76 Cal.Rptr.2d 911.) The trial court granted summary judgment in favor of the owner and his brokers, reasoning, inter alia, that the owner could not establish reasonable reliance on the defendants' representations. (*Ibid.*)

On appeal, the owner and brokers did not assert that paragraph 18F operated as an exculpatory clause, but contended that it established that the buyer's reliance on the pre-sale representations of size was unreasonable because he was on notice that they were "approximations only." (*Furla, supra,* 65 Cal.App.4th at p. 1080, 76 Cal.Rptr.2d 911.) In reversing the summary judgment, we rejected this contention: "Assuming that paragraph 18F put [the buyer] on notice that prior statements of square footage were approximations only, it is still a question of fact for a trier of fact whether [the buyer] reasonably relied ***797** upon defendants' approximations. Defendants assume that if their prior estimates of square footage are treated as approximations, defendants cannot be liable.... But according to [the buyer's] theory of the case, the estimate of 5,500 square feet was not merely inaccurate, it was *grossly* inaccurate, by more than 20 percent. Defendants' own citation of a dictionary definition of 'approximate' includes 'near to; about; a little more or less; close.' The alleged error here was not de minimis, and cannot be ignored. We cannot say that no reasonable jury could conclude that an 'approximation' of square footage which is wildly exaggerated amounts to an actionable misrepresentation of fact." (*Furla, supra,* 65 Cal.App.4th at p. 1080, 76 Cal.Rptr.2d 911.)

Here, McClain alleges that the Charanians exaggerated the size of her unit by 186 square feet, or 7.6 percent of its actual size, and increased her share of the common expenses by 4 percent through a calculation that understated the size of the shopping center by 965 square feet, or 8.1 percent of its actual size. Although these discrepancies are smaller than those at issue in *Furla,* they cannot be regarded as de minimis or necessarily "near to" the actual sizes as a matter of law. As alleged in the complaint, they operated to increase the rental payments incurred by McClain's retail business by more than $90,000 over the term of the lease. In view of *Furla,* the fact that Paragraph 2.1 put McClain on notice that the Charanians' representations of size were approximations does not preclude her from showing that they were, ****896** in fact, materially and unreasonably inaccurate.[3]

[8] In an apparent effort to distinguish *Furla,* Octagon argues that Paragraph 2.1 not only uses the term "approximation," but states (1) that the parties agreed the approximations were "reasonable" and (2) that McClain's rent was not subject to revision regardless of the actual sizes. These clauses do not aid Octagon. As to element (1), a stipulation intended to bar a party's ***798** fraud claims does not bind the party, and thus the insertion of language agreeing that a material misrepresentation is "reasonable" is of no effect. (1 Witkin, Summary of Cal. Law, *supra,* Contracts, § 304, p. 330.) If, as McClain asserts, the Charanians assured her that the square footage represented was accurate and dissuaded her from taking her own measurements, any agreement that the measurement set forth in the lease was reasonable reflects nothing more than a belief induced by such misrepresentations.

Similarly, to the extent element (2) purports to insulate Octagon from liability for any discrepancy—no matter how great—between the actual square footage and that represented in the lease, it is akin to an "as is" clause. California courts have routinely rejected such clauses as ineffective in insulating a contracting party from fraud claims regarding nonobvious defects in goods. (See, e.g., *Orlando v. Berkeley* (1963) 220 Cal.App.2d 224, 228–229, 33 Cal.Rptr. 860 [contractual clause that provides, " 'Buyer agrees to waive termite clearance and to absolve seller of any warranty, accepting house *AS IS* ' " does not bar claim for concealment of termite infestation in house].) In sum, the trial court erred in sustaining the demurrer with respect to McClain's misrepresentation claim.

### 3. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

[9] [10] We reach the contrary conclusion regarding McClain's related claim for breach of the implied covenant. Generally, every contract, including commercial leases, " ' "imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." [Citation.]' " (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371–372, 6 Cal.Rptr.2d 467, 826 P.2d 710, quoting *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683–684, 254 Cal.Rptr. 211, 765 P.2d 373.)

Regarding this claim, the FAC alleges that Octagon breached the implied covenant ****897** "by negotiating with McClain for the rental of the Premises on a per-square foot basis and then intentionally, or negligently, overstating the true size of the Premises. The net result of the foregoing was that Octagon pulled a 'bait & switch' on McClain in that Octagon negotiated a per-square foot price for the Premises and then inserted only its fraudulently derived amount for the base rent as the purported final agreement between the parties in the Lease. The net result was that Octagon intentionally deprived McClain of the benefit of her bargain by surreptitiously charging her a rental rate which was far in excess of the mutually negotiated price." (Italics omitted.)

