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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FREDERICK W. HOWLAND et al., Plaintiffs and Appellants, v. FARMERS GROUP, INC. et al., Defendants and Respondents.	B275277 (Los Angeles County Super. Ct. No. BC415110)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Reversed in part; affirmed in part.

The Anfanger Law Office, Nancy B. Anfanger for Plaintiffs and Appellants.

Locke Lord, Nina Huerta; Greines, Martin, Stein & Richland, Robert A. Olson and Gary J. Was for Defendants and Respondents.

INTRODUCTION

Plaintiff Frederick Howland worked as a district manager performing insurance-related services for several insurance entities for over ten years pursuant to two consecutive written agreements. Under the first agreement, defendants Farmers Insurance Exchange, Fire Insurance Exchange, Truck Insurance Exchange, Mid-Century Insurance Company, and Farmers New World Life Insurance Company[1] engaged Howland individually to recruit and train agents to sell insurance policies for them. At the time of the second agreement, Howland formed a corporation, plaintiff F.W. Howland Insurance, Inc. (Howland, Inc.). Pursuant to that agreement, the companies appointed Howland, Inc. as a district manager agency, and Howland individually as a supervising district manager. Both agreements disclaimed any employer-employee relationship between the parties.

After the companies terminated the second agreement, Howland and Howland, Inc. sued, alleging age discrimination, wrongful termination, and failure to pay all wages due. Plaintiffs also asserted related tort and contract claims arising from the companies' purported breach of the agreements and plaintiffs' termination. Plaintiffs also alleged the same claims against a sixth defendant, Farmers Group, Inc. (FGI), who was not a party to either agreement but whom plaintiffs claimed was an undisclosed principal and alter ego of the other defendants.

Following a series of demurrers and amended complaints, the trial court sustained defendants' demurrer to portions of plaintiffs' third amended complaint without leave to amend. In

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[1] We refer to the five contracting defendants collectively as "the companies" in accordance with the terminology of the agreements at issue here.

particular, the court found that plaintiffs could not plead employment claims because of the contractual language classifying them as independent contractors rather than employees.

On appeal, plaintiffs contend they sufficiently alleged facts supporting the claim that Howland was defendants' employee, despite the contrary language in the parties' agreements. They therefore argue that the trial court erred in sustaining the demurrer to the employment claims. Plaintiffs also challenge the court's sustaining of the demurrer to their breach of contract claim against FGI, arguing that FGI could be liable under the contract as an alter ego or undisclosed principal. Finally, plaintiffs argue the court erred in striking from the complaint allegations regarding emotional distress and punitive damages related to the employment claims. We agree with plaintiffs' contentions, reverse those portions of the court's order, and remand for further proceedings. However, to the extent plaintiffs also seek to appeal their claim for unfair business practices, we conclude that they may not appeal from their voluntary dismissal of that claim.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Plaintiffs' Complaint*

Plaintiffs' complaint asserted nine causes of action arising out of their work for defendants: (1) breach of contract; (2) breach of joint venture agreement; (3) breach of fiduciary duty; (4) misrepresentation; (5) failure to pay wages; (6) wrongful termination in violation of public policy; (7) tortious interference with prospective economic relations; (8) age discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.); and (9) unfair business

practices. Subsequent amended versions of the complaint retained the same claims. Because plaintiffs appeal the court's rulings only on the first (as to FGI), fifth, sixth, eighth, and ninth (to the extent it is premised on allegations regarding plaintiffs' employment classification) causes of action, we focus on the allegations germane to those claims.

Howland alleged that he began working as an insurance agent for defendants in 1987. In 1995, he was promoted and entered into a "District Manager's Appointment Agreement" with the companies (the 1995 DMAA). Under the 1995 agreement, the companies appointed Howland as district manager. According to plaintiffs, the 1995 DMAA was "a written, though ambiguous and unintegrated and subsequently oral and implied in fact agreement with Defendants."

Defendant FGI was not a signatory to this agreement. Plaintiffs alleged that FGI was "the managing agent and attorney-in-fact of the other Defendants, and was the parent company of defendant Farmers New World Life Insurance Company," an "undisclosed principal in the agreements entered into with Plaintiffs," and the alter ego of the other defendants. Plaintiffs alleged FGI was the only defendant that interacted with them "for purposes of their District Manager duties," and did so on behalf of the companies.

In 2005, plaintiffs allege that Elizabeth Stella became the Division Marketing Manager for Howland's division, supervising Howland and several other district managers. Stella was purportedly employed by FGI. According to Howland, defendants "intended to replace highly productive District Managers/Supervising District Managers from one of the most profitable Divisions in the country with much younger

[managers] who would earn far less money." To this end, plaintiffs alleged that Stella and another FGI employee "initiated the termination, forced resignation or harassment of approximately 7 out of 10 District Managers in Plaintiffs' Division at the behest of Defendants," including "putting some District Managers on unreasonable 'formal performance programs,' which programs included the establishment of unreasonable sales goals."

