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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RONNIE CLAYTON et al., Plaintiffs and Appellants, v. ROYAL & SUN ALLIANCE US et al., Defendants and Respondents.	B240844 (Los Angeles County Super. Ct. No. BC253169)

APPEAL from judgments of the Superior Court of Los Angeles County, Charles McCoy, Emilie H. Elias, and Carl J. West, Judges. Affirmed.

Barton, Klugman & Oetting, Thomas E. McCurnin, Mark A. Newton; Affeld Grivakes Zucker, and David W. Affeld for Plaintiffs and Appellants.

Patterson Law Group, James Patterson; Dentons US, Steve Merouse, and Richard M. Zuckerman for Defendant and Respondent, Royal & Sun Alliance US.

Simpson Thacher & Bartlett and Chet A. Kronenberg for Defendant and Respondent, Citibank, N.A.

Dennett Winspear, Jeffrey Galliher; Schwartz Semerdjian Haile Ballard & Cauley, and James R. Ballard for Defendant and Respondent, NorStates Bank.

Murchison & Cumming and B. Casey Yim for Defendant and Respondent, Guardian Capital XV, LLC.

INTRODUCTION

This case is before us for the second time. Appellants are California small businesses who entered into written agreements with Commercial Money Center, Inc. (CMC), a Nevada corporation, providing that CMC would purchase equipment for appellants' use in their respective businesses, in exchange for appellants' promise to make monthly payments (defined as Contracts). CMC subsequently bundled these Contracts into "contract pools," and sold or assigned the payment streams associated with the pooled contracts to various financial institutions (the Assignees). The payment streams were insured by insurance or surety companies (the Sureties) under surety bonds. In separate indemnity agreements in favor of the Sureties, appellants agreed to accept liability if they failed to make payments under their Contracts, and the Sureties were required to make payments under the terms of the surety bonds. In addition, the Sureties were purportedly the Contract servicers, who collected the Contract payments from appellants. According to appellants, the Sureties delegated this task to Commercial Servicing Corporation (CSC), which was also a Nevada corporation.

In 2001, appellants sued CMC, alleging that these Contracts, although entitled equipment leases, were actually loans that charged usurious rates. Appellants also sued (1) CSC, (2) the shareholders of CMC and CSC, (3) the Assignees, and (4) the Sureties. The complaint also included a representative claim under California's Unfair Competition Law (UCL), Business & Professions Code section 17200. In 2002, respondents Guardian Capital XV, LLC (Guardian), NorStates Bank, formally known as Bank of Waukegan (NorStates), and Citibank, N.A. (Citibank), were substituted in place of doe assignee defendants. Additionally, respondent Royal & Sun Alliance US (Royal) was substituted into the case in place of a doe surety defendant.

In June 2002, the case was automatically stayed pursuant to Bankruptcy Code section 362, after CMC and CSC filed voluntary bankruptcy petitions under Chapter 11 of the Bankruptcy Code. The case was then removed to the bankruptcy court. After obtaining an order from the bankruptcy court remanding their claims against the other defendants, on October 15, 2003, plaintiffs filed a second amended and supplemental complaint (SAC). After the trial court (Judge Charles McCoy) sustained demurrers to the SAC and entered judgments of dismissal in favor of certain defendants, appellants appealed.

While the appeal was pending, Proposition 64 was passed. It provided that a named plaintiff may bring a representative UCL claim only if the plaintiff "'has suffered injury in fact and has lost money or property as a result of such unfair competition.'" (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.) After ordering supplemental briefing on the impact of Proposition 64, this court issued its decision. (See *Clayton v. Fisher* (November 18, 2008, B179134) [nonpub. opn.].) We held that as no judgment of dismissal had been entered in favor of defendants named in both the individual and representative claims (such as Guardian and Royal), appellants could not appeal from the trial court's rulings, as there was no final judgment. (See *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 4th 1684, 1695 [order sustaining demurrers not appealable; appeal may be taken only after trial court enters judgment of dismissal].) As to defendants named in the representative UCL claim (such as Citibank and NorStates), we vacated the judgments of dismissal and remanded the

matter to the superior court to allow appellants to amend and substitute a new plaintiff or plaintiffs with standing under the UCL.[1]

After remand, appellants filed a fourth amended and supplemental complaint (4thAC). The trial court (Judge Emilie H. Elias) sustained demurrers to certain causes of action, but granted appellants leave to amend others. Appellants subsequently filed a fifth amended complaint (5thAC). The trial court (Judge Carl J. West) sustained respondents' demurrers to this complaint, and judgments of dismissal in favor of respondents were entered. Appellants then filed this appeal, challenging the prior orders sustaining respondents' demurrers.

We conclude that appellants' claims against respondents fail for numerous reasons. First, Citibank and NorStates cannot be sued on any claim except the UCL claim, as the non-UCL claims were time-barred. Second, Royal cannot be sued for receiving purportedly usurious payments pursuant to orders of a bankruptcy court. Third, respondents cannot be directly liable for usury or failure to be licensed, as they made no loans to appellants. Finally, respondents cannot be vicariously liable for CMC's making of allegedly usurious loans and failure to be licensed as a California finance lender. Accordingly, there was no reversible error in the trial court orders sustaining demurrers to appellants' various complaints.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Appellants filed their original complaint on June 27, 2001 and their first amended complaint (FAC) on August 2, 2001. The case was assigned to Judge McCoy.