The FAC also alleges that Octagon breached the implied covenant "by negotiating the [common expenses] charges with her on a per-square foot ***799** basis, which Octagon held out as a reflection of the ratio which the Premises held to [the] size of the Shopping Center as a whole. Octagon falsely represented the ratio to be 23 [percent]. Octagon induced McClain to enter into the Lease which provided that her proportional share of the annual [common] expenses were [*sic* ] 23 [percent], when it knew or had reason to know that the true ratio was substantially less." Finally, the FAC alleges that Octagon breached the implied covenant because the Charanians repeatedly assured McClain that their representations were trustworthy.

[11] Insofar as these allegations assert that Octagon violated the implied covenant during the negotiations of the lease, they fail to state a claim. As the court explained in *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1035, 14 Cal.Rptr.2d 335, the implied covenant is a supplement to an existing contract, and thus it does not require parties to negotiate in good faith prior to any agreement.

[12] In an apparent effort to avoid the operation of this principle, McClain contends that the FAC alleges—or can be amended to allege—that before the parties executed the lease, they entered into *another* agreement with materially different terms regarding McClain's rent. She argues that Octagon breached the implied covenant by "inserting erroneous figures for the base rent and the [common expense] charges into the [l]ease which did not reflect the contract terms upon which the parties had mutually agreed and which McClain had intended."

[13] No such allegation can cure the deficiency explained above. It contradicts the allegations in the FAC and McClain's original complaint that McClain *accepted* the Charanians' representations about the size of her unit and her share of the common expenses, which were incorporated into the lease. Generally, "[a] plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. [Citation.] Likewise, the plaintiff may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false. [Citation.]" (*Cantu v. Resolution Trust Corp., supra,* 4 Cal.App.4th at p. 877, 6 Cal.Rptr.2d 151, italics omitted.) That is the case here.

**4. *Declaratory Relief***

[14] [15] Because the FAC adequately alleges a fraud claim based on misrepresentations about her proper base rent and share of the common expenses under the lease (see pt. A.2., *ante* ), the trial court erred in sustaining the demurrer to McClain's claim for declaratory relief. As the court explained in ****898 *800** *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 605, 98 Cal.Rptr.2d 277: "The existence of an 'actual controversy relating to the legal rights and duties of the respective parties,' suffices to maintain an action for declaratory relief. [Citation.] Code of Civil Procedure section 1060 is clear: 'Any person interested under a written instrument, ... or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court ... for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract.' " Here, the FAC adequately alleges an "actual controversy" regarding McClain's obligations to pay rent and other expenses under the lease, and thus pleads a claim for declaratory relief.

**B. *CCRAA Claim***

McClain contends that the trial court erred in determining that she failed to establish her claim under the CCRAA. For the reasons explained below, we disagree.

[16] Generally, the CCRAA "limits the dissemination of consumer credit information." (*Olson v. Six Rivers National Bank* (2003) 111 Cal.App.4th 1, 8, 3 Cal.Rptr.3d 301.) Under Civil Code section 1785.3, subdivision (c), a "[c]onsumer credit report" is defined as "any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for: (1) credit to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) hiring of a dwelling unit ..., or (4) other purposes authorized in Section 1785.11."[4] The definition expressly exempts certain categories of credit reports, including reports "furnished for use in connection with a transaction which consists of an extension of credit to be used solely

for a commercial purpose." (§ 1785.3, subd. (c).)

Section 1785.11 authorizes consumer credit reporting agencies to provide a consumer credit report without the consumer's prior written consent only in enumerated circumstances. Pertinent here is subdivision (a)(3)(F), which permits an agency to provide a consumer credit report to a person it has reason to believe "has a legitimate business need for the information in connection with a business transaction involving the consumer." Also of importance here are subdivisions (a)(1) and (a)(2) of section ***801** 1785.19, which authorize the imposition of a civil penalty not exceeding $2,500 on any person who "knowingly and willfully" obtains access to or data from a consumer's credit file "other than as provided in Section 1785.11."

Only "[c]onsumer credit reporting" is subject to the CCRAA. (§ 1785.41.) Section 1785.41 provides: "Commercial credit reports, which differ significantly, are not subject to [the CCRAA]. The circumstances, business practices, and reports themselves differ sufficiently to make it impractical to include commercial credit reports under the [CCRAA]." With exceptions not relevant here, section 1785.42 defines a commercial credit report as "any report provided to a commercial enterprise for a legitimate business purpose, relating to the financial status or payment habits of ****899** a commercial enterprise which is the subject of the report."

[17] At trial, McClain contended that the Charanians violated the CCRAA by improperly obtaining her credit report without her consent. The evidence at trial established that in February 2005, Ted Charanian opened an online credit information account with Citi Credit Bureau (Citi), and that in March 2005, he obtained a credit report on McClain from Citi. McClain testified that she never authorized the Charanians to gain access to her personal credit information. In addition, she submitted testimony from Jimmy Yu, a Citi employee, and records from Citi, indicating that Ted Charanian had stated that his purpose in opening the Citi account was "Tenant screening, management for self."

