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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

ARTAK DALDUMYAN, Plaintiff and Appellant, v. WORLD FINANCIAL GROUP INSURANCE AGENCY, INC., Defendant and Respondent.	B277973 (Los Angeles County Super. Ct. No. BC554536)

APPEAL from judgment and order of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed in part, reversed in part, with directions.

Law Office of Richard M. Foster, Richard M. Foster and Sylvia Sultanyan, for Plaintiff and Appellant.

Hunton & Williams, Phillip J. Eskenazi, Kirk A. Hornbeck, Andrew J. Peterson, for Defendant and Respondent.

Plaintiff and appellant Artak Daldumyan appeals from a judgment following an order sustaining a demurrer as to certain causes of action and an order granting summary judgment as to the remaining causes of action in favor of defendant and respondent World Financial Group Insurance Agency, Inc. (the Insurance Agency). On appeal, Daldumyan contends: (1) the complaint stated causes of action for breach of an implied-in-fact contract, unjust enrichment, fraud, and violation of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.), or was capable of amendment to state these causes of action; (2) there are triable issues of fact with respect to his causes of action for promissory estoppel, intentional interference with contract, and intentional interference with prospective economic advantage; and (3) his claims are not barred by the doctrine of claim preclusion based on allegations in the complaint that the Insurance Agency is the alter ego of a marketing company, whose liability was determined in a prior arbitration action.

As to the ruling on the demurrer, we conclude that the complaint does not allege an implied-in-fact contract between Daldumyan and the Insurance Agency for payment of commissions, and it cannot be amended to do so. It also cannot state a quasi-contract claim for restitution, because the benefits received by the Insurance Agency were incidental to Daldumyan's performance of his written contract with the marketing company. The complaint alleged a cause of action for fraudulent concealment of

material facts, however, namely that the Insurance Agency was created in August 2005 as a separate entity to collect commissions, with no obligation to pay compensation and without any notice to the agents selling the products. Daldumyan also has alleged a cause of action for violation of the unfair competition law based on an unfair or fraudulent business practice. The judgment must be reversed, and the demurrer to the causes of action for fraud and violation of the unfair competition law overruled.

Summary adjudication of the promissory estoppel cause of action was proper, however, because there was no evidence of any clear promise on behalf of the Insurance Agency or reliance by Daldumyan. The cause of action for intentional interference with prospective economic advantage was also properly adjudicated in favor of the Insurance Agency, because there was no evidence that the Insurance Agency's conduct relating to this claim was independently wrongful. Triable issues of fact exist as to the cause of action for intentional interference with contract, however, and summary adjudication must be denied as to that cause of action.

Daldumyan's surviving causes of action are not barred by the doctrine of claim preclusion, because the Insurance Agency's liability for the claims is not derivative of the liability of the party to the earlier action. The Insurance Agency's liability is based on actions that the Insurance Agency is alleged to have taken or failed to have taken, not

because it stands in privity with the marketing company. We reverse the judgment, with directions.

FACTS AND PROCEDURAL BACKGROUND

In 1996, Daldumyan entered into an "Associate Membership Agreement" with World Marketing Alliance, Inc. (the Alliance) to sell insurance products. The Alliance was affiliated with WMA Securities, Inc. Daldumyan signed an acknowledgement stating, "I am or will soon apply to become an insurance agent of the insurance agency World Marketing Alliance and possibly a registered representative of the broker-dealer WMA Securities, Inc. (either or both referred to as [the Alliance])."

Daldumyan became a licensed insurance agent in 1996. As an independent contractor under the contract with Alliance, Daldumyan sold insurance products and recruited additional independent contractors in a hierarchical marketing structure. The contract provided for Daldumyan to receive commissions on the products and services that he sold and on products sold by the "downline" associates in his hierarchy. After Daldumyan obtained his securities license, he entered into a contract with WMA Securities as a registered representative.

In 2001, the insurance and financial services holding company Aegon, N.V., formed the wholly owned subsidiary World Financial Group, Inc. (the Marketing Company). The Marketing Company acquired select assets of the Alliance,

including Daldumyan's contract. The Marketing Company is similarly a multi-level marketing organization that enters into contracts with independent contractors primarily to sell insurance products provided by other companies. The Marketing Company offers independent contractor insurance agents a business platform to run independent financial services and insurance businesses. The independent contractors are referred to as associates or agents. The agents may recruit additional individuals. Agents earn commissions on the insurance products that they sell personally and on the sales by agents who are recruited under them in their hierarchy.

Aegon owned or obtained another wholly owned subsidiary, which was renamed the Insurance Agency in 2001. The Insurance Agency holds the license to sell the insurance products that the independent contractor insurance agents sell. The Insurance Agency has distribution agreements with other insurance companies which provide for payment of commissions to the Insurance Agency on sales made by its agents. The Insurance Agency conducts business through the independent contractor agents who have contracted with the Marketing Company. The Marketing Company operates the computer system which computes and pays the insurance commissions earned by the independent contractors on the products sold through the Insurance Agency. For each policy sold, the computer system calculates the amount for each person entitled to a share of the commission.

Aegon also owns Transamerica Financial Advisors, Inc. (Financial Advisors), which is the successor to WMA Securities. Financial Advisors is a registered securities dealer and brokerage regulated by the Securities and Exchange Commission (SEC). Daldumyan became a representative and earned commissions from Financial Advisors. Financial Advisors also uses the Marketing Company to calculate commissions and issue payments to registered representatives in compliance with SEC regulations. There are no contractors recruited and commissions earned for other contractors' sales in this context.

Financial Advisors belongs to a self-regulatory group called the Financial Industry Regulatory Authority (FINRA). FINRA adopted rules governing the conduct of outside business activities and private securities transactions. FINRA members enforce the FINRA rules. Outside business activities and private securities transactions by registered representatives are not entirely prohibited, but the rules require disclosure before engaging in them.

In November 2011, the Marketing Company terminated an associate named Pedram Mehrian, who was below Daldumyan in his hierarchy, based on criminal charges for rape. Daldumyan's contract provided that a terminated associate's hierarchy would "roll up" to Daldumyan, meaning that every associate and registered representative should move one level closer to Daldumyan and increase Daldumyan's commissions. A few days after

Mehrian's hierarchy automatically rolled up to Daldumyan, the hierarchy was restructured to allocate Mehrian's hierarchy to his brother, who was a junior associate below Daldumyan. Daldumyan complained to Xuan Nguyen, Kent Davies,[1] and Joseph DiPaolo about the improper transfer of Mehrian's hierarchy to his brother.

In May 2012, Daldumyan's clients told him that they were receiving telephone calls from Financial Advisors, the Marketing Company, and the Insurance Agency. The callers were asking whether Daldumyan had solicited them to invest in various businesses. The same person would call twice, once claiming to be with the Marketing Company and once claiming to be with the Insurance Agency. The Insurance Agency has a compliance department, which included Vice President Kathryn Taylor, Assistant Secretary Stephanie Hosier, and Lauren Hodges. The Insurance Agency's compliance department called all of Daldumyan's active clients and downline associates. Taylor, Hosier, and Hodges are employees of the Marketing Company, but perform work for the Marketing Company and the Insurance Agency. Daldumyan called Taylor about the concerns of his clients and associates. Taylor told him that they were following the regular routine that they conduct in any investigation.

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[1] More than one participant has the last name Davies, so they will be referred to individually by their first names for clarity.

In August 2012, the officers and directors of the Insurance Agency included Paul Mineck, Susan Davies, John Joseph, DiPaola, Leesa Easley, and Janice Curcio. They are also employees of the Marketing Company.

On August 17, 2012, Taylor sent an e-mail to a small number of individuals stating that the Insurance Agency received notification from Financial Advisors that Daldumyan had been terminated for cause. The Insurance Agency recommended that the Marketing Company follow suit based on certain provisions of the associate contract. Taylor explained that a virtual vote was being conducted on Insurance Agency agent Daldumyan and asked the recipients to select either "'[f]ollow suit with [Financial Advisors]' and terminate from the Marketing Company for cause," or "'Allow agent to stay with [the Marketing Company].'" Mineck, Susan, Lilian Palacio and Joseph voted to follow suit with Financial Advisors.

In August 2012, the Marketing Company terminated Daldumyan's agreement and stopped paying commissions to him.

Arbitration

On March 1, 2013, Daldumyan initiated an arbitration claim against the Marketing Company for several causes of action, including breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, unjust enrichment, fraudulent inducement and intentional

infliction of emotional distress. Daldumyan filed an amended demand increasing his demand from $10 million to $50 million dollars. Two arbitration hearings were held in July 2014.