In January 2007, the parties terminated the prior agreement and entered into a new one. At that time, Howland "incorporated himself" and became the "principal and sole shareholder" of Howland, Inc. Howland, Inc. and the companies entered into a "Corporate District Manager Appointment Agreement" (2007 DMAA), pursuant to which Howland, Inc. became the "District Manager Agency" for the companies. Under the same agreement, Howland was "individually hired" by the companies "as a 'Supervising' District Manager." Plaintiffs allege that defendants "encouraged [Howland] to incorporate himself," but that Howland had the same duties and working conditions as before. He remained in this position from January to June 2007, when he was "wrongfully terminated, the contracts breached, and he was forced out of his position with Defendants." Plaintiffs alleged they were terminated and Howland was replaced with a younger district manager, under the pretext that Howland had sent "an email of pictures of naked women" to the insurance agents in his district. Howland denied sending the email.

In their breach of contract claim, plaintiffs acknowledged that FGI was neither referenced within, nor a party to, the 1995 DMAA and that Howland did not "contemplate or agree that [FGI] would have anything to do with [Howland's] job as a

District Manager, although it turned out that [FGI] was the company that had day to day contact" with Howland in his job "and exerted control over him." Plaintiffs do not repeat the same allegations regarding the 2007 DMAA, but alleged that the 2007 DMAA suffered from "the same ambiguities." According to plaintiffs, the contracts were modified over the course of their employment both orally and by conduct of the parties. Such modifications included the provision stating that either party could terminate the agreement without cause, which plaintiffs alleged was modified by defendants' promises that he would only be terminated for good cause. In addition, plaintiffs alleged that the parties modified the terms regarding plaintiffs' status as independent contractors rather than employees and the degree of control defendants had over that employment relationship. "In exchange for these modifications," Howland allegedly "subjected himself to reasonable control by Defendants." Plaintiffs alleged that defendants breached the agreements with plaintiffs by terminating them without cause, or for an unlawful reason.

In the operative third amended complaint, only Howland individually asserted claims for wage and hour violations, age discrimination, and wrongful termination.[2] In support of these employment claims, Howland alleged that he was defendants' employee as a district manager under the 1995 DMAA and as a supervising district manager under the 2007 DMAA. He contended that defendants controlled his "wages, hours, working

[2] Plaintiffs are not entirely clear or consistent in the TAC regarding when allegations relate to Howland, Howland, Inc., or both. However, the three employment causes of action are expressly alleged only by "Plaintiff Howland" and plaintiffs on appeal do not suggest otherwise.

conditions, and the manner and means of Plaintiff's work and not just the end results." Specifically, he alleged that starting in approximately November 2005, defendants "exercised unreasonable control over Plaintiffs," including by "demanding all kinds of attendance at meeting[s], regular reports, and generally took over the way time was spent by Plaintiffs performing their job."

As examples of defendants' control, Howland alleged the following: FGI "maintained control over the hiring and firing of insurance agents" in Howland's district and assigned agents to or from Howland at its sole discretion; defendants had to approve all sales promotions for Howland's agents; defendants provided leads to Howland; defendants' managers decided whether to recommend termination or nonrenewal of a policy; they also required him to "sell policies, or cause them to be sold in a certain way," and required him to "train agents in a certain way and attend training himself, including Farmers University"; he was also required to hold a "special class" for agents each month, with the attendees determined by defendants. In addition, Howland alleged he was required to work exclusively for defendants; was required to provide his own commercial office, which had to be approved by defendants and had to contain the "Farmers logo"; he was required to "use his office exclusively in the service of Farmers;" he was limited to working in a certain geographical area, which could only be altered with defendants' permission; defendants controlled "the times during the day when [Howland's] agency had to be open" and "how the agency was staffed, and decorated"; he was required to "use a particular computer and computer system," to maintain a "professional appearance" and a "professional" office; he was also required to

"keep certain office hours." Defendants also allegedly controlled "when and if vacations were taken" and required Howland to "cooperate" with FGI employees by attending regular mandatory district meetings and filling out "daily, weekly, monthly, and quarterly reports." He was also subject to quarterly audits and monthly evaluations from defendants.

While Howland's compensation was based on a commission from the insurance policies sold by his agents, he alleged that defendants "determined which policies would be attributed" to Howland for compensation purposes and "had exclusive control, as a practical matter," over what percentage Howland would receive. Howland alleged that defendants paid him "at regular intervals," defendants provided and paid for health insurance benefits for Howland, and FGI provided a "business support package of sorts to run his district through the Farmers Credit Union," with regular deductions taken from Howland's paycheck. Defendants also had the right to terminate Howland under certain circumstances. In short, "in practice, defendants could not sell insurance without District Managers, and so the work performed by the District Managers was wholly integrated into Defendants' operation."

II. *Contracts*

Although they contend the 1995 and 2007 DMAAs were not controlling in many respects, plaintiffs do not dispute the existence of the agreements. Indeed, they attached copies of both agreements to their second amended complaint. We therefore review the relevant terms.