Ted Charanian testified as follows: When McClain sought to lease her unit, she submitted a personal financial statement that identified her annual income from A+ Teaching Supplies as $25,000 per year, and also stated that her husband's annual income was $170,000. Reassured by McClain's substantial financial resources, the Charanians permitted her to lease the second largest unit in the shopping center. Subsequently, at a deposition in September 2004, Ted Charanian learned that McClain's husband had opened a small business and no longer earned $170,000 per year. In December 2004, McClain paid her rent in an unusual manner: she submitted two checks, only one of which was drawn on her business account.

In February 2005, Ted Charanian decided to open the Citi account to "get a better handle on, if possible, the economic viability of both current and prospective ... [c]ommercial tenants." He explained his purposes to Citi's representative during phone conversations and filled out the Citi application in accordance with the representative's advice. In view of McClain's unusual rent payment and an apparent reduction in the number of her customers, the Charanians became concerned she would not be able to pay her rent. Ted ***802** Charanian obtained the credit report, determined that McClain's credit was in good order, placed the report in his files, and "forgot about it."

In denying McClain's CCRAA claim, the trial court found that the Charanians had a legitimate business need for the report, and that McClain failed to show that Ted Charanian breached his agreement with Citi in obtaining the report. On appeal, McClain argues that the trial court erred as a matter of law in applying the CCRAA. She contends that the record establishes that Octagon obtained access to McClain's credit data in a manner "other than as provided in Section 1785.11" (§ 1785.19, subds.(a)(1), (a)(2)), and that Octagon is subject to a civil penalty under the CCRAA. The crux of this contention is that because the credit report was indisputably obtained in connection with *a commercial transaction,* it is not a "consumer credit report," as defined in section 1785.3, subdivision (c), and thus falls outside the scope of section 1785.11.

This contention fails in the face of sections 1785.41 and 1785.42. Although the parties did not raise or discuss these provisions before the trial court, we will affirm the judgment on any ground properly supported by the record.[5] On appeal, "[w]e do not review the trial court's reasoning, but rather its ruling." (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15, 68 Cal.Rptr.2d 837.) Thus, we may affirm the ****900** trial court's ruling "on any basis presented by the record whether or not relied upon by the trial court." (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1, 119 Cal.Rptr.2d 606.)

In view of the trial court's findings and the undisputed facts, the credit report that Ted Charanian obtained falls within the definition of a "[c]ommercial credit report" in section 1785.42. The record establishes that the tenant on the lease was a commercial enterprise, namely, "Kelly

McClain dba A+ Teaching Supplies," and that Ted Charanian obtained the credit report to determine whether McClain could meet her financial obligations under the lease.[6] The report was thus "provided to a commercial enterprise for a legitimate business purpose, relating to the financial status or payment habits of a commercial enterprise which is the subject of the report." (§ 1785.42.) ***803** Because the report is exempt from the provisions of the CCRAA under section 1785.41, the trial court did not err in rejecting McClain's claim.[7]

Pointing to *Bakker v. McKinnon* (8th Cir.1998) 152 F.3d 1007 (*Bakker* ), McClain argues that the report obtained by Ted Charanian is not a commercial credit report because Citi does not characterize or identify itself as a commercial credit reporting agency. We disagree. In construing a statute, we look first to "the words of the statute, giving effect to their plain meaning. If those words are clear, we may not alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. [Citation.]" (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437, 35 Cal.Rptr.2d 155.) The definition of a "[c]ommercial credit report" in section 1785.42 encompasses "any report" that has the specified features, but does not require such reports to originate from a self-designated commercial credit reporting agency. Moreover, subdivision (b) of section 1785.42 defines a commercial credit reporting agency as "any person who, for monetary fees, dues, or on a cooperative nonprofit basis, provides commercial credit reports to third parties." This definition identifies providers of commercial credit reports as commercial credit reporting agencies regardless of how they characterize themselves. In view of the plain language of section 1785.42, McClain's contention fails.

Additionally, *Bakker* is materially distinguishable. There, an attorney representing the plaintiffs in a dental malpractice action obtained credit reports on the defendant and his daughters in order to obtain information that would force the defendant to enter into a settlement. (*Bakker, supra,* 152 F.3d at pp. 1009–1011.) When the defendant and his daughters sued the attorney under the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) (FCRA), the trial court found that the reports were consumer credit reports protected by the FCRA, and that the attorney had not obtained them for a legitimate business purpose. On appeal, the Eighth Circuit affirmed these determinations, and rejected the attorney's contention that the reports were not consumer credit reports because they had been obtained for what she characterized ****901** as a commercial purpose. (*Bakker,* at pp. 1011–1013.) Unlike *Bakker,* however, where the trial court found the attorney's repeated attempts to " 'dig up as much dirt' " as possible on the defendant constituted a " 'blatant attempt to extract a settlement,' " that " 'grossly crossed the line' " of proper litigation conduct (*id.* at pp. 1009–1011), here the trial court found that Ted Charanian had a legitimate business purpose in obtaining the reports to determine the continued financial viability of his commercial tenant. Moreover, unlike *Bakker,* where the attorney sought to use the information for purposes other than those agreed to (*id.* at p. 1012), here the trial court ***804** found McClain had not shown that Ted Charanian had violated his agreement with Citi. Finally, we note that *Bakker* involved the FCRA which, unlike the CCRAA, lacks provisions akin to sections 1785.41 and 1785.42, which define commercial credit reports and expressly exempt them from the CCRAA.