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[1] While the case was on appeal, appellants filed a third amended complaint, later superseded by the fourth amended and supplemental complaint. (See fn. 4, *infra*.)

In June 2002, the case was automatically stayed after CMC and CSC filed voluntary bankruptcy petitions under Chapter 11 of the Bankruptcy Code. After the case was removed to the bankruptcy court, appellants moved to dismiss CMC and CSC and to remand their claims against other defendants to state court. On April 23, 2003, the bankruptcy court granted appellants' motion to dismiss CMC and CSC, but ruled that "Plaintiffs may have up to two years from the date of filing of the Petition for Relief to assert whatever claims they may have against the bankruptcy estates, with the statute of limitations being tolled during this period." The court further ruled that the action against the remaining defendants would be remanded, subject to the condition that, "[t]he rulings, actions, or judgments by the State Court after remand shall not be binding or have any preclusive or res judicata effect whatsoever on the Trustee, the bankruptcy estates of CMC and CSC or any property of the bankruptcy estates, and no ruling of the State Court shall have any effect on the . . . property of the estate[s], the determination of which is expressly reserved by the bankruptcy court." Appellants then pursued their claims against CMC and CSC in bankruptcy court, and their claims against respondents in superior court.

A. *Second Amended and Supplemental Complaint in Superior Court*

In superior court, on October 15, 2003, plaintiffs filed an SAC. Guardian and Royal were named as defendants in the causes of action for (1) usury, (2) violation of statute, (3) declaratory relief and reformation, (4) assumpsit, (5) cancellation or reformation of instrument, (6) accounting, (7) constructive trust, (8) injunctive relief, and (9) unfair business practices under the UCL. Citibank and NorStates were named as defendants only in the UCL claim. In addition, the UCL claim was the only claim brought on behalf of the named plaintiffs and all other CMC California customers. In the second cause of action for statutory violation,

the complaint alleged that the Contracts were actually "consumer loans" pursuant to Financial Code section 22204, subdivision (b),[2] as the Contracts were secured by accounts and chattel paper. The complaint further alleged that as a result of the Contracts being consumer loans, CMC violated various statutory obligations, including failing to provide required notice and disclosures. Appellants also alleged that CMC violated section 22100 by making the loans without being a licensed California finance lender.

Royal was named as the indemnitee on Contracts signed by numerous named plaintiffs, including William L. Leigon doing business as (dba) William Leigon & Associates dba Huntington Wine Cellars (Leigon).[3] Leigon's Contract, entered into on January 15, 2001, also was alleged to have been sold or assigned to Guardian.[4] No other named plaintiff was alleged to have any connection with any respondent.

Several Contracts were attached as exhibits to the complaints. In the Contracts, each named plaintiff certified that the equipment would be used solely for business, commercial or agricultural purposes, and not for personal, family or household purposes. The plaintiff agreed that its contractual guaranty of payment on the lease would be governed by the law of the state where the Lessor (CMC)

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[2] All further statutory citations are to the Financial Code, unless otherwise stated.

[3] We note no evidence indicates that Royal has asserted its claims as an indemnitee against any named plaintiff. Indeed, Royal has disclaimed any interest in the indemnity agreements.

[4] The complaint incorrectly stated that the Leigon Contract was entered into on November 15, 2001. The attached copy of the Leigon Contract shows that it was entered into on January 15, 2001.

was located. The plaintiff also agreed to the personal jurisdiction of such State and waived trial by jury.

Defendants demurred to the SAC. On March 15, 2004, Judge McCoy sustained the demurrers to the first cause of action for usury with leave to amend, finding that the SAC lacked specificity regarding the purportedly usurious transactions. He sustained the demurrers to the second cause of action for violation of section 22000 et seq. without leave to amend, holding that the Contracts were not "consumer loans" as defined by the Financial Code. Judge McCoy held that under the clear language of the statute, the Contracts were commercial loans, and that "[r]eceiving security interests in accounts and chattel paper does not transform a commercial loan into a consumer loan." He sustained demurrers to the claim for assumpsit with leave to amend, as that claim was derivative of the first and second causes of action. He overruled the demurrers to the accounting claim, finding that an accounting might be necessary to determine the whereabouts of plaintiffs' payments to CMC. As to the claims for constructive trust and injunctive relief, Judge McCoy sustained demurrers without leave to amend, as constructive trusts and injunctive relief were remedies, not causes of action. He granted leave to seek those remedies in connection with appropriate causes of action. Finally, as to the UCL claim, Judge McCoy sustained the demurrers to the claim with leave to amend with greater specificity.