A. *1995 DMAA*

Under the 1995 DMAA, the companies appointed Howland as district manager of California district 85, effective June 1,

1995, "continuing until [the agreement is] terminated or cancelled." The companies agreed to pay Howland "an overwrite on all business produced by Agents of, and written by [the companies], in the District . . . in accordance with schedules and rules adopted from time to time by the respective Companies. . . ." They also agreed to "arrange for Group Life Insurance and Group Hospital-Medical Insurance" for Howland and to "regularly pay their proportion of the premiums required for such insurance." For his part, Howland agreed to "recruit for appointment and train as many agents acceptable to the Companies as may be required to produce sales in accordance with goals and objectives established by the Companies"; to "actively represent the Companies in the conduct of the District"; to "represent no other insurer"; to "conform to all regulations, operating principles and standards of the Companies, and through Agents under his/her supervision to provide claims and other service to policyholders of the Companies"; and to maintain "adequate records…as may be required by the Companies." In addition, the companies retained the "exclusive right, in their sole descretion [*sic*], to at any time decrease or otherwise change overwrite rates, schedules or classifications."

The 1995 DMAA stated that it "may be cancelled without cause by either [Howland] or the Companies on 30 days' written notice... ." At the time of termination, the companies could elect to pay "contract value" to Howland, under a formula set forth in the agreement based on his overwrite commissions. The 1995 DMAA also contained the following provision: "Nothing contained herein is intended or shall be construed to create the relationship of employer and employee. The time to be expended by the District Manager is solely within his/her discretion, and

the persons to be solicited and the area within the district involved wherein solicitation shall be conducted is at the election of the District Manager. No control is to be exercised by the Companies over the time when, the place where, or the manner in which the District Manager shall operate in carrying out the objectives of this Agreement provided only that they conform to normal good business practice, and to all State and Federal laws governing the conduct of the Companies, and their Agents." The 1995 agreement expressly stated that it "supersedes and takes the place of any and all prior agreements, written or otherwise, between the District Manager and the Companies, or any of them, and no change, alteration, or modification hereof may be made," except by a writing signed by the parties.

B. *2007 DMAA*

The first paragraph of the 2007 DMAA states that it was entered into between Howland's corporation, F.W. Howland Insurance, Inc. (Howland, Inc.); Howland, Inc.'s "undersigned stockholders"; and the companies. Under the 2007 DMAA, Howland, Inc. was appointed as a "District Manager Agency" in district 29-85 and Howland was "appointed as Supervising District Manager." These appointments were to "continue until terminated or cancelled" under the terms of the agreement.

In "consideration of the District Manager's agreements," the companies agreed to pay to Howland, Inc. the overwrite commissions produced in that district, with sole discretion retained by the companies to determine or change "which rates, classification, schedule or overwrite shall be applicable." As they had under the previous agreement, the companies agreed to arrange for life and medical insurance for Howland and to regularly pay their portion of the premiums. The companies also

agreed to provide "advertising assistance," appropriate forms, materials, and records, and to "make available for use in the District such education and sales training programs as are developed by the Companies."

For its part, Howland, Inc. agreed to recruit and train "as many agents acceptable to the Companies as may be required to produce sales in accordance with goals and objectives established by the Companies" and to "make available to agent[s] training and assistance in the sale and service of all claims and lines of insurance underwritten by the Companies"; to "represent the Companies in all matters involving the insurance operation of agents in the District . . . and assume management responsibility for the District operation so as to advance the interests of the policyholders, the agents, and the Companies"; to "be responsible for the underwriting practices of the agents in the District and to support the Companies' programs designed to create an underwriting profit"; to "actively represent the Companies in the conduct of the District" and to refrain from representing any other insurer; to provide and maintain at its own expense the necessary facilities, equipment, and supplies and to "hire its own personnel"; to "conform to all regulations, operating principles and standards of the Companies, and through appointed agents of the Companies under the District Manager Agency's supervision, to provide claims and other services to policyholders of the Companies"; and to maintain "adequate records, including a monthly profit and loss statement, as may be required by the Companies" and to make such records available for audit.

The 2007 DMAA provided for cancellation of the agreement "with or without cause" by either Howland, Inc. or the companies on 30 days' written notice. In the event of termination, the

companies agreed to pay "contract value" to Howland, Inc., based on the formula set forth in the agreement. The agreement also contained a modified provision regarding the parties' relationship: "Nothing contained herein is intended or shall be construed to create the relationship of employer and employee, rather District Manager Agency is an independent contractor for all purposes. The time to be expended by District Manager Agency is solely within its discretion, and the persons to be solicited and the area within the District involved wherein solicitation shall be conducted is at the election of District Manager Agency. No control is to be exercised by the Companies over the time when, the place where, or the manner in which District Manager Agency shall operate in carrying out the objectives of this Agreement provided only that such practices conform to normal good business practice. . . ." The 2007 DMAA also provided that it "shall not be altered or amended except by an agreement in writing signed by the District Manager Agency, the Supervising District Manager and an authorized representative of the Companies."