[18] McClain also attacks the trial court's finding that she failed to show that Ted Charanian violated the Citi agreement. On this matter, she argues that Jimmy Yu testified that the Citi agreement obliged Ted Charanian to obtain McClain's written consent prior to obtaining her credit report, and that Ted Charanian conceded that he never acquired this consent.

The record does not support this contention.[8] Yu, Citi's custodian of records, testified that Citi had purged all its personal documents regarding Ted Charanian's account, that none of the documents from Citi's records admitted into evidence defined the terms of "tenant screening" that Ted Charanian had accepted, and that he did not know whether Ted Charanian had filled out the standard Citi agreement. He nonetheless testified that the standard Citi agreement required landlords "to get a consent or some kind of rental application" before Citi would run a report. In addition, Yu stated that after Ted Charanian obtained McClain's report, Citi repeatedly asked him to provide a consent form from McClain, and it terminated his account when he failed to provide it.

Ted Charanian testified that the Citi agreement admitted into evidence was not the one to which he had agreed. He also testified that he informed Citi of his purposes in opening the account, that he supplied all the documents they required to open the account, that Citi never asked him for a consent form from McClain and that he had learned that Citi closed his account only because McClain and her husband had been "harassing" Citi.

[19] The trial court found that McClain had failed to show that Ted Charanian breached any of the terms of his agreement with Citi. In view of the testimony from Yu and Ted Charanian—including the latter's testimony that ***805** he did not execute the standard Citi agreement—the trial court could reasonably infer that McClain never

established the terms of the agreement. In sum, the trial court properly concluded that Octagon had not violated the CCRAA.[9]

****902 C. *Accounting***

[20] McClain contends that the trial court erred in denying her request for a declaration that under the lease she is entitled to an accounting of her share of the common expenses. She argues that the express provisions of the lease, together with the implied covenant, oblige Octagon to permit her to examine its records to verify her share of the common expenses.

Regarding this claim, the record establishes that in February 2005, Octagon sent McClain a letter stating her share of the actual common expenses for the 2004 calendar year and her share of these expenses for the 2005 calendar year. When she requested "a reasonably detailed statement" regarding these expenses pursuant to the lease, Octagon provided a more elaborate description of the common expenses for the 2004 calendar year. McClain's husband responded to the statement in a letter dated April 7, 2005. Asserting that a landlord owed a fiduciary duty to a tenant, the letter questioned certain expenditures, disputed the need for others, and sought documentation beyond that verifying the actual expenses incurred. In addition, the letter requested permission for an auditor to examine Octagon's records and obtain answers to the questions raised in the letter. Octagon did not agree to the request. The trial court determined that neither the express language of the lease nor the implied covenant of good faith and fair dealing accorded McClain the right to such an audit.

For the reasons explained below, we conclude that McClain is not entitled to dispute the need for expenses or to audit Octagon's records. Rather, she is entitled only to disclosure of the documents supporting the Charanians' "reasonably detailed statement" of her share of the common expenses, for the limited purpose of verifying that the listed expenses were incurred and that the listed amounts are accurate. Octagon may fulfill this obligation in any reasonable manner it elects, as by providing copies of the relevant documents or permitting McClain to examine the originals.

[21] [22] [23] [24] [25] On appeal, McClain argues only that the implied covenant supports her request for an accounting, and does not suggest that the lease imposes ***806** fiduciary duties upon Octagon regarding the common expenses. Generally, the implied covenant operates to protect the express covenants or promises of the contract. (*Racine & Laramie, Ltd. v. Department of Parks & Recreation, supra,* 11 Cal.App.4th at pp. 1031–1032, 14 Cal.Rptr.2d 335.) " 'In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Ibid.*, quoting *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153, 271 Cal.Rptr. 246.) Accordingly, it imposes " 'not only ... upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.' " (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1093, 8 Cal.Rptr.3d 233, quoting *Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417, 5 Cal.Rptr. 367.) Nonetheless, because it protects only the ****903** express terms of the agreement, [i]t cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349–350, 100 Cal.Rptr.2d 352, 8 P.3d 1089.) The precise nature and extent of the duties imposed under the implied covenant thus depend upon the purposes of the contract. (*Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1551–1552, 54 Cal.Rptr.2d 488.)