B. *Adversary Action in Bankruptcy Court*

In the bankruptcy proceeding, on May 18, 2004, appellants filed an adversary complaint against CMC and the bankruptcy trustee as successor-in-interest to CMC, seeking (1) declaratory relief to void the Contracts, and (2) recovery of usurious interest and principal. Appellants also stated causes of

action for usury and violation of the statutory duty to be licensed as a California finance lender, along with a UCL claim based on those two grounds.

On May 31, 2005, the bankruptcy court approved a global settlement between the bankruptcy trustee and various financial institutions and sureties, including Royal. In the global settlement, the trustee transferred any and all interest of the CMC bankruptcy estate in nearly all of the Contracts to certain financial institutions, including Royal.

On November 21, 2006, appellants amended their adversary action to include class allegations. On June 29, 2007, the bankruptcy court granted the trustee's motion to dismiss the amended adversary complaint with prejudice. The court held that on the facts alleged by appellants, CMC was not liable for usury or violation of a statutory duty. It also held that if the equipment leases were loans, they were commercial loans. Specifically, the court held that securing loans intended for commercial use with accounts and chattel paper did not convert the loans into consumer loans under section 22204, subdivision (b).

Nothing in the record shows appellants sought clarification or reconsideration of the bankruptcy court's adverse rulings and dismissal order. Nor is there any evidence that appellants appealed the order in the federal courts.

C. *Fourth Amended and Supplemental Complaint in Superior Court*[5]

In the superior court proceedings, appellants appealed from judgments of dismissal in favor of certain defendants entered after Judge McCoy's order

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[5] While the appeal from the demurrers to the SAC was pending, appellants filed a third amended complaint against defendants who had not been dismissed. Those defendants demurred to the complaint based on the absence of CMC as a necessary party. Judge McCoy ordered appellants to attempt to join CMC, and they filed a motion seeking relief from the stay in bankruptcy court. That court refused. Thereafter, the parties stipulated that the entire action should be stayed pending appeal, and the superior court entered the stay order.

sustaining various demurrers. As described above, following the passage of Proposition 64, this court remanded with instructions to allow appellants to amend their representative UCL claim to substitute a plaintiff or plaintiffs with standing. Following remittur, on September 2, 2009, appellants filed their 4thAC. In the 4thAC, appellants stated they were pursuing the action "only to the extent of the current Defendants' interest in the subject matter and hereby reserv[ing] all rights to prosecute their claims against CMC and CSC, if any, within the bankruptcy court proceedings." Appellants restated their UCL claim against all defendants on behalf of themselves and similarly situated California customers. Additionally, they restated against Royal and Guardian their causes of action for usury, declaratory relief and reformation, assumpsit, cancellation or reformation of instruments, and an accounting. For the first time, appellants added Citibank and NorStates as defendants in these non-UCL causes of action. They also added a new claim under section 22100 against Citibank, NorStates, and Guardian, alleging that because CMC entered into the Contracts without being a licensed finance lender, the Contracts were void. Finally, appellants sought declaratory relief, and included class action allegations.

In the 4thAC, several new plaintiffs were added. Felipe Cruz dba Cruz Service Center (Cruz) was alleged to have entered into a Contract in June 2001, which was sold or assigned to NorStates. Sundown Systems Inc. (Sundown) was alleged to have entered into a Contract in March 2001, which was sold or assigned to Citibank. Valley Animal Clinic, Inc. was alleged to have entered into a Contract in late 2000 or early 2001, which was sold or assigned to Citibank. Brian Bates and Bates Auto Body, Inc. (Bates) was alleged to have entered into a Contract on February 13, 2001, and the Contract was sold or assigned to Citibank.

Following demurrers to the 4thAC, the trial court held a hearing and issued its rulings on the demurrers. Judge Elias sustained the demurrer of Guardian with leave to amend on all causes of action, except the second cause of action for violation of the Financial Code, which was sustained without leave to amend. She sustained the demurrer of Royal without leave to amend, except as to the UCL claim, which was sustained with leave to amend. Judge Elias determined that the attenuated relationship between appellants and respondents -- the lack of contact between them and the failure to allege that respondents received payments in excess of the principal owed -- precluded liability. In addition, the demurrers of Citibank and NorStates to the newly asserted non-UCL claims were sustained without leave to amend, based on the running of the statute of limitations; the demurrer to the UCL claim was sustained with leave to amend.

D. *Fifth Amended Complaint in Superior Court*

On November 1, 2010, appellants filed their 5thAC. The named plaintiffs sued on their own behalf and as a class action on behalf of all California customers of CMC who entered "purported lease agreements with CMC [a]fter June 27, 1997 and prior to it becoming a licensed Financial [*sic*] Lender on June 12, 2001, and who made payments in connection with those leases, and/or remain liable or are alleged to remain liable to make payments on the purported leases."

In the 5thAC, it was alleged that as a result of litigation between the bankruptcy trustee and Royal, in May 2002, Royal began receiving payments on Contracts entered into by Andrew Micklos dba MIC Trucking, Raul Barrille dba Barr Machine Shop, Precision Relocation, LLC, St. Clair Thomas, David Nuss dba Nuss Farms, and Valley Animal Clinic, Inc.