The 2007 DMAA contained a signature from a representative for the companies and three separate signatures by Howland—first on behalf of Howland, Inc., secondly as a shareholder, and finally in his individual capacity as supervising district manager. The agreement was signed in late 2006 and became effective January 2007.

III. *Procedural Background*

Plaintiffs filed their initial complaint on June 3, 2009. Defendants demurred to the complaint and also moved to strike certain allegations. The parties stipulated to take these motions off-calendar and to allow plaintiffs to file a first amended

complaint. After plaintiffs filed their first amended complaint, defendants again demurred and moved to strike.

At the hearing on the demurrer, plaintiffs agreed to submit to the court's tentative ruling. The court thus adopted its tentative ruling as its final order, sustaining the demurrer on all nine causes of action with leave to amend. The court held that plaintiffs had failed to allege sufficient facts to support their claims for wrongful termination (sixth cause of action) and age discrimination (eighth cause of action), specifically, "what conduct of plaintiff that promoted or protected a statutory or constitutional policy led to his discharge," and what facts would "indicate that his discharge was due to his age."

Plaintiffs filed their second amended complaint (SAC) alleging the same nine causes of action. The SAC attached the 1995 and 2006 DMAAs as exhibits. Defendants again demurred and moved to strike the second amended complaint. Following oral argument on July 22, 2010, the court took the matter under submission.

The court issued a written ruling on October 14, 2010. On the first cause of action for breach of contract, the court sustained the demurrer as to defendant FGI without leave to amend and overruled the demurrer as to the other defendants. The court found that the SAC contained fatally contradictory allegations that, on one hand, plaintiffs were FGI employees under the contracts but, on the other hand, FGI was not a party to the contracts. The court also found plaintiffs failed to adequately plead a claim against FGI based on alter ego or undisclosed principal theories, or "cite any authorities to overcome the principle that only a party to a contract is liable for its breach."

The court sustained the demurrer as to all defendants on all other causes of action with leave to amend.[3] On the employment claims, which "require the existence of an employer-employee relationship," the court found that the "existence of such a relationship is contradicted by the contracts that plaintiffs signed and attach[ed] to the SAC." Further, "[i]f plaintiffs intend to attack the provision of the contract that they were an independent contractor rather than an employee, plaintiffs must factually allege the factors that will establish an employment relationship."

Plaintiffs filed their third amended complaint (TAC) on October 29, 2010. This time, they did not attach the contracts as exhibits. Once again, defendants demurred and moved to strike. Defendants also filed a request for judicial notice of plaintiffs' SAC, including the two agreements attached as exhibits.

Following oral argument by the parties at the hearing, the court largely adopted its tentative ruling. Noting that plaintiffs had omitted the contracts from their TAC, the court took judicial notice of the contracts attached to the SAC, stating that "[p]laintiffs cannot omit allegations from later complaints to circumvent a deficiency that may be attacked on demurrer."

The court sustained the demurrer to the second (breach of joint venture agreement), third (breach of fiduciary duty), fifth (wage violations), sixth (wrongful termination), and eighth (age discrimination) causes of action without leave to amend as to all defendants. The court also sustained the demurrer without leave to amend on the seventh cause of action (tortious interference) as

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[3] For FGI, the court's order did not specify whether it was granting leave to amend on the second, third, fifth, sixth, or eighth causes of action.

to FGI only. With respect to the first cause of action (breach of contract), the court noted that it had already ruled on this claim when it sustained the demurrer to the SAC without leave to amend as to FGI and overruled it as to the other defendants. The parties proceeded to ignore these rulings, as plaintiffs included FGI as a defendant on the breach of contract claim in their TAC and the companies again demurred on this claim as against them. The court therefore reiterated its prior order, sustaining the demurrer as to FGI and overruling it as to the companies.

The court found plaintiffs had sufficiently pled the remaining claims—the first cause of action (breach of contract) as to the companies (as noted above), the fourth cause of action (misrepresentation) as to FGI, the seventh cause of action (tortious interference) as to the companies, and the ninth cause of action (unfair business practices) as to all defendants.

With respect to the employment claims, the court found that the deficiencies it had previously noted "have not been corrected." In addition, as to FGI, the court found that plaintiffs' conclusory allegation that they were employed by FGI "is not factual because it is contradicted by the contracts themselves."

The court also granted defendants' motion to strike in part. As relevant to this appeal, the court struck plaintiffs' allegations of emotional distress and punitive damages from the age discrimination cause of action and from the prayer.

Subsequently, the court granted summary judgment to FGI on the fourth cause of action for misrepresentation and to the companies on the seventh cause of action for tortious interference, thus disposing of those claims entirely. Plaintiffs then voluntarily dismissed without prejudice their remaining two claims, the first cause of action for breach of contract against the

companies and the ninth cause of action for unfair business practices against all defendants. Judgment was entered on April 5, 2016; plaintiffs timely appealed.