California courts have long recognized that when two parties enter into an agreement for the sharing of profits that accords one party exclusive access and control over financial records bearing on the profits, the implied covenant accords the other party the right to an accounting of the profits. In *Nelson v. Abraham* (1947) 29 Cal.2d 745, 747, 177 P.2d 931 (*Nelson* ), the defendant, who manufactured ice, entered into a profit-sharing agreement with the plaintiff. Under the terms of the agreement, the plaintiff was to sell ice for the defendant in San Francisco in exchange for one third of the net profits from his sales operation; the plaintiff otherwise acquired no interest in the defendant's business. (*Ibid.*) When the defendant sold his business, including the San Francisco operation, to a third party, the plaintiff filed an action for an accounting and division of profits. (*Id.* at p. 749, 177 P.2d 931.) The trial court determined that the parties had not formed a partnership or joint venture and rejected the plaintiff's claim for an accounting. (*Id.* at p. 747, 177 P.2d 931.)

In reversing, our Supreme Court concluded that under the circumstances, the implied covenant obliged the defendant to provide an accounting, even if the agreement did not create a partnership or other form of fiduciary relationship. (*Nelson, supra,* 29 Cal.2d at p. 750, 177 P.2d



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931.) It reasoned: "[U]nder an agreement calling for a division of profits, whether the contract is one of copartnership, joint venture, or employment, good faith and fair dealing ***807** require that neither party may be permitted to take an unfair advantage or enjoy greater rights than called for by the terms of the agreement. One may not obtain a secret profit or undue benefit. The one who is entrusted with the rights of another is charged with the duty of guarding those rights with the utmost good faith. [Citations.]" (*Id.* at p. 751, 177 P.2d 931.)

In a later case, *Waverly Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 724–725, 32 Cal.Rptr. 73 (*Waverly* ), two corporations entered into a motion picture distribution agreement that obliged them to share profits, but granted one of the corporations exclusive rights to sell the rental rights to the motion picture in other countries. Without mentioning *Nelson,* the court in *Waverly* concluded that although the agreement did not create a fiduciary relationship, the trial court had properly required the corporation in exclusive control of the rental rights to provide an accounting. (*Waverly,* at p. 731, 32 Cal.Rptr. 73.)

In *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 31–33, 130 Cal.Rptr.2d 860 (*Wolf* ), the court endorsed and explained the holding in *Nelson.* There, the author of a novel entered into agreements with an entertainment corporation to share the profits from a movie and related merchandise based on the novel. (*Wolf,* at pp. 27–28, 130 Cal.Rptr.2d 860.) The agreements expressly accorded the author the right to an accounting. (*Ibid.*) After a dispute arose, the author initiated an action against the entertainment corporation, asserting, inter alia, a claim for breach of fiduciary duty. (*Ibid.*) When the trial court sustained a demurrer to this claim without leave to amend, the author sought ****904** relief by petition for writ of mandate. (*Id.* at p. 29, 130 Cal.Rptr.2d 860.)

In rejecting the author's contention that the parties' agreements created a fiduciary relationship, the court in *Wolf* acknowledged the continuing vitality of *Nelson:* "The duty to provide an accounting of profits under the profit-sharing agreement in *Waverly* is appropriately premised on the principle, also expressed in *Nelson,* that a party to a profit-sharing agreement may have a right to an accounting, even absent a fiduciary relationship, when such a right is inherent in the nature of the contract itself. As the court in *Nelson* observed, the right to obtain equitable relief in the form of an accounting is not confined to partnerships but can exist in contractual relationships requiring payment by one party to another of profits received. That right can be derived not from a fiduciary duty, but simply from the implied covenant of good faith and fair dealing inherent in every contract, because without an accounting, there may be no way " ' "by which such [a] party [entitled to a share in profits] could determine whether there were any profits...." ' " " (*Wolf, supra,* 107 Cal.App.4th at p. 34, 130 Cal.Rptr.2d 860, quoting *Nelson, supra,* 29 Cal.2d at p. 751, 177 P.2d 931.)

***808** In our view, the principle asserted in *Nelson* also encompasses the cost-sharing provisions of the lease. Like the courts in *Nelson, Waverly* and *Wolf,* we see no basis in these provisions for concluding that the lease imposes fiduciary duties upon Octagon regarding the common expenses. (See also *Korens v. R.W. Zukin Corp.* (1989) 212 Cal.App.3d 1054, 1058–1059, 261 Cal.Rptr. 137 [lease term requiring tenant to make security deposit does not impose fiduciary duty on landlord].) The lease obliges the parties to share the common expenses of the shopping mall, as enumerated in the lease, but accords Octagon exclusive management and control over those expenses while requiring it to provide McClain with a reasonably detailed statement of the expenses. Because McClain's share of the common expenses under the lease is determined by the *actual expenses* incurred by Octagon, she is entitled to verify that such expenses were, in fact, incurred and that the listed amounts are accurate. Accordingly, if requested, Octagon must provide McClain with the documents it used in preparing the "reasonably detailed statement"; to hold otherwise would necessarily " 'frustrate [ ] [McClain's] rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation, supra,* 11 Cal.App.4th at pp. 1031–1032, 14 Cal.Rptr.2d 335, quoting *Love v. Fire Ins. Exchange, supra,* 221 Cal.App.3d at p. 1153, 271 Cal.Rptr. 246.) Octagon may discharge this obligation in any reasonable manner it selects, including providing McClain with copies of the pertinent documents or giving her an opportunity to view the original documents.