The 5thAC alleged a cause of action for unfair business practices against all defendants. The unfair business practices included making usurious loans while

being unlicensed. Respondents, except Royal, also were alleged to have "approv[ed]" the form of the Contracts and funded them. The 5thAC also alleged a UCL claim based on the contention that the Contracts were unconscionable. In addition, against Guardian only, the complaint alleged causes of action for usury, assumpsit, declaratory relief and reformation, and cancellation or reformation of instruments.

The 5thAC further alleged that respondents received and/or continued to receive and collect payments on the usurious Contracts, and that the Assignee defendants enforced and continued to enforce their rights as assignees. Plaintiffs sought restitution in the form of recoupment of all payments made by them and received during the four years prior to the filing of the 5thAC. They also sought injunctive relief and attorney fees. Copies of the Contracts of Leigon, Cruz, Sundown, Valley Animal Clinic, Inc., and Bates were attached.

Respondents demurred to the 5thAC. After a hearing, Judge West sustained all demurrers without leave to amend. As to Citibank and NorStates, Judge West sustained their demurrers on the grounds that appellants had not alleged that either Citibank or NorStates had any direct participation in CMC's equipment lease business. He further ruled that Citibank and NorStates could not be vicariously liable for CMC's alleged wrongful conduct, and that their receipt of a portion of the lease payments did not render them liable for usury.

With respect to Royal, Judge West ruled that the UCL claim against it was effectively a collateral attack on the bankruptcy court's orders in the CMC bankruptcy. He noted that plaintiffs had agreed that no ruling of the state courts would have any effect on the property of the CMC bankruptcy estate, yet they were seeking to recoup monies Royal received as part of the disposition of CMC's bankruptcy estate.

Finally, as to Guardian, Judge West ruled that the claims against Guardian were premised on usury. He found that Leigon's Contract was governed by the law of Nevada, which has no legal prohibition against usury. He further concluded that the claims were precluded by the bankruptcy court's orders rejecting appellants' claims against CMC.

Judgments of dismissal in favor of respondents were entered in February and March 2012. Appellants timely noticed their appeal from the judgments.

DISCUSSION

Appellants contend the orders sustaining respondents' demurrers were erroneous. "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The judgment must be affirmed "'if any one of the several grounds of demurrer is well taken. [Citations.]'" (*Id*. at p. 967, quoting *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 21.) As the demurrers were sustained in part based on the application and interpretation of California statutes, we independently review the trial court's interpretation of those statutes. (*People ex rel. Lockyer v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 432.) For the reasons explained below, we find no reversible error in the trial courts' orders sustaining the demurrers.

A. *The Claims Against Citibank and NorStates*

Citibank and NorStates were first named as defendants in the UCL claim in the SAC filed in October 2003. Appellants asserted no non-UCL claim against

them until the 4thAC filed in September 2009. Judge Elias sustained the demurrers of Citibank and NorStates to the non-UCL causes of action in the 4thAC based on the statute of limitations; she sustained the demurrers to the UCL claim but allowed appellants to amend. Following the filing of the 5thAC, asserting a UCL claim against Citibank and NorStates, Judge West sustained respondents' demurrers on the basis that Citibank and NorStates could not be held vicariously liable for CMC's allegedly wrongful conduct. We conclude the trial courts properly sustained the demurrers.

1. *The Non-UCL Claims are Time-barred, and the Relation Back Doctrine does not Save Them*

An action upon "any contract, obligation or liability founded upon an instrument in writing" must be brought within four years. (Code Civ. Proc., § 337.) In addition, a plaintiff may recover usurious interest paid within two years of a suit, or treble the amount paid if an action is brought within one year after such payment. (*Creative Ventures, LLC v. Jim Ward & Associates* (2011) 195 Cal.App.4th 1430, 1441 (*Creative Ventures*).) Prior to the 4thAC, appellants asserted no non-UCL claim against Citibank or NorStates. However, in the 4thAC, additional plaintiffs (Cruz, Sundown, Valley Animal Clinic and Bates) were added as named plaintiffs to the UCL claim. These new plaintiffs asserted new, independent causes of action against respondents for usury, violation of statutory consumer loan regulations, and violation of mandatory licensing requirement.

Appellants do not contest that these new causes of action asserted by newly added plaintiffs were filed after the running of the statute of limitations, but contend the new claims relate back to the filing of the SAC, as they arise from the same general set of facts. (See *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 244 (*Branick*) [relation-back doctrine applies where amended

complaint rests on same general set of facts, involves same injury, and refers to same instrumentality as original complaint].) We disagree. It is well settled that "an amended pleading that adds a new plaintiff will not relate back to the filing of the original complaint if the new party seeks to enforce an independent right or to impose greater liability against the defendants." (*San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545,1550; accord, *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1278; *Bartalo v. Superior Ct.* (1975) 51 Cal.App.3d 526, 534; see also *Branick, supra*, at p. 243 [plaintiff substituted into complaint may not state facts which give rise to wholly distinct and different legal obligation against defendant].) Here, new plaintiffs were added to the 4thAC, and they asserted new and independent claims that imposed greater liability against respondents. These new plaintiffs asserted for the first time non-UCL claims for usury and violation of statutory duties and sought, among other remedies, money damages, "trebled interest payments," and attorney fees -- special damages not available under the UCL. (See *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 399 ["Private plaintiffs suing under the UCL may seek only injunctive and restitutionary relief, and the UCL does not authorize attorney fees."].) Thus, these new claims cannot relate back to the date of the SAC.