DISCUSSION

Plaintiffs raise the following challenges on appeal: (1) the trial court erred in sustaining defendants' demurrer to Howland's employment claims premised on a finding that Howland was not defendants' employee; (2) in doing so, the court improperly took judicial notice of the SAC and the contracts attached thereto; (3) the court erred in sustaining FGI's demurrer to the breach of contract claim; and (4) the court improperly struck plaintiffs' allegations regarding emotional distress and punitive damages related to the discrimination and wrongful termination claims. We examine each in turn.

I. *Standard of Review*

A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Insurance Company of Minnesota v. Comerica Bank–California* (1994) 27 Cal.App.4th 800, 807.) We review de novo the dismissal of a civil action after a demurrer is sustained without leave to amend. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 879 (*Cantu*).) In doing so, "we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'" (*Ibid*.) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid*.)

On appeal, a plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a

matter of law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) To establish that a cause of action has been adequately pled, a plaintiff must demonstrate he or she has alleged "facts sufficient to establish every element of that cause of action. [Citation.]" (*Cantu, supra*, 4 Cal.App.4th at pp. 879-880.) If the complaint fails to plead any essential element of a particular cause of action, this court should affirm the sustaining of a demurrer. (*Id*. at p. 880.)

We also review de novo an order granting a motion to strike. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255, citing *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1223.) We do not read the allegations subject to a motion to strike in isolation; rather, we must read the "allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth. [Citations.]" (*Clauson* at p. 1255; see also *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.)

II. *Demurrer to Employment Claims*

Plaintiffs' primary contention on appeal is that the court erred in sustaining the demurrer to Howland's three employment claims (the fifth, sixth, and eighth causes of action). The trial court relied heavily on the terms of the 2007 DMAA in finding that Howland had not sufficiently alleged an employer-employee relationship with defendants. Plaintiffs contend this was in error; we agree.

A. *Judicial Notice*

As an initial matter, plaintiffs assert the trial court improperly took judicial notice of the terms of the two DMAAs in considering the demurrer to the TAC. They argue that the contract terms were not properly subject to judicial notice

because they were "in issue, and were not indisputably true." Plaintiffs' focus on the requirements for judicial notice for documents such as court records misses the point. Plaintiffs' allegations in their SAC and TAC centered around the 1995 and 2007 DMAAs, and they attached the contracts as exhibits to their SAC. As such, the court properly considered the terms of the agreements as part of the pleading, along with all of plaintiffs' other allegations, when addressing the demurrer. (See *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94 ["[E]videntiary facts found in recitals of exhibits attached to a complaint or superseded complaint . . . can be considered on demurrer."]; see also, *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505 ["we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits"]; *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627 ["facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence"].)

Plaintiffs cannot avoid the contractual language incorporated into their prior pleading by omitting the documents from the TAC. (See *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425 ["plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers"]; *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151 ["If a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting facts which made the previous complaint defective or by adding facts inconsistent with those of previous pleadings, the court may take

judicial notice of prior pleadings and may disregard any inconsistent allegations."].) Further, while plaintiffs alleged that the contract language does not control their employment status due to subsequent agreements and conduct between the parties, they do not challenge the validity of the documents themselves. As such, the trial court did not err in considering the terms of the DMAAs; we will do the same.

B. *Employment classification*

Defendants argue that plaintiffs' employment claims fail for two reasons. First, they contend that neither plaintiff had standing to bring such claims, because a corporate entity cannot do so and Howland as an individual was not a party to the employment agreement at the time of his termination. Second, they argue that the 2007 DMAA expressly designated plaintiffs as independent contractors, not employees. We disagree on both counts.[4]

With respect to the 2007 DMAA itself, defendants suggest that Howland "had no contractual relationship with the Companies" because he "signed the contract as the President of [Howland, Inc.], not individually." However, this contention is contradicted by the 2007 DMAA itself. Howland signed the document on behalf of Howland, Inc. and also as an individual. In addition, he was expressly designated as the supervising district manager under the 2007 DMAA. We also note that although the 2007 DMAA designates Howland, Inc. as an independent contractor, there is no similar provision regarding a classification for Howland as the supervising district manager.

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[4] Because the TAC expressly alleged employment claims only by Howland as an individual, we need not consider defendants' arguments as to Howland, Inc.

Thus, defendants have not demonstrated that Howland lacks standing based on the face of the 2007 DMAA, nor is the document necessarily inconsistent with Howland's allegation that he was employed directly by defendants until his termination.[5]

Each of Howland's employment claims—for unpaid wages under the Labor Code, for age discrimination under FEHA, and for wrongful termination in violation of public policy—requires him to establish that he was defendants' employee, rather than an independent contractor. (See, e.g., *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530 [wage claims]; *Vernon v. State* (2004) 116 Cal.App.4th 114, 123 [FEHA claims]; *Holmes v. General Dynamics Corp*. (1993) 17 Cal.App.4th 1418, 1426, fn. 8 [wrongful termination in violation of public policy].) While the language of the contract under which the parties operated is relevant to the determination of whether Howland was defendants' employee, our inquiry does not end there. The parties' contractual label "is not dispositive and will be ignored if their actual conduct establishes a different relationship." (*Estrada v. FedEx Ground Package System, Inc*. (2007) 154 Cal.App.4th 1, 11 (*Estrada*), citing *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 (*Borello*); *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 877-878 (*Toyota*).)