[26] In so concluding, we do not suggest that McClain's limited right to the documents underlying the "reasonably detailed statement" accords her greater control over the shopping center and its management than authorized by the express terms of the lease.[16] As our Supreme Court explained in *Carma Developers (Cal.), Inc. v. Marathon Development California,* ****905** *Inc., supra,* 2 Cal.4th at page 374, 6 Cal.Rptr.2d 467, 826 P.2d 710, " '[a]s to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct.' " (Quoting *VTR, Incorporated v. Goodyear Tire & Rubber Company* (S.D.N.Y.1969) 303 F.Supp. 773, 777–778.) We hold only that Octagon may not prevent her from examining the records supporting its statements regarding actual

common expenses incurred.

### *809 DISPOSITION

The judgment is reversed solely with respect to McClain's claims for misrepresentation, an accounting, and declaratory relief, and the matter is remanded for further proceedings in accordance with this opinion. The judgment is otherwise affirmed in all other respects. The parties are to bear their own costs on appeal.

We concur: WILLHITE, Acting P.J., and SUZUKAWA, J.

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Footnotes

1 Under California law, a defrauded party to a contract may elect to rescind the contract and seek restitution, or stand on the contract and recover damages arising from the fraud. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 827–829, pp. 1200–1202.) Here, the FAC seeks damages rather than rescission of the lease.

2 Because the lease constitutes the "foundation" of the fraud claim and is incorporated into the FAC, the trial court properly examined the lease in assessing whether the claim is legally tenable. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 390–391, pp. 487–488.)

3 During oral argument, Octagon's counsel suggested that the term "approximation" in Paragraph 2.1 gave any prospective lessee notice that no firm or actionable representations about size were made in the lease. However, the question is not whether the term puts a prospective lessee on notice that the stated size may not be precisely accurate. It does. The question is whether it necessarily renders any deviation from the stated size immaterial. It does not. Where, as here, the deviations cannot be said to be immaterial as a matter of law, the use of the term "approximation" cannot insulate a lessor from potential liability for misrepresentations about size.

Octagon's counsel also suggested that because the FAC alleged that McClain had been assured the square footage figures used in the lease were "exact," the contract's "approximation" language necessarily put her on notice of a discrepancy she should have pursued. This may well be relevant to McClain's demonstration of reasonable reliance, but it does not bar her claim as a matter of law. (See *Hinesley v. Oakshade Town Center, supra,* 135 Cal.App.4th at p. 301, 37 Cal.Rptr.3d 364 [lease clause providing that tenant was not relying on existence of other tenants was relevant in determining whether tenant's alleged reliance on agent's representations of existing tenants was reasonable: "[T]he rule that this kind of contract provision does not, as a matter of law, preclude a finding of fraud does not mean the contract provision is in every case irrelevant."].)

4 All further statutory citations are to the Civil Code.

5 We accorded the parties an opportunity to present supplemental briefs on the provisions in question.

6 Although section 1785.42 does not provide a definition of "commercial enterprise," courts have generally concluded that the designation "d.b.a." in connection with an individual indicates that the individual operates a business and is liable for its obligations. (See *Providence Washington Ins. Co. v. Valley Forge Ins. Co.* (1996) 42 Cal.App.4th 1194, 1200, 50 Cal.Rptr.2d 192); *Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348–1349, 57 Cal.Rptr.2d 356 and the cases cited therein.) Accordingly, the term "commercial enterprise," as commonly understood, encompasses such individuals.

7 In view of the trial court's findings, we note that the CCRAA claim also fails even if the report constitutes a consumer credit report.

8 We review the trial court's findings for the existence of substantial evidence. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561, 38 Cal.Rptr.2d 221.) On review for substantial evidence, "all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity [ ] to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel* (1944) 25 Cal.2d 520, 527, 154 P.2d 384.)

9 For the first time on appeal, McClain argued during oral argument that the credit report at issue constituted a consumer credit report under the CCRAA, and that the trial court erroneously determined that Ted Charanian had a legitimate business purpose (within the meaning of the CCRAA) in obtaining it. McClain has forfeited this contention. (See *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal.Rptr.2d 457.)

10 McClain's requested audit, as described in the letter dated April 7, 2007, far exceeds the access to Octagon's documents authorized by the principles we have articulated. Under our holding, McClain is entitled to have Octagon produce the records to confirm the figures in the statement it provided her regarding her share of the common expenses; she is not entitled to demand explanations of Octagon's decisions to incur common expenses or to challenge these decisions. The record discloses that Ted Charanian was prepared to give McClain cancelled checks verifying the expenditures set forth in the detailed statement. It thus appears that McClain's claim for declaratory relief on this matter would have been unnecessary had she asked only for an opportunity to see the documents underlying the statement provided to her.