Allegations of the Complaint in the Instant Case

On August 13, 2014, Daldumyan filed the complaint in the instant case against the Insurance Agency. Daldumyan filed an amended complaint on April 1, 2015, for breach of implied-in-fact contract, intentional interference with contract, intentional interference with prospective economic advantage, unjust enrichment, promissory estoppel, fraud, and violation of Business and Professions Code section 17200. In addition to the facts above, the complaint alleged that the Insurance Agency and the Marketing Company are affiliated, meaning they are subsidiaries that are both ultimately owned by Aegon. Prior to August 9, 2005, product providers paid the commissions that were earned by associates directly to the Marketing Company, who paid the associates their portions based on commission schedules. On August 9, 2005, the Insurance Agency registered as an active insurance agent with the California Department of Insurance. The Marketing Company became merely the payment coordinator for the Insurance Agency to process the payment of commissions earned through the sale of insurance products for product providers to associates as directed by the Insurance Agency. The Marketing Company

is not an agent authorized to transact insurance business in California. On August 9, 2005, the Insurance Agency and the Marketing Company caused the appointments held by Marketing Company associates to become connected with the Insurance Agency's registration as an active insurance agent without any written notice to the Marketing Company associates. Pursuant to this arrangement, the Marketing Company asserts now that it is simply a paymaster for the Insurance Agency. The Marketing Company associates, including Daldumyan, were "kept in the dark regarding this move."

The Insurance Agency and the Marketing Company are alter egos of one another. They maintain such a unity of interest and ownership that the separate personality of the two corporations no longer exists. They use their purported separate corporate forms to perpetrate fraud, circumvent adjudication of disputes, and accomplish other wrongful and inequitable purposes. Since August 9, 2005, the Insurance Agency has retained a portion of the commissions earned by Daldumyan and continues to retain portions of commissions earned through his business.

The Marketing Company had no basis to terminate Daldumyan's agreement or to stop paying his vested commissions. The Insurance Agency acted in conjunction with the Marketing Company. The Marketing Company claimed to have terminated his contract because Financial Advisors terminated an agreement with him, but the contract did not permit for termination based on a

termination of the agreement with Financial Advisors. Furthermore, the Financial Advisors termination was unauthorized and a sham. The Insurance Agency and the Marketing Company sent notices to insurance product providers with whom Daldumyan had appointments stating that he was no longer with the Marketing Company.

A. Implied-in-Fact Contract

Daldumyan's cause of action for breach of implied-in-fact contract additionally alleged that the Insurance Agency has selling agreements with other insurance companies that permit the Insurance Agency and the independent contractors to sell insurance products on behalf of the Insurance Agency. An implied-in-fact contract was formed between the Insurance Agency and Daldumyan on August 9, 2005. The implied contract incorporated certain provisions of Daldumyan's written contract, including paying commissions to Daldumyan (1) arising from the sale of the insurance products of the companies with which Daldumyan had appointments, and (2) arising from his hierarchy of several hundred associates, who were made Insurance Agency agents on August 9, 2005.

The implied contract required the Insurance Agency to pay commissions to Daldumyan for the sale of authorized products and services, income from trails, and income from renewals. Having received the benefit of the selling agreements with the various insurance companies, the

Insurance Agency was to pay the commissions earned from the sale of the product providers pursuant to the commission schedules which Insurance Agency published through the Marketing Company's internal website. The Insurance Agency had a further duty to continue paying Daldumyan vested commissions generated by his hierarchy of downline associates, even if he chose to stop making sales. The Insurance Agency also had a duty not to interfere with his appointments with insurance product providers and his effort to sell the products of providers.

Daldumyan fully performed his obligations under the implied-in-fact contract. In August 2012, the Insurance Agency breached the contract by failing to pay Daldumyan commissions of approximately $70,000 that he earned and was owed from his own sales before his termination. Beginning in August 2012, the Insurance Agency breached the contract by failing to pay him commissions, including trail and renewal commissions. The contract was never terminated and there was no basis to terminate the contract. It was not dependent on his contract with Financial Advisors. Insurance Agency also breached the implied covenant of good faith and fair dealing by failing to pay commissions due and owing from direct sales and sales by downline associates without good, just or legitimate cause.

B. Tortious Interference with Contract

Daldumyan alleged with respect to the cause of action for tortious interference with contract that he had a valid contract with the Marketing Company, under which the Marketing Company agreed to pay a percentage of commissions and bonus pools. On August 9, 2005, the Insurance Agency, along with the Marketing Company, caused Daldumyan's appointments to be connected to the Insurance Agency without notification or authorization. The Insurance Agency knew about Daldumyan's contract with the Marketing Company and intended to interfere with it by connecting the appointments to the Insurance Agency. In August 2012, the Insurance Agency interfered with Daldumyan's contract with the Marketing Company by causing the Marketing Company to terminate its contract with Daldumyan without any basis or standing and causing a breach in the contractual relationship.

The Insurance Agency knew Daldumyan had been appointed with multiple insurance product providers on behalf of whom the Insurance Agency is listed as an authorized agent. By working with the Marketing Company to terminate Daldumyan's contract and withhold vested commissions, they also prevented him from selling products for providers and deprived him of future sales, commissions, trails and renewal income. The Insurance Agency and the Marketing Company sent notices to insurance product providers with which Daldumyan had appointments, stating

that Daldumyan was no longer with the Marketing Company and forcing the termination of Daldumyan's appointments with multiple product providers. Daldumyan's contracts and appointments with various product providers were terminated, including ING, Allianz Life Insurance Company of North America, Western Reserve Life Assurance Company of Ohio, Transamerica Financial Life Insurance Company, and others. The Insurance Agency's conduct caused interference with Daldumyan's contracts with third party product providers, resulting in millions of dollars in damages.

C. Intentional Interference with Prospective Economic Advantage

With respect to his cause of action for intentional interference with prospective economic advantage, Daldumyan alleged that he built a client base of thousands of customers over 16 years as an associate of the Marketing Company. Around May and June 2012, the Insurance Agency and the Marketing Company contacted Daldumyan's customers in various manners, including telephone calls and letters. The Marketing Company claimed this investigation was conducted by the Insurance Agency, through Marketing Company employees using Marketing Company resources. Daldumyan began receiving inquiries from his customers, who were concerned about the contacts. The Insurance Agency's conduct was intended to harass Daldumyan and interfere with his business relationships with customers.

The interference caused damages in an amount to be proved at trial.

Daldumyan also recruited many associates to join the Marketing Company. By August 2012, he had a hierarchy of 480 "downline" agent associates. Daldumyan had existing business relationships with the associates in his hierarchy and a probability of future economic benefit from these relationships. In May and June 2012, the Insurance Agency and the Marketing Company contacted the downline associates through telephone calls and letters about various subjects under false pretenses. The Marketing Company claimed the investigation was conducted by the Insurance Agency, through Marketing Company employees using Marketing Company resources. The investigations gave the downline associates the impression that Daldumyan had engaged in wrongdoing. Daldumyan began receiving inquiries from concerned associates. The Insurance Agency and the Marketing Company made threats to Daldumyan's family members who were downline associates, including his father. The Insurance Agency's conduct was intended to harass Daldumyan and interfere with his prospective business relationships with the associates and his customers. The interference caused damages in an amount to be proved at trial.

The Insurance Agency further interfered with Daldumyan's existing business relationships with several product providers by working in conjunction with the Marketing Company to wrongfully terminate Daldumyan's

contract. The Insurance Agency and the Marketing Company sent notices to the insurance product providers that Daldumyan had appointments with stating that he was no longer with the Marketing Company, forcing the termination of the appointments. As a consequence, Daldumyan was deprived of a future relationship with any of these product providers for at least three years following his termination. Had the Insurance Agency not interfered with Daldumyan's prospective economic advantage, Daldumyan would have continued to generate commissions since August 2012. The interference caused damages in an amount according to proof at trial.

D. Unjust Enrichment

Daldumyan alleged in his cause of action for unjust enrichment that he built his hierarchy and sold insurance products based on the Marketing Company's representations about the business, thereby permitting the Insurance Agency to collect a portion of the commissions generated by the sales. The Insurance Agency had wrongfully withheld payments of Daldumyan's commissions since August 2012, and failed to pay the commissions to him, so the Insurance Agency has been unjustly enriched by the benefit conferred upon it by Daldumyan in an amount to be determined at trial.

E. Promissory Estoppel

The cause of action for promissory estoppel alleged that to induce Daldumyan to sell products and grow his hierarchy of associates, the Marketing Company held itself out as a multi-level marketing company that offered a business platform to individuals seeking to run an independent financial services and insurance business. In reliance on these continued representations, Daldumyan dedicated time and money to build a business, under the belief that he was building his own independent business. The Insurance Agency uses Marketing Company employees to make representations through the Marketing Company, since the Insurance Agency does not have its own employees. The Insurance Agency is the entity allowed under California law to collect and pay commissions on the sale of insurance products. The Insurance Agency, through the Marketing Company, makes representations to its agents that the insurance business they are building is their own business in which they can become vested and continue to earn commissions from their sales and the commissions generated by their hierarchy even after they retire. After an agent retires, the Marketing Company claims it has sole discretion to terminate and divest associates of their own business and stop paying commissions. The Marketing Company steps into the shoes of the Insurance Agency when it discusses payment of commissions, appointments with product providers and communicating with associates, because the

Insurance Agency does not have separate employees. Daldumyan relied on clear and unambiguous promises to dedicate 16 years to the Marketing Company and affiliated companies, including the Insurance Agency. He was injured and suffered damages in an amount according to proof.