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[5] Defendants do not assert a standing argument as to the 1995 DMAA, as Howland individually was the contracting party. That agreement did not designate Howland as an independent contractor, but it did expressly disclaim any employer-employee relationship with him. Under either agreement, as we discuss herein, Howland's allegations are sufficient to withstand demurrer on this issue.

In considering the nature of the employment relationship, we apply the common-law test for all three of Howland's employment claims. (See *Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 (*Beaumont-Jacques*); *Estrada, supra*, 154 Cal.App.4th at p. 10.)[6] "Under the common law, "'[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.'" [Citation.]" (*Ayala v. Antelope Valley Newspapers, Inc., supra,* 59 Cal.4th at p. 531.) The essence of the test is the "control of details"—that is, whether the principal has the "right to control the manner and means" by which the worker accomplishes the work. (*Borello, supra*, 48 Cal.3d at p. 350.)

While the "control of details" is the primary factor in assessing an employment relationship, there are also a number of additional factors a court may consider, including (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether

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[6] Howland contends that his claim for failure to pay wages is subject to the definition of "employee" and "employer" set forth in Industrial Welfare Commission (IWC) wage order 4-2001. Under this broader definition, defendants are liable as an employer if a plaintiff meets one of "three alternative definitions. [Employ] means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 64.) Because we find that Howland has sufficiently alleged facts to meet the common law test, he would necessarily meet this statutory test as well.

the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship. (See *Ayala, supra*, 59 Cal.4th at p. 532 [listing factors as "secondary indicia"]; *Borello, supra*, 48 Cal.3d at pp. 350-351; *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1064-1065.)

Here, while the 2007 DMAA explicitly defines an independent contractor relationship with Howland, Inc., the complaint alleges that Howland's actual working relationship with defendants was much more tightly controlled. For example, the TAC alleged that defendants dictated the hours when Howland could work, when he could take vacation, where his office could be located, and in what region he could work. With respect to the primary part of his job—recruiting and training insurance agents—Howland alleged defendants required certain training for him and his agents; maintained control over which agents were hired, transferred, and fired; dictated the manner in which the insurance policies would be sold; and required certain paperwork on a regular basis. Howland also alleged defendants required him to work exclusively for them, provided him with insurance, and paid him regularly. While defendants point out other factors that could weigh against a finding that Howland was an employee, we conclude that the TAC has alleged sufficient facts supporting a conclusion that defendants controlled the manner and means of Howland's work, rather than merely dictating the result required.

The determination of the nature of the employment relationship (employee or independent contractor) is one of fact. (*Borello, supra*, 48 Cal.3d at p. 349.) Thus, we must tread carefully where, as here, our inquiry is limited to the sufficiency of plaintiffs' allegations. Notably, defendants have not cited, nor have we found, any cases in which a demurrer was sustained on the basis that similar allegations failed to support a claim that a plaintiff was an employee. Instead, both parties cite cases where, having weighed *evidence* of some similar factors, courts concluded a plaintiff was or was not properly classified as an employee. (See *Toyota, supra*, 220 Cal.App.3d at pp. 876-877 [finding in determination of good faith settlement that pizza delivery driver was employee based on evidence that employer exercised control over work and could terminate at any time, even though driver provided own car and insurance and was paid on commission; *Estrada, supra*, 154 Cal.App.4th at pp. 11-12 [finding after bench trial that drivers were employees based on FedEx's level of control over their work]; *Beaumont-Jacques, supra,* 217 Cal.App.4th at p. 1144 [affirming summary judgment finding that district manager was independent contractor based on evidence of her control over her work]; *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 589 [affirming summary judgment finding that nonexclusive insurance agent was independent contractor where she was largely unsupervised and not subject to mandatory training].)[7] But at the demurrer

[7] We also note *Davis v. Farmers Insurance Exchange* (2016) 245 Cal.App.4th 1302, a case brought by another district manager under a similar DMAA. Howland testified at Davis's trial in support of the claim that Davis was an employee and was

stage, we must simply determine whether plaintiffs' allegations are sufficient to state a claim.

Construing plaintiffs' allegations liberally, as we must (Code Civ. Proc. § 452), we conclude Howland has sufficiently alleged facts that could support a finding that he was operating under the 1995 and 2007 DMAAs as defendants' employee. As such, the court's order sustaining the demurrer to his fifth, sixth, and eighth causes of action was in error and must be reversed.

III. *Demurrer to Breach of Contract Claim*

Plaintiffs also contend the trial court erred in sustaining the demurrer on their breach of contract claim as to FGI. Defendants argue that this claim is not appealable, because plaintiffs subsequently dismissed the entire contract claim without prejudice. Defendants further contend that plaintiffs failed to adequately allege any basis to hold FGI liable for breach of a contract to which it was admittedly not a party. We conclude that plaintiffs did not forfeit their right to appeal the demurrer ruling on this claim. Additionally, we agree with plaintiffs that the TAC adequately alleged liability by FGI as an alter ego or an undisclosed principal.