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JAMES WOLFRAM,
WALT WILKES

Plaintiffs,

vs.

PARDEE HOMES OF NEVADA,

Defendant.

AND RELATED CLAIMS

CASE NO.: A-10-632338-C
DEPT NO.: IV

**SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Hearing Date: October 9, 2013
Hearing Time: Chambers

Pardee Homes of Nevada ("Pardee"") submits the following Supplemental Brief ("Brief") in Support of its Motion for Partial Summary Judgment ("Motion").

At the hearing held September 23, 2013, Plaintiffs argued a line of cases from California suggesting that an accounting was a cause of action, not simply a remedy. Pardee pointed out that all of those cases only arose in the context of fiduciary relationships. Plaintiffs acknowledged they and Pardee did not have a fiduciary relationship, but argued only a "special relationship" arising from breach of the covenant of good faith and fair dealing was required, not a fiduciary relationship. Pardee disagrees strongly with Plaintiffs' contention, but even if Plaintiffs' argument is accepted at face value, in Nevada no "special relationship" exists, as a matter of law, between

Plaintiffs and Pardee. As such, without a "special relationship" between Plaintiffs and Pardee, even against Plaintiffs' flawed argument, Pardee's Motion must be granted.

## I. UNDER NEVADA LAW, NO "SPECIAL RELATIONSHIP" EXISTS BETWEEN PARDEE AND PLAINTIFFS.

The Nevada Supreme Court has held that an action in tort for breach of the covenant of good faith and fair dealing may arise in limited circumstances where a "special relationship" exists between the parties.[1] *See*, for example, *Insurance Co. of the West v. Gibson Title Co.*, 112 Nev. 455, 461, 134, P3d 698,702 (2006). However, the Nevada Supreme Court has never recognized a "special relationship" between sophisticated contracting parties, who specifically negotiated their contract at issue, like Pardee and the Plaintiffs. This position was clearly articulated in the court's seminal decision in *Aluevich v. Harrah's,* 99 Nev. 215, 660 P.2d 986 (1983). In *Aluevich*, the relationship between the parties was that of lessee and lessor. *Id*. at 217, 987. The lessee was an experienced businessperson and an attorney. *Id*. The lease at issue had been thoroughly negotiated between two sophisticated parties. *Id*. The court made it clear that a special relationship was not recognized in the general context of a lessee/lessor relationship, or in the specific context of the facts at issue. *Id*. The court explained a special relationship giving rise to a tort claim for breach of the implied covenant of good faith and fair dealing had only been recognized in the insurance context and "arose out of a need for special protection of insureds in light of the quasi-public nature of the insurance industry and the element of an insured's heavy reliance upon the insurer's credibility." *Id*. at 217, 987, *citing U.S. Fidelity v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975).

A few years later, the court reiterated that its decision in *Aluevich* was meant to emphasize the narrow and rare circumstances in which a special relationship exists

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[1]Pardee has found no Nevada Supreme Court cases suggesting that the existence of a "special relationship" between contracting parties transmutes an accounting from a remedy into a legal cause of action.



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between contracting parties, which may give rise to a tort action arising from breach of the implied covenant of good faith and fair dealing. *See Smith v. Cladianos*, 104 Nev.67, 68, 752 P. 2d 233,234 (1988). Later, the court concluded that no special relationship exists generally in the employer/employee relationship. In *D'Angelo v. Gardner*, the court held that mere breach of an employment contract does not give rise to tort damages unless the relationship exhibits the same level of trust and dependency that is *present in insurances cases. 107 Nev. 704, 717, 819 P. 2d 206, 215 (1991); See also, Martin v. Sears Roebuck and Co.,* 111 Nev. 923,929, 899 P 2d 55, 555, (1995) ("For this cause of action to apply, specific elements must exist. First, there must be an enforceable contract. Second, there must be a special relationship between the tortfeasor and the tort victim, such as the relationship that exists between an insured and insurer, that is a relationship of trust and special relevance."); *Great American Insurance Company v. General Builders*, 113 Nev. 346, 355, 934, P2d. 257, 263 (1997)(relationship between a builder and its surety not a special relationship; " the parties [were] both experienced commercial entities represented in the transaction by experienced agents and this stood in equal bargaining positions.").

Since *Aluevich* and its progeny, the Nevada Supreme Court has maintained its position that there are only very narrow circumstances in which a "special relationship" between contracting parties may be found. "Although every contract contains an implied covenant of good faith and fair dealing, an action **in tort** for breach of the covenant arises only 'in rare and exceptional cases' when there is a special relationship between the victim and tortfeasor." *Insurance Co. of the West v. Gibson Tile Co., Inc.*, 122 Nev. 455, 461, 134 P.3d 698, 702 (2006). "A special relationship is 'characterized by elements of public interest, adhesion, and fiduciary responsibility.'" *Gibson Tile Co.*, 122 Nev. at 461-462, 134 P.3d at 702; *quoting Great American Ins. v. General Builders,* 113 Nev. 346, 355, 934 P.2d 257, 263 (1997). (relationship between a surety and a builder was not a special relationship). The court has repeatedly cited back to its holding in *Aluevich*, which denied finding a special relationship where the agreement at



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issue was specifically negotiated and the aggrieved party was a sophisticated business person or represented by counsel of choice.