F. Fraud

Daldumyan alleged fraud in the creation of a scheme by the Insurance Agency and the Marketing Company. The Marketing Company uses the Insurance Agency to transact insurance business in the state of California without the Marketing Company having the proper licenses or being admitted as an authorized agent. To induce Daldumyan to sell the products of providers and to recruit a hierarchy of associates for the Insurance Agency, the Marketing Company held itself out as a multi-level marketing company that offers a business platform to individuals seeking to run an independent financial services and insurance business. In reliance on these representations, Daldumyan and other associates dedicated time and money to build a business and recruit associates, in order to collect commissions from their own sales and their associates' sales, under the belief that they were building their own independent business.

Since August 9, 2005, the Insurance Agency has been comprised of officers and directors who are also officers and directors of the Marketing Company. The Insurance Agency does not have its own employees. The Insurance Agency

uses employees of the Marketing Company to make representations through the Marketing Company. The Insurance Agency is the entity that has the ability to collect and pay commissions based on the sale of insurance products as a licensed insurance agent in California. The Insurance Agency through the Marketing Company continually makes representations to its agents that the insurance business they are building is their own business in which they can become vested and earn commissions even after they retire. Then, the Marketing Company later claims it has sole discretion to terminate and divest associates of their own business and stop paying commissions.

The Insurance Agency intentionally leads associates to believe it is a department within the Marketing Company. Associates, including Daldumyan, are shocked to discover the Insurance Agency purports to be a separate entity on which they are dependent to receive payment of commissions, but with which they do not have a written contract. The Marketing Company employees cannot distinguish between the companies. The Insurance Agency concealed its intent to rely on a separate corporate existence from the Marketing Company in order to deprive Daldumyan of commissions due and owing to him, including vested commissions, and put up further legal road blocks to Daldumyan's attempts to seek judicial redress. The Insurance Agency and the Marketing Company knew the representations made to Daldumyan were false when they were made and they made the representations recklessly

with disregard for the truth. Daldumyan's reliance was reasonable, and as a proximate result of the Insurance Agency's conduct, Daldumyan has been damaged in an amount according to proof at trial.

G. Unfair Competition

In Daldumyan's claim for violation of the unfair competition law, he alleged the Insurance Agency and the Marketing Company maintained such a unity of interest and ownership that the separate personalities of the two corporations no longer exist. They behaved in a manner inconsistent with the separate corporate existence of the two entities. They used their purported separate corporate forms to perpetrate fraud, circumvent adjudication of disputes, and accomplish other wrongful and inequitable purposes.

An agent must be licensed by the Department of Insurance to transact insurance business in California. The Marketing Company is not authorized to transact insurance business in California. The Insurance Agency and the Marketing Company have created an unlawful and fraudulent scheme through which the Marketing Company uses the Insurance Agency to transact insurance business in California without the proper licenses. The Marketing Company associates who are licensed by the Department of Insurance are designated by the Marketing Company and the Insurance Agency as authorized agents of the Insurance Agency without the consent of the associates.

The Insurance Agency retains a percentage of commissions generated by associates of the Marketing Company, who are licensed agents and sell products. The associates are required by contract to litigate disputes with the Marketing Company in arbitration before the American Arbitration Association (AAA) pursuant to Georgia law. The Insurance Agency does not maintain written contracts with associates, so there is no forum selection for disputes between associates and the Insurance Agency. The Marketing Company and associates who are registered representatives of Financial Advisors are required by FINRA to arbitrate disputes between themselves and Financial Advisors through FINRA arbitration. The Insurance Agency, the Marketing Company, and their affiliated entities use their corporate forms to erect legal road blocks to associates seeking judicial redress of their wrongful conduct. The Insurance Agency, along with the Marketing Company, are structured so aggrieved associates do not have an appropriate forum to seek legal redress, because the Insurance Agency and the Marketing Company have defenses they raise in each forum. This conduct by the Insurance Agency is intended to deceive associates and is fraudulent and unfair. The Insurance Agency will continue to engage in these unlawful, unfair and fraudulent practices, and therefore, should be enjoined from engaging in such conduct.

Daldumyan sought an amount of damages to be determined at trial, injunctive and declaratory relief, punitive damages, and an order of costs and attorney fees.

Demurrer to Amended Complaint

The Insurance Agency filed a demurrer to the amended complaint in May 2015. The Insurance Agency argued in the demurrer that the complaint failed to state a cause of action for breach of contract because Daldumyan could not have both an express contract and an implied contract governing the obligation to pay him commissions on sales. The fraud claim did not allege a false representation attributable to the Insurance Agency, and the promissory estoppel claim was duplicative of the fraud claim. Daldumyan had not stated an unfair competition claim, because he had not alleged an independent, actionable wrong.

Daldumyan opposed the demurrer, and the Insurance Agency filed a reply. A hearing was held on June 2, 2015. Daldumyan argued with respect to the cause of action for fraud that the Insurance Agency had a duty to disclose the new entities were being formed, the Insurance Agency was directing that commissions be paid, and the Marking Company was the entity making payments to agents. As to the unfair competition claim, the trial court stated that the Marketing Company's violation of insurance law by selling insurance when the Insurance Agency held the license did not cause damages to Daldumyan. His termination and lost

commissions did not result from the Marketing Company practicing without a license. The trial court acknowledged that Daldumyan was not relying on alter ego allegations to establish liability for the causes of action for intentional interference with contract, intentional interference with prospective economic advantage, and promissory estoppel.

The trial court sustained the demurrer without leave to amend as to the causes of action for breach of contract, unjust enrichment, fraud, and violation of Business and Professions Code section 17200. The court overruled the demurrer as to the causes of action for intentional interference with contract, intentional interference with prospective economic advantage, and promissory estoppel.

Arbitration Award

On May 28, 2015, following two additional days of arbitration hearings and briefing, the arbitrators issued an award in favor of Daldumyan on causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. The arbitration award contained the following findings:

Daldumyan's contract provided that the Alliance had contractual relationships with certain companies "(collectively, the 'Preferred Companies', or individually, a 'Preferred Company')" which authorized the Alliance or its members to sell various products and to designate Alliance members for appointment with the Preferred Companies as

independent sales representatives with respect to their products and services. The termination provisions of Daldumyan's contract allowed the Alliance to terminate the agreement for cause, which included "any breach of the Associate's contract(s) with any of the Preferred Companies."

On August 12, 2012, Financial Advisors terminated Daldumyan's contract to sell securities after concluding that Daldumyan failed to timely disclose outside business activities and private securities transactions. The contract between Financial Advisors and Daldumyan was not within the scope of the arbitration clause, and Financial Advisors was not a party to the arbitration.

On August 20, 2012, the Marketing Company terminated its contract with Daldumyan, because Financial Advisors had terminated him as a registered securities representative. The Marketing Company divested him of commissions which had been vested as of the time of his termination based on the sales level he had attained in the hierarchy. The commission stream from a contractor who was terminated for committing a felony was transferred to another contractor downline from Daldumyan, rather than to Daldumyan.

The arbitrators found that Financial Advisors was not a product provider and was not considered a Preferred Company under the contract between the Marketing Company and Daldumyan. Since Financial Advisors was not a Preferred Company, any breach of Daldumyan's contract with Financial Advisors did not constitute a cause for

termination under the agreement with the Marketing Company. The Marketing Company could not rely on Financial Advisors' termination of Daldumyan to terminate him from the Marketing Company. The arbitrators found the Marketing Company had no contractual right to terminate the contract with Daldumyan, divest him of his commissions and bonuses (past, present and future), or transfer the commission stream from the terminated contractor to a downline contractor.

The arbitrators also found that the Marketing Company breached its covenant of good faith and fair dealing with Daldumyan by transferring the commission stream improperly, terminating him and divesting him of his contractual rights. The record established that the acts were done to deprive him of the benefits of the contract and not in good faith. No additional damages were being assessed for this cause of action, however, because the damages awarded covered all allowable causes of action. The arbitrators concluded that there was insufficient evidence to find in favor of Daldumyan on the remaining causes of action for promissory estoppel, fraudulent inducement, unjust enrichment, and intentional infliction of emotional distress.

Daldumyan had sought as damages: (1) the loss of commissions earned on products sold by himself or members of his hierarchy prior to his termination; (2) the loss of commissions vested to him prior to his termination; (3) consequential economic damages; (4) attorney fees and costs; (5) punitive damages; and pre- and post-judgment interest.

The arbitrators concluded a reasonable assumption for Daldumyan's working life was 23 years based on his age, health and the nature of the work. The panel selected the model of damages provided by the Marketing Company which reflected their finding that both the termination and the transfer of commissions were improper. The panel concluded the Marketing Company's conduct did not warrant an award of punitive damages and denied Daldumyan's request for punitive damages.

After further proceedings to establish attorney fees and costs, the arbitrators awarded Daldumyan damages of $5,241,273.35, legal fees of $703,575, and costs of $72,855.86, plus post-award interest. In addition, the arbitrators ordered their fees, as well as the administrative expenses of the dispute resolution organization, to be paid by the Marketing Company. The Marketing Company was required to reimburse Daldumyan for the arbitration fees and expenses that he had paid of $115,946.80.