As an initial matter, we find no support for defendants' argument that plaintiffs forfeited their right to appeal this claim. Defendants cite to the general rule that a party cannot challenge a claim on appeal after it voluntarily consented to its dismissal. (See *Gray v. Superior Court* (1997) 52 Cal.App.4th 165, 170-171 ["a plaintiff's voluntary dismissal under section 581 has generally been held to be nonappealable, on the theory that the dismissal of the action is a ministerial action of the clerk, not a judicial act"];

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terminated based on his age. (*Id.* at p. 1313, fn. 6.) The jury found Davis was a Farmers' employee. (*Id.* at p. 1313.)

Parenti v. Lifeline Blood Bank (1975) 49 Cal.App.3d 331, 335, disapproved on other grounds by *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 789.) Thus, defendants suggest that when plaintiffs dismissed the remainder of their breach of contract claim, they lost the right to appeal it.

Here, however, plaintiffs seek to appeal *only* their claim against FGI. The breach of contract claim against FGI was not dismissed by plaintiffs, as the trial court had previously sustained the demurrer to the TAC on that claim as to FGI without leave to amend. As such, plaintiffs are entitled to challenge the court's demurrer ruling on appeal from the ultimate judgment. (Code Civ. Proc. § 472c(b)(1).) None of the authority cited by defendants holds otherwise. (See *Gray v. Superior Court, supra,* 52 Cal.App.4th at p. 167 [plaintiff voluntarily dismissed entire complaint].)[8]

Similarly, defendants fail to cite any authority to support their argument that plaintiffs cannot allege a breach of contract claim against FGI as an alter ego or an undisclosed principal because plaintiffs dismissed their contract claim against the actual contracting parties—the companies. Defendants' cited

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[8] We reach the opposite conclusion, however, to the extent that plaintiffs seek to appeal from the dismissal of their ninth cause of action for unfair business practices. While their intent is not entirely clear from their briefing, plaintiffs assert that this claim was "gutted" by the court's demurrer ruling, presumably to the extent that claim relied on allegations that Howland was an employee. But, unlike the breach of contract claim, the trial court did not sustain a demurrer as to this cause of action, nor did it strike any of its allegations. Instead, the court overruled defendants' demurrer; subsequently, plaintiffs dismissed the entire claim without prejudice. As such, plaintiffs may not appeal from their voluntary dismissal of this claim.

case, *NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 780-781, does not address this proposition, holding instead that a shareholder could be added to a judgment as an alter ego of the original judgment debtor only where the individual's interests were represented in the underlying action. Here, assuming that plaintiffs have alleged facts establishing that FGI was an alter ego or undisclosed principal to the contracting defendants, they may proceed on a breach of contract claim against FGI. (See *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 606 ["Where a contract is made by an agent acting on behalf of an undisclosed principal, a third party . . . may sue the undisclosed principal."]; *Bank of America v. State Bd. of Equal.* (1962) 209 Cal.App.2d 780, 796 ["A contract made by an agent for an undisclosed principal is for most purposes the contract of the principal"]; *Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal.App.3d 405, 411 [alter ego liability applies in "situations where there has been an abuse of corporate privilege, because of which the equitable owner of a corporation will be held liable for the actions of the corporation"].)

We turn therefore to the question of whether plaintiffs sufficiently alleged alter ego and undisclosed principal liability by FGI in the TAC. We conclude that they did.

"A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) In order to support a claim that an entity is the alter ego of another entity or individual, plaintiffs must allege facts to establish two conditions: "First, there must be such a unity of interest and ownership

between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.]" (*Ibid*.)

A number of factors are relevant in the determination of whether there is a sufficient unity of interest and ownership, including "commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other." (*Roman Catholic Archbishop v. Superior Court*, *supra*, 15 Cal.App.3d at p. 411.) Other relevant factors include "inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers." (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at p. 539.) "[T]he conditions under which the corporate entity may be disregarded vary according to the circumstances in each case and the matter is particularly within the province of the trial court. [Citations.] This is because the determination of whether a corporation is an alter ego of an individual is ordinarily a question of fact." (*Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 46.)

Here, plaintiffs alleged that the companies were alter egos for FGI. Specifically, they claimed that each of the companies commingled "funds and assets" with FGI and failed "to observe corporate formalities." The companies each "failed to maintain an identity separate and distinct" from FGI and acted as "a business conduit and alter ego." Plaintiffs further alleged that defendants were "operating as a single enterprise," including,

among other things, that "Defendants' employees, including District Managers, receive their paychecks or automatic deposits from FGI," and "all members of the board of directors of each Defendant are officers or employees or consultants of FGI." Finally, plaintiffs alleged that "the adherence to the fiction of the separate legal existence of [FGI] and [the companies] would permit an abuse of corporate and reciprocal exchange privilege, promote injustice, and sanction a fraud."