The cases on which appellants rely to avoid this result are distinguishable. In *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717, 720 (*Jensen*), an unincorporated corporation consisting of condominium owners sued a builder for constructing a defective swimming pool. After the complaint was filed, the association lost standing due to a change in law. The complaint was amended to substitute two condominium owners, individually and as representatives of a class of condominium owners, in place of the association. (*Id*. at p. 720.) The appellate court held that the amended complaint related back to the original complaint, as the

factual allegations remained the same, and no new cause of action was asserted. (*Id*. at pp. 720, 723.) *Jensen* is not applicable to the instant matter, as in contrast to *Jensen*, the new plaintiffs here asserted new causes of action.

Similarly, *Santamarina v. Sears, Roebuck & Co.* (7th Cir. 2006) 466 F.3d 570 does not assist appellants. There, the court held that where the original complaint was a class action alleging fraud, an amended complaint adding two named plaintiffs to the class and elaborating on the nature of the fraud related back to the original complaint, as the defendant was on notice that the new plaintiffs might be added to the fraud claim. (*Id*. at pp. 571-572.) In contrast, here, the SAC contained no class action allegations, and the only representative claim was the UCL claim seeking restitution and injunctive relief. Thus, respondents were not on notice that there would be new plaintiffs, suing on new Contracts, asserting new claims seeking monetary damages, trebled interest payments, and attorney fees.

Finally, appellants' reliance on *Smeltzley v. Nicholson Mfg. Co*. (1977) 18 Cal.3d 932, *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, *Rowland v. Superior Court* (1985) 171 Cal.App.3d 1214, and *Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, is also misplaced. Those cases all involved an original plaintiff adding additional theories of liability, additional responsible defendants, or additional damages arising from the same injury. In contrast, here, appellants sought to add new plaintiffs asserting new non-UCL causes of action against respondents. Accordingly, Judge Elias properly found the non-UCL causes of action against Citibank and NorStates time-barred.[6]

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[6] The same analysis does not apply to the UCL claim. No statute of limitations bars appellants from adding new plaintiffs to the representative UCL claim, or asserting a new basis for relief on the same general operative facts set forth in the UCL claim in the SAC.

2. *Appellants Cannot State a UCL Claim Against Citibank or NorStates*.

As to the UCL claim against Citibank and NorStates, we conclude that respondents cannot be held vicariously liable for CMC's allegedly wrongful actions.

The UCL borrows violations of other laws and treats them as "'unlawful practices'" independently actionable under the UCL. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co*. (1999) 20 Cal.4th 163, 180.) "'The concept of vicarious liability has no application to actions brought under the unfair business practices act.' [Citation.] A defendant's liability must be based on his personal 'participation in the unlawful practices' and 'unbridled control' over the practices that are found to violate [Business & Professions Code] section 17200 . . . ." (*Emery v. Visa Internat. Service Assn*. (2002) 95 Cal.App.4th 952, 960 (*Emery*), quoting *People v. Toomey* (1984) 157 Cal.App.3d 1, 14-15.) Here, as alleged in the various complaints, respondents had no direct contact with appellants. Respondents never solicited appellants to be borrowers, drafted or signed the Contracts, purchased the equipment for appellants' use, provided monies to appellants, or received monies directly from appellants. (See *Emery*, *supra*, 95 Cal.App.4th at pp. 961-964 [where foreign lottery merchant sent illegal solicitations allowing payment with Visa bank cards, Visa not liable under UCL as it had no control over the merchants; Visa also not liable for failing to stop merchants from using its logo despite learning that logo was being used and deriving financial gain from the exploitation]; accord *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 983-984 [gun manufacturers and distributors not liable under UCL's unfair prong for criminal use of their guns, as no evidence showed they provided guns to criminals or engaged in practices that resulted in high risk that

guns would end up in criminal hands].) Moreover, appellants do not allege that respondents had control over CMC, or that CMC acted as an agent for respondents in regard to the transactions. (Cf. *People v. JTH Tax, Inc*. (2013) 212 Cal.App.4th 1219, 1242 [Attorney General could assert UCL claim against franchisor based on franchisee's misleading advertising under normal agency theory].)[7]