The sole dissenting member of the arbitration panel would have found any company contracting with the Marketing Company to be a Preferred Company under the associate contract, including Financial Advisors, and would have awarded substantially reduced damages in favor of Daldumyan. The Marketing Company filed a motion in federal court to vacate the arbitration award, which was denied. Daldumyan filed a motion to confirm the award in federal court, which the Marketing Company did not oppose. The federal court confirmed the arbitration award on

November 23, 2015. On December 14, 2015, Daldumyan acknowledged that the Marketing Company had satisfied the judgment.

Motion for Summary Judgment and Supporting Evidence

In January 2016, the Insurance Agency filed a motion for summary judgment, or in the alternative summary adjudication, as to the remaining causes of action. The Insurance Agency argued that the claims that survived demurrer were barred by the doctrine of res judicata, because the complaint alleged the Insurance Agency was the alter ego of the Marketing Company. Daldumyan had already litigated his causes of action against the Marketing Company in the arbitration action. The arbitration ruling set a ceiling for recovery against any alter ego. The issue of his lost commission income had been determined, which was identical to the harm alleged in the instant action. Where the judgment has been fully satisfied, res judicata bars subsequent suit. In addition, the Insurance Agency argued that the alter ego allegation established it was in privity with the Marketing Company. Daldumyan could have raised his causes of action in the arbitration, which involve the same factual nucleus, because a nonsignatory can be compelled to arbitrate if sued as an alter ego.

In addition, the Insurance Agency argued that the promissory estoppel cause of action was based on four alleged promises: (1) Daldumyan would be paid

commissions on sales of insurance products; (2) he would be paid commissions on sales of insurance products by downline associates in his hierarchy; (3) he would become vested in his commissions; and (4) he was building his own independent business. The promises alleged as the basis for promissory estoppel were made by the Marketing Company. No promise had been identified as having been made by the Insurance Agency. There also could be no promissory estoppel when a valid contract existed governing the subject matter.

Daldumyan did not identify independently wrongful conduct as the basis for his intentional interference with prospective economic advantage. He also did not allege specific economic relationships that offered a probability of future economic benefit.

Daldumyan could not rely on conduct by employees of the Marketing Company, through the alter ego allegation, to allege interference with contract, because the Marketing Company could not interfere with its own contract. A true statement to Daldumyan's insurance product providers that he was no longer with the Marketing Company could not serve as the basis for intentional interference either. Although the Insurance Agency's agreements with the product providers required the providers to terminate Daldumyan, the existence of the contracts was not actionable and there was no evidence that the Insurance Agency exercised its rights under those contracts.

The Insurance Agency submitted the declaration of its officer Paul Mineck in support of its motion for summary

judgment. Mineck declared that he is an officer and Vice President of the Insurance Agency. He is also Senior Vice President and Chief Marketing Officer of the Marketing Company. He is an independent contractor with respect to Financial Advisors. In August 2012, the president and a vice president of Financial Advisors told him that Daldumyan's conduct with respect to undisclosed business activities, including his apparent conduct in connection with an Armenian timeshare project, appeared to violate FINRA's disclosure rules. Mineck understood that a violation of FINRA's rules would constitute a breach of a registered representative's contract with Financial Advisors. Their statements caused Mineck to wonder if the Marketing Company should terminate its business relationship with Daldumyan.

Financial Advisors held a meeting in August 2012 as part of its investigation to determine whether Daldumyan violated FINRA disclosure rules. Mineck participated in the meeting at the invitation of Financial Advisors as a representative of the Marketing Company. Mineck found Daldumyan's answers to questions to be evasive and not credible. Because the meeting focused on the securities aspect of Daldumyan's business, the Insurance Agency did not request to participate in the meeting.

Two days after Financial Advisors' termination of Daldumyan, the Marketing Company obtained a uniform termination notice for the securities industry stating that Financial Advisors had terminated Daldumyan for violating

FINRA disclosure rules regarding outside business activities and private securities transactions. On August 17, 2012, Kathryn Taylor, an employee of the Marketing Company, requested that Mineck and several other employees of the Marketing Company vote on whether to terminate Daldumyan's contract based on Financial Advisors' termination. Taylor circulated the form from Financial Advisors with her request. The group unanimously voted to terminate the contract. On August 20, 2012, the Marketing Company provided notice to Daldumyan that his contract had been terminated for cause. The Marketing Company also provided this notice to other companies, including Transamerica Premier Life Insurance Company.

The Insurance Agency also submitted a request to take judicial notice of the arbitration award and Daldumyan's acknowledgement of payment of the judgment, in addition to a declaration from attorney Kirk Hornbeck.

Opposition to the Motion for Summary Judgment and Supporting Evidence

Daldumyan opposed the motion for summary judgment. He argued that claim preclusion did not apply, because the arbitration did not involve the same parties. The Insurance Agency had expressly asserted that the AAA did not have jurisdiction over it or the subject matter in Daldumyan's subpoena for records. He argued that the Insurance Agency and the Marketing Company relied on their separate legal existence in the arbitration and should

not be able to bar claims against the Insurance Agency now, based on the allegations of alter ego liability. The purpose of the alter ego doctrine is to prevent misuse of the corporate laws and requires a finding of fact. The judgment against the Marketing Company was not for damages caused by the Insurance Agency. Daldumyan's recovery in the arbitration was for the Marketing Company's conduct and no determination had been made that the Insurance Agency was its alter ego.

Daldumyan noted that his claims against the Insurance Agency allow recovery of additional damages that are not limited to contract damages. For the torts of interference with contract or prospective economic advantage, he is entitled to compensation for all the detriment proximately caused by the tort, including unforeseen expenses, emotional suffering, damages to reputation, and punitive damages where the interference was done with malice.

Daldumyan pointed out that the Insurance Agency did not exist in 1996 when he entered into his contract with the Alliance and agreed to arbitrate any disputes. In the arbitration proceedings, the Marketing Company was uncooperative, refused to produce documents pertaining to commission payments that were relevant for calculating damages, and later produced information in a meaningless form, insisting it could not provide the information in a relevant form. Documents prepared by the marketing department showed Daldumyan's damages were many times

the amount of the arbitration award, but the discovery was provided too late and the arbitration panel relied on the Marketing Company's calculation of damages. The information pertaining to commissions was in the Insurance Agency's control as the entity contracting with product providers.

With respect to promissory estoppel, Daldumyan argued that Insurance Agency executives and/or board members made representations pertaining to the compensation that Insurance Agency agents would earn from the sale of insurance products. The same individuals represented on behalf of the Insurance Agency that Daldumyan was building his own insurance agency, which entitled him to vested commissions from his own sales and from sales of other agents. Since the Marketing Company is not a licensed insurance agency and does not have contracts with product providers, the Marketing Company cannot have insurance agents. The representations had to have been made regarding the Insurance Agency compensating its agents to induce reliance by the agents.

On the issue of intentional interference with prospective economic advantage, Daldumyan argued the Insurance Agency violated the principal's duty to deal with an agent fairly and in good faith by conspiring with Financial Advisors and the Marketing Company to terminate his contracts with those companies. There were triable issues of fact to establish his expectation that he

could continue to generate commissions from sales to his client base.

There were also triable issues of material fact as to his cause of action for intentional interference with contract. The Insurance Agency was aware that he had contracts with the Marketing Company and product providers. The Insurance Agency intentionally acted to induce the breach or disruption of those contracts, causing damages. Taylor is employed by the Marketing Company, but performs duties for the Marketing Company and the Insurance Agency. She worked as the compliance supervisor of the Insurance Agency's compliance department. She opened an investigation pertaining to Daldumyan on behalf of the Insurance Agency. Hodges, an Insurance Agency compliance specialist, participated in the investigation. The Insurance Agency's investigation file contained handwritten notes showing the Insurance Agency's attempt to find any purported violation to attribute to Daldumyan in order to terminate his relationship with the Marketing Company, Financial Advisors, and the product providers. Mineck voted with others to terminate Daldumyan's contract with Financial Advisors, although he did not work for Financial Advisors and conceded that there was no evidence of any violation of FINRA rules. Mineck and other Insurance Agency executives voted to terminate Daldumyan's contract with the Marketing Company. On August 17, 2012, the Insurance Agency notified Daldumyan that the contract with the Marketing Company was terminated.

In addition to compensatory damages in the form of lost income, Daldumyan sought punitive damages against the Insurance Agency for interference with Daldumyan's relationships with his customers.