We find these allegations sufficient to support plaintiffs' alter ego claim for their breach contract cause of action against FGI. By contrast, the cases cited by defendants simply demonstrate the insufficiency of a "bare conclusory allegation that the individual and separate character of the corporation had ceased and that [the corporation] was the alter ego of the individual defendants." (*Vasey v. California Dance Co*. (1977) 70 Cal.App.3d 742, 749; see also *Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537 ["It is settled law that a pleading must allege facts and not conclusions."].)

Moreover, defendants' suggestion that plaintiffs are required to plead that the companies were undercapitalized in order to allege alter ego is without merit. While inadequate capitalization is a relevant factor in assessing alter ego, defendants cite no authority suggesting it is a required element of the claim. (See *Sammons Enterprises, Inc. v. Superior Court* (1988) 205 Cal.App.3d 1427, 1434 [holding that where "there is no showing the subsidiary is undercapitalized, that corporate formalities are not maintained, or that the subsidiary is held out as the agent of the parent, plaintiff has not met his burden to show personal jurisdiction based upon the alter ego theory"]; *Harris v. Curtis* (1970) 8 Cal.App.3d 837, 842 ["The court *may*

also consider that the corporate entity or entities are not adequately capitalized."], citations omitted, emphasis in original.)

We reach the same conclusion with respect to plaintiffs' allegations that FGI was the undisclosed principal of the companies. Under this theory, "[w]here a contract is made by an agent acting on behalf of an undisclosed principal, a third party, upon discovering the facts of the agency, may sue the undisclosed principal." (*Del E. Webb Corp. v. Structural Materials Co.*, *supra*, 123 Cal.App.3d at p. 606; see also 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 158 ["If the principal is undisclosed, i.e., if an agent acting for his principal makes a contract in his or her own name either orally or in writing, the result will ordinarily be that either the principal or the agent may be held liable on it by the third party. [Citations.]"].)

In support of this theory, plaintiffs alleged that the companies entered into the 1995 and 2007 DMAAs, with FGI acting as the undisclosed principal to the agreement. They further alleged that at the time of the agreements, the companies did not disclose to them or mention in the agreements any relationship with FGI, but that FGI was in fact "the company that had day to day contact with Plaintiff as a District Manager, and exerted control over him." These allegations, read in context with the entirety of the TAC, are sufficient to support plaintiffs' claim that the companies acted as agents on behalf of FGI as an undisclosed principal when they entered into the DMAAs with plaintiffs.

IV. *Motion to Strike*

Finally, plaintiffs challenge the trial court's rulings striking certain allegations related to emotional distress and punitive

damages. Defendants moved to strike plaintiffs' allegations of emotional distress and malicious conduct throughout the TAC. The trial court denied the motion as moot as to the relevant allegations in plaintiffs' sixth cause of action for wrongful termination, but granted the motion to strike punitive damages from the prayer for relief on that claim. The court also granted the motion to strike the allegations from plaintiffs' eighth cause of action for age discrimination. The court gave no explanation for these rulings.

On appeal, defendants argue that Howland, Inc. cannot allege emotional distress as a corporation and that the allegations regarding Howland were "conclusory." We disregard the first argument as moot, as the TAC alleges emotional distress only on behalf of Howland.

We also reject defendants' argument that Howland's allegations of emotional distress and punitive damages were insufficiently pled in the context of his claims for age discrimination and wrongful termination. The TAC alleges that defendants intentionally "initiated the termination, forced resignation or harassment of approximately 7 out of 10 District Managers in Plaintiffs' Division at the behest of Defendants," as part of a plan to replace older managers with younger, cheaper workers. Howland specifically contends that defendants harassed and discriminated against him because of his age, and then wrongfully terminated him, despite his decades of experience and successful efforts to "grow[ ] the business substantially," under the pretext that he sent a lewd email that he did not send. He further alleges that his complaints about this termination to various Farmers' executives were ignored. Finally, he alleges defendants acted willfully and maliciously and

that he suffered emotional distress, among other things, as a result of this treatment. As such, reading the TAC as a whole, we conclude it contains sufficient facts to apprise defendants of the bases upon which plaintiffs are seeking relief. (See *Perkins v. Superior Court*, *supra*, 117 Cal.App.3d at p. 6.) Plaintiffs have adequately alleged the ultimate facts to support their entitlement to the relief requested, including that defendants acted with a "knowing and deliberate state of mind from which a conscious, disregard of petitioner's rights might be inferred—a state of mind which would sustain an award of punitive damages." (*Ibid*.; *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166.)

DISPOSITION

We reverse the court's order sustaining the demurrer on plaintiffs' fifth, sixth, and eighth causes of action in their entirety, and on plaintiffs' first cause of action as to FGI. We also reverse the court's order granting defendants' motion to strike as to paragraphs 166 and 167 in the eighth cause of action and the request for punitive damages under the sixth cause of action in the prayer for relief. We otherwise affirm the judgment. Plaintiffs are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J. MANELLA, J.