different service, and that at the bottom of the advertisement is a disclaimer which states, "The statements made on this web page and any page that follows within the Chicago Title website are not intended, and shall not be construed to expressly or implicitly issue or deliver any form of written guaranty, affirmation, or certification of any fact, insurance coverage or conclusion of law."[10]

Regardless of whether the alleged advertisement came from CTC or CTIC[11], CTC asserts that advertisements are not offers and, thus, cannot be the basis for mutual consent/ agreement. To support this assertion, CTC cites *Harris v. Time, Inc.* (1987) 191 Cal.App.3d 449, 455 (*Harris*), but CTC misquotes *Harris* which actually states, "advertisements are not typically treated as offers, but merely as invitations to bargain. [Citation.] There is, however, a fundamental exception to this rule: an advertisement can constitute an offer, and form the basis of a unilateral contract, if it calls for performance of a specific act without further communication and leaves nothing for further negotiation." CTC does not sufficiently develop its argument as CTC has not negated the potential exception.

2. No breach.

CTC argues secondarily that even if the court finds the existence of an implied-in-fact contract, CTC fully performed its obligations. CTC cites to *Summit*, *supra*, to assert that its obligations are limited to following the instructions given to it by the parties to the transaction. CTC proffers evidence that it received no written instructions from Buyer or Seller in this transaction.

However, this argument does not squarely address Seller's contention that despite the lack of any written instructions, CTC undertook other contractual obligations beyond just following the written instructions from the parties to the transaction. Instead, CTC apparently repeats its earlier arguments that it did not agree to undertake any other obligations (because CTC did not issue the purported advertisement and the advertisement included a disclaimer). As noted above, the court either finds a triable issue of material fact or finds the argument to be insufficiently developed, i.e., CTC has not met its initial burden.[12]

3. No causation of damages.

Finally, cross-defendant CTC contends it is not liable for breach of contract because it did not proximately cause Seller's damages. "An essential element of a claim for breach of contract are damages resulting from the breach. [Citation.] Causation of damages in contract cases requires that the damages be proximately caused by the defendant's breach. [Citations.]" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352.)

"Like breach of duty, causation also is ordinarily a question of fact which cannot be resolved by summary judgment. The issue of causation may be decided as a question of law only if, under undisputed facts, there is no room for a reasonable difference of opinion." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864; see also *Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 354—"the issue of proximate cause ordinarily presents a question of fact. However, it becomes a question of law when the facts of the case permit only one reasonable conclusion.")

According to CTC, Seller's damages, if any, resulted from the Buyer's failure to close and not from any actions of CTC. Again, the court finds CTC's argument insufficiently developed. The SAXC alleges, in relevant part, that "[d]ue to [CTC's] failure to advise otherwise, [Seller] provided multiple extensions of time and did not seek

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[10] See CTC UMF, Fact Nos. 12 – 14.

[11] Seller proffers evidence in opposition which would create a triable issue of material fact with regard to whether CTC and CTIC are related entities providing integrated services and thus whether an advertisement from CTIC can be attributed to CTC. See Seller's Response UMF, Fact No. 13. See also Green Villa Apartment LP's Separate Statement of [Additional] Disputed Material Facts in Support of Opposition to Chicago Title Company's Motion for Summary Judgment or Alternatively Summary Adjudication ["Seller's DMF"], Fact Nos. 1 – 5.

[12] "A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted.)

additional buyers for the Subject Property, until July 2020 … and sold the subject property to another buyer for approximately $2,000,000 less than the agreed upon sales price in the PSA." (SAXC, ¶¶39 and 41.) Unquestionably, the Buyer's failure to close caused Seller to suffer injury, but the damage attributable to CTC is for the delay it caused Seller. To establish that Seller's damage is attributable solely to Buyer's failure to close, CTC would need to establish that the subject property's ultimate sales price (allegedly $2 million less) would have been the same had there been no delay. CTC has not provided any such evidence.

For all the reasons discussed above, cross-defendant CTC's motion for summary judgment of cross-complainant Seller's SAXC is DENIED.

B. Cross-defendant CTC's alternative motion for summary adjudication is GRANTED.

In the alternative, CTC seeks summary adjudication as to Seller's claim for punitive damages.

In opposition, Seller concedes it "will not seek punitive damages as against [CTC]."[13]

In light of Seller's concession, cross-defendant CTC's alternative motion for summary adjudication of cross-complainant Seller's claim for punitive damages is GRANTED.

III. Order.

Cross-defendant CTC's motion for summary judgment of cross-complainant Seller's SAXC is DENIED.

Cross-defendant CTC's alternative motion for summary adjudication of cross-complainant Seller's claim for punitive damages is GRANTED.

DATED:

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

[13] See page 14, line 15 of Seller's MPA.