Daldumyan submitted his own interrogatory responses in which he alleged detailed promises had been made by the Insurance Agency, by the Marketing Company acting on behalf of the Insurance Agency, or by the Marketing Company as the alter ego of the Insurance Agency. Daldumyan noted that the Insurance Agency and the Marketing Company had been evasive regarding what capacities individuals worked in when they performed certain functions. Both companies had promised to pay commissions on the sale of products through documentation provided by the Insurance Agency's employees. At every annual convention, key executives of the Insurance Agency and the Marketing Company, including Kent and Susan Davies, Mineck, DiPaolo, Joseph, and others represented to Daldumyan and other independent contractor agents that they would continue to earn commissions on insurance products they sold as insurance agents. These individuals also made promises on behalf of the Insurance Agency that Daldumyan, as an agent, would continue to earn commissions from the sale of products by his hierarchy. They represented on behalf of the Insurance Agency that he was building his own independent business which entitled him to commissions from his own sales and his hierarchy, and he was vested in these commissions. Daldumyan

concluded that the representations were made on behalf of the Insurance Agency, because the Marketing Company cannot have independent contractor insurance agent and does not have contractual relationships with product providers to pay commissions. Daldumyan provided specific details from several convention presentations about the value for agents of the Insurance Agency in building their own agencies.

Daldumyan submitted his own declaration and the declaration of his attorney Sylvia Sultanyan. Daldumyan provided the Insurance Agency's responses to interrogatories in support of his opposition as well. In particular, the Insurance Agency responded that it delegated its obligation to pay commissions on the sale of any insurance products made by independent contractor insurance agents to the Marketing Company, which functioned as the Insurance Agency's "paymaster." Daldumyan had agreed to the arrangement by entering into the contract with the Alliance, which the Marketing Company acquired as an asset acquisition in 2001. Daldumyan, the Marketing Company, and the person most qualified at the Insurance Agency would know that agents of the Insurance Agency are paid exclusively by the Marketing Company. The Insurance Agency and the Marketing Company have a servicing arrangement pursuant to which the Marketing Company functions as the paymaster for the Insurance Agency, among other things, in exchange for a monthly expense allocation. In this manner, the Insurance Agency delegated its

obligation to pay commissions on the sale of insurance products to the Marketing Company. The Insurance Agency has never paid Daldumyan any commissions. The selling agreements that the Insurance Agency has with insurance carriers entitled the Insurance Agency to commissions on any sales of insurance products that Daldumyan made through the Insurance Agency. The Insurance Agency has not paid any portion of commissions retained from the sale of insurance products to the Marketing Company. The Insurance Agency derives 99 percent of its revenues from commissions on the sale of insurance products and the remainder is from intercompany interest booked to the Insurance Agency. The Insurance Agency does not maintain hierarchies, which is exclusively a function of the Marketing Company's multi-level marketing platform.

Daldumyan also provided the Insurance Agency's discovery admissions. The Insurance Agency admitted that the individuals who work for the Insurance Agency do not work exclusively for the Insurance Agency. Pursuant to a servicing arrangement between the Insurance Agency and the Marketing Company, certain Marketing Company employees perform certain compliance-related, licensing, and/or other functions on behalf of the Insurance Agency in exchange for an expense allocation.

The Insurance Agency did not admit that it was the alter ego of the Marketing Company. It responded that the Insurance Agency and the Marketing Company are affiliates, not alter egos. They qualify as affiliates because

they are independent subsidiaries under the common control of Aegon, but they are separate legal entities that operate as separate entities under the direction and control of different groups of officers and directors.

The Insurance Agency admitted that it receives commission income from insurance product providers based on the sales of insurance products by independent contractor insurance agents and that it has no obligation to pay the independent contractor agents a portion of the commissions arising from their sales. The Insurance Agency would not admit that it had an obligation to pay independent contractor agents a portion of the commissions arising from their sale of insurance products. The Insurance Agency also would not admit that it directs the Marketing Company to pay the independent contractor agents a portion of the commissions arising from their sales of insurance products or from the sales of their hierarchy of independent contractor agents. The Insurance Agency would not admit that it retained a portion of the commissions generated from the independent contractor agents' sales of insurance products.

The Insurance Agency admitted that it permitted Daldumyan to sell the insurance products of product providers with whom the Insurance Agency had selling agreements, in that Daldumyan was "piggybacking" on the Insurance Agency's relationships with the product providers as a sub-agent, but the right to collect the commissions generated from Daldumyan's sales belonged to the Insurance Agency alone.

The Insurance Agency admitted that it does not issue paychecks or any type of compensation to the Marketing Company employees who perform services for the Insurance Agency. Instead, the Marketing Company provides an expense allocation to the Insurance Agency in the form of a monthly journal entry, to compensate the Marketing Company and the Marketing Company employees who perform those services.

Daldumyan submitted copies of letters that he received from product providers stating they received requests to terminate his distribution channel contracts or stating that they were terminating his agreement due to a notification that he was no longer with the Marketing Company.

Daldumyan submitted the minutes of a committee meeting called by Taylor, which seem to be minutes of an Insurance Agency committee meeting. The voting members listed are Mineck, Joseph, Davies, and Lilian Palacio. Non-voting members listed who attended the meeting are DiPaola, Easley, Taylor, Suzanne Imbrogno, Tim Smith, Hosier, and Hodges. The minutes state that the Insurance Agency "will be on a stand still" until Daldumyan's termination notice from Financial Advisors is submitted. Easley asked if termination for cause on the broker-dealer side automatically led to termination on the agency side. Following an unrecorded discussion, Joseph stated that they would have a virtual vote after Financial Advisors had officially terminated Daldumyan, and he instructed that no information should be given unless someone requested it.

Daldumyan submitted copies of the virtual votes. He submitted a "WFG Compliance Complaint Log." A complaint or issue was raised by Kent and received by reviewers Hosier and Hodges on June 6, 2012. The log stated that the investigation information was provided to Financial Advisors because Daldumyan was approved with them. Financial Advisors determined that Daldumyan had participated in unapproved outside business activities, unapproved private securities transactions, and unapproved personal investments, so they terminated him for cause. The log stated, "Following suit, [the Insurance Agency] sent out a virtual vote and decided to terminate agent for cause of being terminated from [Financial Advisors]."

Daldumyan also submitted the Insurance Agency's written objections to his subpoena in the arbitration matter, including "because the AAA does not have the authority to compel the overbroad pre-hearing document production sought by the Subpoena of a non-party."

He submitted Kent's deposition testimony. Kent did not understand the technical connection between the Marketing Company and the Insurance Agency. As far as he understood, Taylor was the Director of the Insurance Agency Compliance and Hodges worked for the Insurance Agency in the same department. He was notified by the Insurance Agency that Daldumyan was terminated. The Marketing Company did no investigation in connection with the termination of Daldumyan.

Daldumyan submitted Hodges's deposition testimony as well. Hodges stated that she is a Compliance Analyst for the Marketing Company and the Insurance Agency, but she is paid by the Marketing Company. Hodges made several specific handwritten notes, but has no recollection about where she obtained the information and only recalls speaking with Taylor about Daldumyan's investigation.

Daldumyan submitted portions of the reporter's transcript from the arbitration hearings. A witness testified in the arbitration that the Marketing Company does not have a compliance department. The employees for the Marketing Company are used in connection with the Insurance Agency in a compliance capacity on behalf of the Insurance Agency. Taylor and Hodges are employees of the Marketing Company, but their primary function is the duties that they perform on behalf of the Insurance Agency's compliance department. They are also involved in agency relations for the Marketing Company, which is conflict resolution between hierarchies. The hierarchies are a construct of the Marketing Company. Taylor and Hodges performed functions on behalf of the Insurance Agency as Marketing Company employees. The Insurance Agency does not have a payroll or a list of employees. Those functions are fulfilled by employees of the Marketing Company.

Daldumyan provided the deposition testimony of Janice Curcio, who was the person most qualified to testify for the Insurance Agency. The agents do not have their own contracts with product providers. Instead, they are listed

with the product providers as sub-agents under the Insurance Agency. A conversation between Mehrian's brother and Kent in 2012 started the investigation into Daldumyan. The Insurance Agency's compliance department, specifically Taylor, and Financial Advisors' compliance department ran the investigation pertaining to Daldumyan. The concerns about Daldumyan's outside business activities related to a bank and a resort. Agents with knowledge of the outside business activities were brought to the Insurance Agency compliance department for interviews. Outside business activities are not prohibited for an insurance agent. Outside business activities are relevant to registered representatives of a broker-dealer, but the Insurance Agency is not a broker-dealer. The Insurance Agency's investigation into Daldumyan's outside business activities was part of the Insurance Agency's investigation file, because the Insurance Agency and Financial Advisors worked the cases at the same time and shared information.

Curcio explained that the practice was for the Insurance Agency to notify the product providers that the agent was appointed, and the Insurance Agency would keep the records.

Daldumyan provided the Marketing Company's interrogatory responses in the arbitration proceedings. The Marketing Company identified all persons with knowledge of the investigation suggesting Daldumyan violated FINRA rules and breached his Financial Advisors agreement to be Mineck, Joseph, Susan, Palacio, Taylor and Hosier. The

Marketing Company has no selling agreements with insurance companies or mutual fund companies. The Marketing Company's function is to process commission payments received by either Financial Advisors or the Insurance Agency for payment to Marketing Company associates who are properly licensed, registered and appointed registered representatives of Financial Advisors, or properly licensed, appointed agents of the Insurance Agency.