Nor are the allegations that Citibank and NorStates "approved" the Contracts as part of their underwriting and lending process sufficient to show direct participation in CMC's allegedly wrongful conduct. (See *Kenneally v. Bank of Nova Scotia* (S.D. Cal. 2010) 711 F.Supp.2d 1174, 1192 [allegation that lenders effectively had direct control over defendant developer's project because lenders could have foreclosed on the property was insufficient to plausibly suggest that lenders "'exceeded the normal scope of financing practices and actively participated in and aided the advancement of a fraudulent scheme, or otherwise assisted in the luring of purchasers for an allegedly dubious project'"]; cf. *Schulz v. Neovi Data Corp*. (2007) 152 Cal.App.4th 86, 90, 97 [allegations that Paypal, a payment processor, and Neovi, a check processor, knew that defendant EZ's lottery operation was illegal but "'knowingly and intentionally aided and abetted the operation'" and "'directly profited . . . by receiving a percentage of each . . . transaction or collecting a fee'" were insufficient to support claim under section 17200, as the allegations did not suggest Paypal and Neovi rendered "'substantial assistance or encouragement'" to EZ].) Finally, *Creative Ventures* does not assist appellants, as that case did not involve a UCL claim. (See *Creative Ventures, supra*, 195 Cal.App.4th at pp. 1436-1437, 1441 [investors in lender's

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[7] Nor did appellants make any such factual allegations with respect to Royal and Guardian. Specifically, appellants never alleged any direct contact between Royal or Guardian and any named plaintiff.

loans liable for usury where lender liable for usury].) Thus, on the facts as alleged, appellants cannot state a UCL claim against Citibank or NorStates based on these respondents' own conduct.

B. *The Claims Against Royal.*

Appellants admit that only the UCL claim had previously been asserted against Royal. They acknowledge that prior to filing the 5thAC, they had no factual basis for asserting a usury claim against Royal. Their claim against Royal in the 5thAC is based on its receipt of funds administered by the bankruptcy court. Specifically, the 5thAC sought to recover purportedly usurious payments received by Royal as part of a global settlement between the bankruptcy trustee and Royal. As explained below, this claim constitutes an impermissible collateral attack on the bankruptcy court's orders.

After this matter was removed to the bankruptcy court, appellants dismissed CMC and CSC as defendants and asked the bankruptcy court to remand the claims against the remaining defendants to superior court. The bankruptcy court granted the motion to remand on the express condition that "no ruling of the State Court shall have any effect on the property of the estate, the determination of which is expressly reserved by the bankruptcy court." Appellants thereafter filed an adversary complaint seeking to have their claims against CMC adjudicated in the bankruptcy court. Subsequently, the bankruptcy trustee, as successor-in-interest to CMC, entered into a global settlement whereby CMC's interest in certain Contracts, including any income stream from those Contracts, was transferred to Royal.[8] The bankruptcy court entered an order approving this global settlement on

[8] We reject appellants' contention that the income streams on certain Contracts reassigned, pursuant to the global settlement, to Royal were not part of the bankruptcy estate. The trustee asserted any and all interest of CMC in those

May 31, 2005. Later, the court granted the trustee's motion to dismiss with prejudice appellants' adversary complaint against CMC. As noted above, no evidence suggests appellants appealed these orders.

Appellants cannot now assert causes of action that would interfere with the bankruptcy court's administration of the CMC bankruptcy estate. As Judge West correctly found, appellants' UCL claim against Royal, at its core, seeks to "overturn the disposition of the property of the Bankruptcy Estate to Royal." However, the bankruptcy court's remand order -- sought by appellants and expressly providing that "no ruling of the State Court shall have any effect on the property of the [CMC] estate" -- barred appellants from challenging the disposition of property of the CMC bankruptcy estate determined by the bankruptcy court. Thus, appellants' UCL claim against Royal in the 5thAC is, as Judge West found, "specifically prohibited by the order of remand." More important, appellants are seeking to undo a bankruptcy court's distribution of assets in a bankruptcy estate and to redistribute those same assets to themselves, years later, in a separate proceeding in an entirely different court. Such a collateral attack on the plenary power of a bankruptcy court in administering a bankrupt estate is impermissible. (See *Martin v. Martin* (1970) 2 Cal.3d 752, 762 [bankruptcy court orders cannot be collaterally attacked in state court proceedings]; see also *Celotex Corp. v. Edwards* (1995) 514 U.S. 300, 313 [plaintiffs not permitted to collaterally attack a bankruptcy court's order in separate court proceeding as it would "seriously undercut[] the orderly process of the law"]; *Gruntz v. County of Los Angeles* (9th Cir. 2000) 202 F.3d 1074, 1084, 1088 ["state courts should not intrude upon the plenary power of the federal courts in administering bankruptcy cases by

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Contracts, and transferred CMC's interest in those Contracts to Royal as part of the settlement.

attempting to modify or extinguish federal court orders"].) In short, Royal cannot be liable on any cause of action predicated on its receipt, pursuant to orders of the bankruptcy court, of allegedly usurious payments or its status as an assignee on certain Contracts. To the extent Royal's liability is premised on CMC's wrongful conduct, for the reasons discussed above, no cause of action can be asserted based on vicarious liability.

C. *The Claims Against Guardian*

Appellants asserted both UCL and non-UCL claims against Guardian. As to the UCL claim, for the reasons stated above, Guardian cannot be vicariously liable for CMC's allegedly wrongful conduct. As to the non-UCL claims, appellants stated causes of action for failure to comply with statutory consumer loan regulations, failure to be licensed, and violation of California's usury law. We conclude that appellants cannot assert a claim against Guardian on any of these theories.