Reply and Trial Court Ruling

The Insurance Agency filed a reply. A hearing was held on July 22, 2016. The trial court found privity existed between the Insurance Agency and the Marketing Company based on the allegations of the complaint that the Insurance Agency was the alter ego of the Marketing Company. There was no evidence that any employee of the Insurance Agency was separate from an employee of the company in arbitration. The gravamen of the complaint was that the Marketing Company terminated the written agreement and is liable to Daldumyan for vested commissions. Daldumyan stated that he was not seeking a double recovery. The trial court granted the motion for summary judgment on the ground that Daldumyan's recovery in the arbitration action covered the claims that had been asserted against the Insurance Agency or could have been asserted in the arbitration, even though the defendant at arbitration was

the Marketing Company. The trial court entered judgment in favor of the Insurance Agency on August 5, 2016. Daldumyan filed a timely notice of appeal.

DISCUSSION

Demurrer

A. Standard of Review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 (*Dinuba*).)

When a demurrer is sustained without leave to amend, we determine "whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*Dinuba*, *supra*, 41 Cal.4th at p. 865; *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1122.)

B. Implied-in-Fact Contract

Daldumyan contends the allegations of the complaint were sufficient to state a cause of action for breach of an implied-in-fact contract between the Insurance Agency and himself, or they could be amended to do so. We disagree.

An implied contract is one where the existence and terms of the agreement are manifested by the parties' conduct. (Civ. Code, § 1621.) In order to plead a cause of action for implied contract, "the facts from which the promise is implied must be alleged." (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 247.) "Like an express contract, an implied-in-fact contract requires an ascertained agreement of the parties. (*Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 102, p. 144.)" (*Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 636.)

The allegations of the complaint show there was no agreement between the Insurance Agency and Daldumyan for the Insurance Agency to make payments to Daldumyan. Daldumyan had a written contract to receive certain commissions from the Marketing Company in exchange for his performance under the associate contract. There is no allegation that he ever received payments from the Insurance Agency or expected to receive payments from the Insurance Agency. He was not even aware that the Insurance Agency had connected his appointment to the Insurance Agency's registration with the Department of

Insurance. The Insurance Agency never made any payment to Daldumyan, so it did not establish any contract to make payments through its course of conduct. The Insurance Agency had selling agreements with insurance product providers that required the providers to pay amounts to the Insurance Agency based on products and services that the agents sold, but the agreements did not require the Insurance Agency to pay any amount to the agents. If the Marketing Company failed to pay Daldumyan the amounts that he was entitled to receive under his associate contract with the Marketing Company, the Insurance Agency had no separate or independent obligation to pay him those amounts based on an implied contract. The complaint fails to allege an implied contract for payment by the Insurance Agency, and Daldumyan has not shown that the complaint could be amended to allege an implied contract between these parties. Since the allegations and the briefs concern a contract for the payment of commissions, we do not consider whether an implied contract arose for any other purpose as a result of the Insurance Agency's conduct.

C. Quasi-Contract (Unjust Enrichment)

Daldumyan contends that the complaint alleges a cause of action for unjust enrichment, which is considered to be a quasi-contract claim for restitution. We disagree.

"'The right to restitution or quasi-contractual recovery is based upon unjust enrichment. Where one obtains a

benefit which he may not justly retain, he is unjustly enriched. The quasi-contract, or contract "implied in law," is an obligation created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his former position by return of the thing or its equivalent in money. [Citations.] [¶] However, "[t]he mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.'" (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 91, pp. 122–123.) Thus, '[e]ven when a person has received a benefit from another, he is required to make restitution "only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it."' (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51; accord, *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1663.)" (*California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal.App.4th 151, 171, fn. 23, italics omitted (*California Medical*).) "Ordinarily, restitution is required only if "'the benefits were conferred by mistake, fraud, coercion or request.'" [Citation.]" (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1132 (*Prakashpalan*).)

"[A] quasi-contract action for unjust enrichment does not lie where, as here, express binding agreements exist and define the parties' rights. (Cf. *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1387; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 203; *Hedging Concepts, Inc. v.*

First Alliance Mortgage Co. (1996) 41 Cal.App.4th 1410, 1419–1420.) 'When parties have an actual contract covering a subject, a court cannot—not even under the guise of equity jurisprudence—substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract.' (*Hedging Concepts, Inc.,* at p. 1420.)" (*California Medical,* supra, 94 Cal.App.4th at p. 172, fns. omitted.)

"In *Hedging Concepts*[*, supra*,] 41 Cal.App.4th 1410, the appellate court stated: 'A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. [Citations.] However, it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation.' (*Id.* at p. 1419.) The appellate court also stated: 'Quantum meruit is an equitable theory which supplies, by implication and in furtherance of equity, implicitly missing contractual terms. Contractual terms regarding a subject are not implicitly missing when the parties have agreed on express terms regarding that subject. A quantum meruit analysis cannot supply "missing" terms that are not missing. "The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability . . . ."' (*Ibid.*)" (*California Medical, supra,* 94 Cal.App.4th at p.172, fn. 27.)

In *California Medical*, defendant insurance company Aetna collected premiums from enrollees and entered into contracts with intermediary companies that would pay physicians for services rendered to enrollees. The intermediaries contracted directly with the physicians, including provisions that the physicians would "look solely" to the intermediaries for payment for health services provided to enrollees in Aetna's plans. (*California Medical, supra,* 94 Cal.App.4th at pp.156–157, fn. 7.) Several intermediaries became insolvent and failed to pay physicians, despite having received payment from Aetna. The physicians filed an action against Aetna alleging quasi-contract, among other theories, to obtain payment. The appellate court held that as a matter of law, where the subject matter of the claim was governed by express contracts that defined the parties' rights, there could be no quasi-contract claim. In *California Medical*, the issue of whether the physicians were entitled to compensation from Aetna was addressed by the contracts between the physicians and the intermediaries, contracts between the intermediaries and Aetna, and contracts between the enrollees and Aetna, so there could be no action for quasi-contract in that case. (*Id*. at pp. 172–173.) The *California Medical* court further found that nothing in that case precluded Aetna's risk-shifting arrangement or obligated Aetna to guarantee payment to the physicians if the intermediaries failed to pay them after Aetna had made payments to the intermediaries for their services. (*Ibid*.)

Lastly, the court found that the physicians' quasi-contract claim also failed "because under the circumstances alleged here, any benefit conferred upon defendants by Physicians was simply an incident to Physicians' performance of their own obligations to Intermediaries under the Intermediary-Physician Agreements. (*Major-Blakeney Corp. v. Jenkins* (1953) 121 Cal.App.2d 325, 340–341.) As noted by the appellate court in *Major-Blakeney Corp.*, "'A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.'" (*Id.* at pp. 340–341; accord, *Griffith Co. v. Hofues* (1962) 201 Cal.App.2d 502, 508; see 1 Witkin, Summary of Cal. Law, *supra,* Contracts, § 97, pp. 126–127 ['where the plaintiff acts in performance of his own duty or in protection or improvement of his own property, any incidental benefit conferred on the defendant is not unjust enrichment'].)" (*California Medical,* supra, 94 Cal.App.4th at p. 174.)

In the instant case, no quasi-contract claim has been stated, because Daldumyan had a written contract with the Marketing Company. His successful performance under the associate contract entitled him to payments from the Marketing Company. Any benefits received by the Insurance Agency from product providers were simply incident to Daldumyan's performance of his contract with the Marketing Company. Since Daldumyan was not entitled to restitution, the trial court properly sustained the

demurrer without leave to amend as to the quasi-contract claim for restitution of commissions received by the Insurance Agency based on sales of insurance products by Daldumyan and the associates in his hierarchy.

D. Fraud

Daldumyan contends that the complaint alleges a fraud cause of action based on fraudulent concealment and misrepresentation. We conclude that he stated a cause of action for fraudulent concealment.

"The elements of a claim for fraudulent concealment require the plaintiff to show that: '(1) the defendant . . . concealed or suppressed a material fact, (2) the defendant [was] under a duty to disclose the fact to the plaintiff, (3) the defendant . . . intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff [was] unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' [Citation.] The duty to disclose may be established where there is a confidential relationship between the parties, defendant has made a representation which was likely to mislead due to the nondisclosure, there is active concealment of undisclosed matters, or one party has sole knowledge of or access to material facts and knows such facts are not known to or

discoverable by the other party." (*Prakashpalan, supra,* 223 Cal.App.4th at p. 1130.)

In this case, Daldumyan alleged that on August 9, 2005, the Insurance Agency caused Daldumyan's appointment to become connected with the Insurance Agency's registration as an active insurance agent in California instead of the Marketing Company without providing any notice to Daldumyan. Beginning in August 2005, the Insurance Agency began collecting the commissions on sales made by Daldumyan and the associates in his hierarchy without any notice to associates or obligation to make payments to associates. Under Daldumyan's contract with the Marketing Company, he was required to arbitrate disputes with the Marketing Company under Georgia law, but the Insurance Agency was not required to arbitrate and was not subject to the jurisdiction of the arbitration proceedings, which increased the burden on Daldumyan when he sought resolution of his disputes. Without his knowledge, the restructuring potentially required litigation in multiple forums with the danger of conflicting results. The Insurance Agency had knowledge or access to the material facts about the effect of the corporate payment restructuring of which Daldumyan was not made aware. Daldumyan's complaint alleges that he was unaware of the material facts that the Insurance Agency concealed and his reliance on the fraudulent conduct was reasonable and justifiable. It also alleges that he was damaged

according to proof at trial. This was sufficient to allege a cause of action for fraudulent concealment.

Daldumyan's fraud cause of action was also based on misrepresentations. "The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)" (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.)

No justifiable reliance has been alleged as to these representations. The same types of representations were made by the Alliance and the Marketing Company before August 2005, namely, that the companies offered a business platform for individuals seeking to run an independent business and agents could build their own business in which they can become vested, continue to earn commission from their sales and the commissions generated by the hierarchies. Daldumyan invested nine years building a career in multi-level marketing of insurance products prior to August 2005—initially with the Alliance and continuing with the Marketing Company—based on these representations. Daldumyan's written contract governed the payment and vesting of commissions and the termination of the contractual rights. Daldumyan has not alleged that he

took any action or refrained from taking any action in reliance on representations made after August 2005 by the Insurance Agency through the Marketing Company. The demurrer was properly sustained as to fraud based on misrepresentation, but must be overruled as to fraudulent concealment.

E. Unfair Competition

Daldumyan contends that the complaint alleged a cause of action for violation of the unfair competition law. We agree.

"The primary purpose of the UCL is "'the preservation of fair business competition.' [Citations.]' (*Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (hereafter *Cel–Tech*).) This purpose includes "'the right of the public to protection from fraud and deceit.'" [Citations.]" (*People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 514–515, italics omitted (*Fremont Life Ins. Co.*).)

The UCL defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) "Written in the disjunctive, this language 'establishes three varieties of unfair competition.' (*Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647.)" (*Fremont Life Ins. Co.*, *supra*, 104 Cal.App.4th at p. 515.)

"The three prongs of the law have different thresholds. Under its 'unlawful' prong, 'the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL.' (*Lazar v. Hertz Corp*. (1999) 69 Cal.App.4th 1494, 1505.) Thus, a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." (*Prakashpalan*, *supra*, 223 Cal.App.4th at p. 1133.)

"To establish an unfair business act or practice, a plaintiff must establish the unfair nature of the conduct and that the harm caused by the conduct outweighs any benefits that the conduct may have. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1473.)" (*Prakashpalan*, *supra*, 223 Cal.App.4th at pp. 1133–1134.) "A business act or practice is unfair when the conduct 'threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.' (*Cel–Tech*[*, supra,*] 20 Cal.4th at p. 187.)" (*Prakashpalan*, *supra*, 223 Cal.App.4th at p. 1133.) "In a consumer case, determining whether a business practice is 'unfair' involves 'weigh[ing] the utility of the defendant's conduct against the gravity of the harm to the alleged victim.' (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 718.)" (*Ibid.*)

"The *unfairness* prong has been employed to enjoin deceptive or sharp practices. [Citations.] The court also has determined that *unfair* business practices include

unconscionable provisions in standardized agreements. (*People v. McKale* (1979) 25 Cal.3d 626, 634–637 [tenants of mobile home park required to sign documents that include illegal provisions].)" (*Fremont Life Ins. Co.*, *supra*, 104 Cal.App.4th at pp. 515–516, fn. omitted.)

"Finally, the *fraud* prong of section 17200 'bears little resemblance to common law fraud or deception.' [Citation.] Under section 17200, '[t]he test is whether the public is likely to be deceived. [Citation.]' . . . [Citation.]" (*Fremont Life Ins. Co.*, *supra*, 104 Cal.App.4th at p. 516.) "Thus, in order to state a cause of action based on a fraudulent business act or practice, the plaintiff must allege that consumers are likely to be deceived by the defendant's conduct. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211.)" (*Prakashpalan*, *supra*, 223 Cal.App.4th at p. 1134.) "Traditional fraud requirements, such as intent or actual reliance, are inapplicable to the UCL." (*Id.* at p. 1133.) "'This means that a section 17200 violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. [Citation.]' [Citation.]" (*Fremont Life Ins. Co.*, *supra*, 104 Cal.App.4th at pp. 516–517.)

"A distinguishing feature of the UCL is that it does not provide a private action for damages or other legal remedies. Instead, the UCL provides an equitable means to prevent unfair practices in the future and restore money or property to victims of those practices. [Citation.] Thus, remedies are

limited to injunctive relief and restitution." (*Prakashpalan*, *supra*, 223 Cal.App.4th at p. 1133.) "'Injunctions are "the primary form of relief available under the UCL to protect consumers from unfair business practices," while restitution is a type of "ancillary relief."' [Citation.] Restitution is available 'to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition.' (§ 17203.)" (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 790.)

"'[T]he equitable remedies of the UCL are subject to the broad discretion of the trial court. [Citation.] The UCL does not *require* "restitutionary or injunctive relief when an unfair business practice has been shown. Rather, [section 17203] provides that the court '*may* make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore . . . money or property."'" [Citation.]" (*In re Tobacco Cases II*, *supra*, 240 Cal.App.4th at p. 790.)

In this case, both the unfair and fraud prongs of section 17200 apply to the allegations. The difficulty that an independent contractor insurance agent would have in attempting to ascertain the corporate payment structure from the associate contract is unfair in the sense of a deceptive or sharp practice. The arbitration provisions in the associate contracts with the Marketing Company, while the Insurance Agency has the right to collect commissions and is not subject to the jurisdiction of the arbitration

proceedings for purposes of discovery or resolution of any disputes, are at least unfair, and arguably unconscionable. The fact that information about the Insurance Agency's collection of commissions on sales from product providers without any corresponding obligation to pay compensation to agents is not conspicuously set forth in an agreement, waiver, or notice to the independent contract insurance agents is likely to deceive, which also brings this set of circumstances within the fraud prong of section 17200.

Daldumyan's complaint sought injunctive relief. We conclude that the complaint states a cause of action for violation of the unfair competition law. A private plaintiff has standing to bring an action under the UCL only if he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1359.) Daldumyan lost commissions due to the improper termination of his associate contract. He was unable to obtain payment from the entity that collects the commissions because the payment structure had been changed without notification to the associates, and the nature of the separation was concealed from him and the other independent contractor agents. Instead of one economical arbitration to resolve his disputes, Daldumyan was required to pursue actions in two different forums to obtain discovery and resolution of the issues underlying his termination. He lost the business that he had spent his adult life building as a result of alleged interference by the

Insurance Agency in his contract and did not have the recourse that he expected to be able to pursue, because he had been misled about, or the companies failed to notify him of, their separate nature. Daldumyan's allegations are sufficient to state that he suffered injury in fact and lost money or property because of the unfair competition.

Summary Adjudication

A. Standard of Review

"We review orders granting or denying a summary judgment motion de novo." (*Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1403 (*Crown Imports*).) "'As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)" (*Crown Imports, supra,* 223 Cal.App.4th at p. 1403.) "'We liberally construe the evidence in support of the party opposing summary [adjudication] and resolve doubts concerning the evidence in favor of that party.' (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th

1028, 1037.)" (*Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 269.)

B. Promissory Estoppel

Daldumyan contends there are triable issues of fact as to his cause of action for promissory estoppel. We disagree.

"""The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance."""" [Citation.]" (*Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 416 (*Granadino*).)

"""[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice . . . ." [Citation.] The promise must, in addition, be "clear and unambiguous in its terms." [Citation.] "Estoppel cannot be established from . . . preliminary discussions and negotiations.'" [Citation.]" (*Granadino, supra,* 236 Cal.App.4th at p. 417.)

"""Promissory estoppel applies whenever a "promise *which the promissor should reasonably expect* to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance" would result

in an "injustice" if the promise were not enforced . . . .""
[Citation.]" (*Id.* at p. 418.)

Daldumyan alleged that the Insurance Agency promised through documentation provided by its employees to pay him commissions on the sale of products. He alleged that executives of the Insurance Agency and the Marketing Company represented at annual conventions that independent contractor agents would continue to earn commissions on insurance products they sold as insurance agents. These individuals also made promises on behalf of the Insurance Agency that Daldumyan, as an agent, would continue to earn commissions from the sale of products by his hierarchy. They represented on behalf of the Insurance Agency that he was building his own independent business which entitled him to commissions from his own sales and his hierarchy, and he was vested in these commissions. Daldumyan concluded that the representations were made on behalf of the Insurance Agency, because the Marketing Company cannot have independent contractor insurance agents and does not have contractual relationships with product providers to pay commissions. Daldumyan provided details of several convention presentations about the value for agents of the Insurance Agency in building their own agencies.