1. *Failure toComply with Statutory Consumer Loan Regulations*

Judge McCoy sustained demurrers to appellants' causes of action based on failure to comply with statutory consumer loan regulations, after determining that the Contracts were not consumer loans. Similarly, the bankruptcy court dismissed appellants' statutory violation claims against CMC on the same ground. Appellants did not appeal the latter ruling in federal court and thus are precluded from challenging it now. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201, fn. 1 ["Collateral estoppel precludes a party from relitigating in a second proceeding the matters litigated and determined in a prior proceeding."].) Appellants contend they cannot be bound by the bankruptcy court's determination that the Contracts were not consumer loans, as there are new named plaintiffs who were not parties to the bankruptcy proceedings. However, the only named plaintiff

with any claim against Guardian -- Leigon -- was a party to the bankruptcy proceedings. Accordingly, appellants are collaterally estopped from challenging the bankruptcy court's determination that the transactions at issue, if loans, were not consumer loans.[9]

Moreover, were we to consider the issue anew, we would conclude that both Judge McCoy and the bankruptcy court correctly interpreted the relevant consumer loan provisions in the Financial Code. Under section 22000 et seq., licensed "finance lenders" are exempt from the usury law. (See § 22002.) A "finance lender" is "any person who is engaged in the business of making consumer loans or making commercial loans." (§ 22009.) A "commercial loan" is defined as "a loan of a principal amount of five thousand dollars ($5,000) or more, or any loan under an open-end credit program, whether secured by either real or personal property, or both, or unsecured, the proceeds of which are intended by the borrower for use primarily for other than personal, family, or household purposes." (§ 22502.) In contrast, a "consumer loan" is "a loan, whether secured by either real or personal property, or both, or unsecured, the proceeds of which are intended by the borrower for use primarily for personal, family, or household purposes." (§ 22203.) In addition, section 22204 expands the definition of consumer loans. It provides in relevant part: "(a) In addition to the definition of consumer loan in Section 22203, a 'consumer loan' also means a loan of a principal amount of less than five thousand dollars ($5,000), the proceeds of which are intended by the

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[9] We note than even unnamed plaintiffs who are later added to a class action may be bound by a prior federal class action. (See *Johnson v. American Airlines, Inc.* (1984) 157 Cal.App.3d 427, 431 ["As long as [plaintiff] was a member of the class, even though unnamed, and was adequately represented, she is bound by the settlement in the federal action"; res judicata applied because primary right allegedly violated in present case was the same as asserted in earlier federal action -- violation of the right to be free from employment discrimination based on sex].)

borrower for use primarily for other than personal, family, or household purposes. . . . [¶] (b) A consumer loan under this section is a loan secured in the manner provided for in this division if it is secured, in whole or in part, by any lien on, security interest in, assignment of, or power of attorney relative to income arising from the operation of a business by the borrower, such as accounts, and chattel paper, including the right to payment for accounts or chattel paper sold by the borrower prior to or contemporaneously with the making of the loan."

Under these provisions, any loan of a principal amount of less than $5,000 is a consumer loan. Any loan in excess of that amount is a consumer loan if the proceeds are intended by the borrower for use primarily for personal, family, or household purposes. If the proceeds of the loan are intended to be used for any other purpose, it is a commercial loan.

Appellants contend that subdivision (b) of section 22204 creates an additional category of consumer loans -- those loans in any amount that are secured by accounts or chattel paper. We disagree. By its plain language, subdivision (b) applies only to a "consumer loan under this section," that is, consumer loans as defined in section 22204, subdivision (a). Thus, section (b) does not remove the $5,000 limit set forth in section 22204, subdivision (a). In contrast, under appellants' interpretation, a loan intended for commercial purposes in *any amount* would, by virtue of being secured by business income, be converted to a consumer loan subject to the additional requirements designed to protect consumers or borrowers of amounts under $5,000. We discern no reason to assume the Legislature intended such a result.

Contrary to appellants' contention, our interpretation does not render subdivision (b) of section 22204 superfluous. Generally, consumer loans or commercial loans are secured if the security interest is in real or personal property.

(See §§ 22203, 22502.) Subdivision (b) of section 22204 expands the scope of security interest, providing that for consumer loans of less than $5,000, the security interest may be in commercial assets, such as accounts or chattel paper. When read in conjunction with subdivision (a), subdivision (b) provides that consumer loans remain consumer loans even if they are secured by income arising from a borrower's business operation.

Applying the relevant sections of the Financial Code to the Contracts, we conclude that the Contracts, if loans, are commercial loans. The Contracts indisputably were for principal amounts in excess of $5,000. The proceeds were used to purchase equipment, and the borrower certified that the equipment would be used for commercial purposes only. As the Contracts are commercial loans, appellants cannot state a cause of action based on the Contracts being consumer loans. Thus, appellants cannot assert they were charged excessively high interest rates (see "Loan Regulations," §§ 22303 & 22304, ch. 2, art. 3), or that the Contracts imposed unconscionable provisions (see *id*., § 22302). The Financial Code does not impose those regulations on commercial loans. (Compare §§ 22600-22601.) Accordingly, Judge McCoy properly sustained demurrers to those causes of action.