In response to the summary judgment motion, no evidence of a clear, unambiguous promise by the Insurance Agency was submitted. No evidence was submitted to support finding that any employee promised that the

Insurance Agency would pay commissions to Daldumyan or other associates. In addition, there is no evidence that Daldumyan took any action or refrained from taking any action in reliance on the statements that he has submitted. Prior to 2005, Daldumyan worked for nine years to build a successful career selling financial and insurance products and recruiting associates. The promotional statements made in documents and at conventions were no different than the promises that caused him to enter into the associate contract with the Alliance and continued with the Marketing Company. Had the statements not been made after 2005, there is no evidence that Daldumyan would have taken any different action. Summary adjudication was proper for the cause of action for promissory estoppel.

C. Intentional Interference with Contract

Daldumyan contends that there are triable issues of material fact concerning his cause of action for intentional interference with contract. We agree.

"[A] stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 (*Pacific Gas*).) The elements necessary to state a cause of action for intentional interference with contractual relations are "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts

designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Ibid.*)

"It is not a requirement that 'the defendant's conduct be wrongful apart from the interference with the contract itself. [Citation.]' (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 (*Quelimane*).)" (*Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, 51.)

A tort cause of action for interference with a contract cannot be maintained against a party to the contract or the agent of a party to the contract, because a party to a contract cannot interfere with its own contract. (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 963–964 (*Asahi Kasei*); *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 513, 507, 514; *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1604 ["it is settled that 'corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract'"].) A corporate owner, however, does not have an absolute privilege to interfere with a subsidiary's contract. (*Asahi Kasei*, *supra*, 222 Cal.App.4th at pp. 520–521; *Collins v. Vickter Manor, Inc.* (1957) 47 Cal.2d 875, 883 [privilege of corporation owners "to cause the corporation to discontinue its relations with plaintiffs, in the belief that such a course of action was in the best interests of the corporation, is a matter of defense, to be decided by a resolution of the factual issues presumptively involved"]; *Culcal Stylco, Inc. v.*

Vornado, Inc. (1972) 26 Cal.App.3d 879, 882–883 [parent corporation is not privileged under all circumstances to intentionally interfere with contract of a subsidiary].)

In the instant case, there were triable issues of fact as to whether the Insurance Agency interfered with the Marketing Company's contract with Daldumyan. Daldumyan submitted evidence from which a trier of fact could conclude that the Marketing Company and Daldumyan had a valid contract, of which the Insurance Agency was fully aware. The Insurance Agency was the entity that had a compliance department. There was evidence that the Insurance Agency investigated whether Daldumyan engaged in outside business activities, even though the activities were not prohibited under his contract with the Marketing Company and were unrelated to his ability to sell insurance products as an agent of the Insurance Agency. Mineck declared that employees of the Marketing Company voted to terminate Daldumyan's contract, but Daldumyan submitted evidence from which a trier of fact could conclude that the investigation and termination of Daldumyan was conducted in their capacities as officers and directors of the Insurance Agency, and as employees performing work for the Insurance Agency. Officers and directors of the Insurance Agency voted to terminate Daldumyan even though they had no contract with Daldumyan and were not parties to his contract with the Marketing Company. Based on the recommendation received from the Insurance Agency, the Marketing Company followed the direction of the Insurance

Agency to terminate and divest Daldumyan. A trier of fact could find that the Insurance Agency's intentional acts in investigating and voting to terminate Daldumyan based on business activities that were not precluded under his contract with the Marketing Company were designed to induce a breach or disruption of his contractual relationship with the Marketing Company, and in fact caused a breach of his contractual relationship with the Marketing Company, resulting in damages to Daldumyan. The motion for summary adjudication of the cause of action for intentional interference with contract must be denied.

D. Intentional Interference with Prospective Economic Advantage

Daldumyan did not raise the issue of intentional interference with prospective economic advantage until his reply brief. We find no independently wrongful conduct has been alleged apart from the alleged interference itself, and therefore, summary adjudication of the cause of action for intentional interference with prospective economic advantage was proper.

"'The elements of a claim of interference with economic advantage and prospective economic advantage are: '"' (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional [or negligent] acts on the part of the defendant designed to disrupt the relationship; (4) actual

disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' [Citation.]" [Citation.]' (*Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 596.)" (*Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1404 (*Crown Imports*).)

"An additional element is required. 'The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct. [Citation.]' (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1158–1159.) As such, courts require an additional element, that the alleged interference must have been wrongful by some measure beyond the fact of the interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392–393.) For an act to be sufficiently independently wrongful, it must be 'unlawful, that is, . . . it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' (*Korea Supply Co. v. Lockheed Martin Corp., supra,* 29 Cal.4th at p. 1159.)" (*Crown Imports*, *supra*, 223 Cal.App.4th at p. 1404.)

"The independently wrongful act must be the act of interference itself, but such act must *itself* be independently wrongful. That is, '[a] plaintiff need not allege the interference and a second act independent of the

interference. Instead, a plaintiff must plead and prove that the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a prospective economic advantage. [Citations.]' (*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.* (2006) 138 Cal.App.4th 1215, 1224.)" (*Crown Imports*, *supra*, 223 Cal.App.4th at p. 1404.)

"It is the plaintiff's burden to plead and prove that the defendant's conduct is independently wrongful in order to recover. The fact that the defendant's conduct was independently wrongful is an element of the cause of action itself. (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881.)" (*Crown Imports*, *supra*, 223 Cal.App.4th at pp.1404–1405.)

Daldumyan's allegations of interference with prospective economic advantage were based on the telephone calls that the Insurance Agency made to clients and associates during its investigation of Daldumyan's business activities. He has not provided evidence of any independent actionable wrongdoing in the Insurance Agency's telephone calls and questions to clients and associates beyond the interference with Daldumyan's prospective economic advantage. Summary adjudication of this cause of action is proper.

E. Claim Preclusion

Finally, the Insurance Agency contends Daldumyan's action is barred by the doctrine of claim preclusion. Specifically, the Insurance Agency contends that it is in privity with the Marketing Company for purposes of claim preclusion because Daldumyan alleged the Insurance Agency is the alter ego of the Marketing Company. The Insurance Agency asserts the judgment in the arbitration proceedings precludes Daldumyan from relitigating any causes of action resolved in the arbitration, as well as any causes of action that could have been raised in the arbitration. This analysis is incorrect.

"*Claim preclusion* 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).)

"*Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. [Citation.] There is a limit to the reach of issue preclusion,

however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party." (*DKN Holdings, supra,* 61 Cal.4th at p. 824.)

"Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privy in the first suit. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828.) 'Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding. [Citations.]' (*Ibid.*) In summary, issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings, supra,* 61 Cal.4th at pp. 824–825.)

"When a defendant's liability is entirely derived from that of a party in an earlier action, claim preclusion bars the second action because the second defendant stands in privity with the earlier one. (See *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 576–57; *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 557–558.)" (*DKN Holdings, supra,* 61 Cal.4th at pp. 827–828.) ""A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract . . . , but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter

ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice.'" (*Greenspan v. LADT LLC* [(2010) 191 Cal.App.4th 486,] 516, citing *Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1359.)" (*Wells Fargo Bank, N.A. v. Weinberg* (2014) 227 Cal.App.4th 1, 7–8.)

Daldumyan cannot maintain claims against the Insurance Agency where the Insurance Agency's liability is only derivative of the Marketing Company's liability. The causes of action remaining in the lawsuit, however, are based directly on the Insurance Agency's actions; liability does not depend on a finding of alter ego. In particular, the cause of action for intentional interference with contract is based on the Insurance Agency's liability for its own alleged actions to disrupt the contract between the Marketing Company and Daldumyan. No cause of action for intentional interference with contract was determined in the arbitration.

The cause of action for fraudulent concealment is also based on the Insurance Agency's own actions in that Insurance Agency failed to notify agents of changes. Fraudulent concealment was not a cause of action litigated in the arbitration proceedings. The cause of action for violation of Business and Professions Code section 17200 was not a cause of action determined by the earlier arbitration proceeding, nor could it have been, because the provisions of California's unfair business law did not apply

under the Georgia law applied in the arbitration. We note that Daldumyan is precluded, however, from relitigating the amount that he was damaged as a result of the Marketing Company's breach of the contract and the covenant of good faith and fair dealing. The arbitrators determined the issue of Daldumyan's damages for breach of contract, including the amount of lost commissions, the consequential economic damages, and his legal fees stemming from the arbitration proceedings. Judgment was entered by the federal court confirming the arbitration award in favor of Daldumyan. Daldumyan is bound by the issues conclusively determined in the prior proceeding. The issue of contract damages, including lost commissions and consequential economic losses, was actually litigated and necessarily decided in the earlier action to which Daldumyan was a party. He may continue to litigate issues pertaining to other relief, such as injunctive relief or tort damages that have not previously been determined.

DISPOSITION

The judgment is reversed. The order granting summary judgment and the order sustaining the demurrer are reversed. The trial court is directed to enter a new and different order sustaining the demurrer as to causes of action for implied-in-fact contract and unjust enrichment, but overruling the demurrer as to causes of action for fraudulent concealment and violation of Business and

Professions Code section 17200. The trial court is also directed to grant summary adjudication of the causes of action for promissory estoppel and intentional interference with prospective economic advantage, but deny summary adjudication of the cause of action for intentional interference with contract. In the interests of justice, the parties are to bear their own costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KIM, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.