2. *Violation of Mandatory Licensing Requirement*

Appellants also sought to void the Contracts on the basis that CMC was not licensed to make any loans. Section 22100 provides that all finance lenders must be licensed. Appellants do not purport to allege that Guardian (or any other respondent) was a finance lender with respect to the Contracts. Rather, appellants' causes of action against respondents are based on derivative liability. In the bankruptcy court, however, appellants lost on their claim that they were entitled to relief because CMC was not licensed to make loans. Appellants never appealed

that ruling and thus are precluded from claiming that the Contracts were illegal and void due to CMC's status as an unlicensed lender. (See *Martin v. Martin*, *supra*, 2 Cal.3d at p. 762 [bankruptcy court's determination that husband's spousal payment obligation could not be discharged was res judicata on same issue in superior court proceedings]; *Celotex Corp. v. Edwards*, *supra*, 514 U.S. at p. 313 [noting that respondents should have appealed the bankruptcy court's decision if they were dissatisfied with it]; *Gruntz v. County of Los Angeles*, *supra*, 202 F.3d at p. 1088 ["state courts should not intrude upon the plenary power of the federal courts in administering bankruptcy cases by attempting to modify or extinguish federal court orders"].)

3. *Usury*

"The law of usury in California is based upon California Constitution article XV, section 1, which limits the interest payable '[f]or any loan or forbearance of any money.'" (*Southwest Concrete Products v. Gosh Construction Corp*. (1990) 51 Cal.3d 701, 705.) Appellants do not allege that Guardian made any loans to them. Instead, relying on *Creative Ventures*, appellants argue that the eventual receipt of usurious payments, standing alone, is sufficient to create direct liability for usury. We disagree.

In *Creative Ventures*, two limited liability companies borrowed money from a corporation that was not licensed as a finance lender, agreeing on an interest rate of eight percent and a loan fee of six percent, which total exceeded the applicable nonusurious interest rate of 10 percent. The corporation then solicited investors to fund the loans and assigned the investors their fractional interests in the investments. (*Creative Ventures*, *supra*, 195 Cal.App.4th at pp. 1436-1437, 1441.) The companies sued the corporation and the investors for usury. The trial court found the corporation had committed usury, but determined that the investors, as

holders in due course of their fractional interests who did not receive any part of the loans fees, could not be liable for usury. The appellate court reversed as to the investors. Rejecting the characterization of the investors as holders in due course, the court found they were assignees, whose rights derived from those of the assignor: "They took their fractional interests subject to any equities and defenses existing in favor of plaintiffs at the time of assignment." (*Id*. at p. 1448.) Because the assignor corporation was unlicensed and not legally authorized to make any loans, the court held the assignees were not entitled to any interest on the loans.

Contrary to appellants' contention, the *Creative Ventures* court did not hold that the mere receipt of usurious interest payments, standing alone, is sufficient to establish direct liability for usury. Rather, the court held that where an assignor's liability renders "the interest terms . . . void," any receipt of interest by the assignee is unlawful. (*Creative Ventures, supra,* 195 Cal.App.4th at p. 1448.) Here, appellants are precluded from asserting that the loans are void based on CMC's status as an unlicensed lender. They raised that claim in the bankruptcy court, where it was rejected. They did not appeal that order and may not now state a claim against Guardian predicated on its eventual receipt of interest payments from loans made by CMC. Accordingly, appellants cannot state a claim for usury against Guardian.[10]

In sum, the non-UCL claims against Citibank and NorStates are time-barred, as they are new claims asserted by new plaintiffs. The claims against Royal seeking recovery of assets distributed by the bankruptcy court are barred because appellants cannot collaterally attack the bankruptcy court's orders. Appellants cannot prevail on their UCL claims, as the UCL does not provide for vicarious

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[10] In light of our holding, we need not address whether Nevada law (which expressly has no prohibition against usury) is applicable to Leigon's Contract.

liability. Their claims based on failure to comply with statutory consumer loan regulations fail, as the Contracts were not consumer loans. Finally, appellants cannot hold Guardian directly liable for usury because the mere receipt of allegedly usurious interest payments is an insufficient basis for liability. In short, the judges of the trial court properly sustained demurrers to all of appellants' causes of action against respondents.[11]

DISPOSITION

The judgments are affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.

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[11] As there are no viable claims against respondents, Judge West's ruling that the claims were not suitable for class treatment is moot. Moreover, appellants are bound by the bankruptcy court's adverse ruling against them on this issue. (See *Alvarez v. May Department Stores Co*. (2006) 143 Cal.App.4th 1223, 1238 [plaintiffs not named in separate class action but holding similar interests, alleging similar misconduct against defendants, and represented by same counsel were collaterally estopped from challenging adverse decision on class certification in separate action].)