The relationship between Pardee and Plaintiffs is governed by the Commission Agreement. The Commission Agreement came as the result of substantial arm's-length negotiations between Plaintiffs and Pardee. Both sides were represented by counsel of their choice throughout the negotiation process, and at the time of the execution of the Commission Agreement. Further, both sides came to the bargaining table with substantial knowledge and experience in real estate transactions.

There is nothing in this case that would give rise to a special relationship between Plaintiffs and Pardee.

## II. THE ISSUE OF WHETHER A SPECIAL RELATIONSHIP EXISTS IS A QUESTION OF LAW.

The issue of whether or not a special relationship exists between parties to a contract is a question of law.

In Nevada, generally the existence of a duty is a question of law to be decided by the Court. *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). This is so, at least in part, because deciding whether a duty exists requires considering the public policy implications of imposing such a duty. *See Ashwood v. Clark County*, 113 Nev. 80, 84, 930 P.2d 740, 742-43 (1997). Indeed, the Nevada Supreme Court has noted that duty determinations are "the courts . . . making a vital expression of the aggregate of those policy considerations which cause the law to conclude that protection is owed." *Id.* (internal quotation omitted). The decision whether a special relationship exists to give rise to a tort cause of action for breach of the covenant of good faith and fair dealing is a legal determination. *See Great Am. Ins. Co. v. General Builders, Inc.*, 113 Nev. 346, 355, 934 P.2d 257, 263 (1997) (determination of special relationship made as matter of law); Insurance Co. of the West v. Gibson Title Co, Inc.

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122 Nev 455, 461, 134 P.3d 698, 702 (2006) ("We conclude as a matter of law, that no special relationship existed ").

If no special relationship exists, no legal cause of action for an accounting can stand, even under the tortured theory advanced by Plaintiffs' counsel. Accounting is a remedy, not a legal cause of action. Therefore, summary judgment in favor of Pardee on this claim is appropriate.

RESPECTFULLY SUBMITTED this 27th day of September, 2013.

McDONALD CARANO WILSON LLP

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McDONALD·CARANO·WILSON

**<u>CERTIFICATE OF SERVICE</u>**

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on the 27th day of September, 2013, I served a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT** via electronic delivery on the following:

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| JAMES WOLFRAM and WALT WILKES, Plaintiffs, vs. PARDEE HOMES OF NEVADA, Defendant. | CASE NO.: A-10-632338-C<br>DEPT. NO.: IV |

**ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter coming on for a hearing on the 23rd day of September, 2013 at 8:30 a.m., on the issue of Defendant's Motion for Partial Summary Judgment, James J. Jimmerson, Esq. and James M. Jimmerson, Esq. appearing on behalf of Plaintiffs, and Pat Lundvall and Aaron Shipley, Esq. appearing on behalf of Defendant Pardee Homes of Nevada, and the Court having reviewed the papers and pleadings on file, Defendant's Motion for Partial Summary Judgment, Plaintiffs' Opposition thereto, Defendant's Reply, Plaintiffs' Supplement, and Defendant's Supplement and the Court having heard the arguments of counsel, and for good cause appearing,

THE COURT FINDS that an accounting is an independent cause of action that is distinct from the equitable remedy of accounting. *See*, *e.g. Botsford v. Van Riper*, 33 Nev.



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156, 110 P. 705 (1910); *Young v. Johnny Ribiero Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990); *Oracle USA, Inc. v. Rimini Street, Inc.*, No. 2:10-CV-00106-LRH-PAL, 2010 WL 3257933 (D. Nev. Aug. 13, 2010); *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 92 Cal. Rptr. 3d 696 (Cal. App. 2009); *Mobius Connections Group, Inc. v. Techskills, LLC*, No. 2:10-CV-01678-GMN-RJJ, 2012 WL 194434 (D. Nev. Jan. 23, 2012).

THE COURT FURTHER FINDS that in order to prevail on a claim for an accounting, a Plaintiff must establish the existence of a special relationship whereby a duty to account may arise. *See Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 92 Cal. Rptr. 3d 696 (Cal. App. 2009). The right to an accounting can arise from Defendant's possession of money or property which, because of the Defendant's relationship with the Plaintiff, the Defendant is obliged to surrender. *Id.*

THE COURT FURTHER FINDS that there is a genuine issue of material fact as to whether the relationship between the parties establishes the existence of a special relationship ~~between the parties establishes the existence of a special relationship~~ whereby a duty to account may arise.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Partial Summary Judgment against Plaintiffs is DENIED.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that counsel for Plaintiffs is to prepare the Order and request approval as to form and content from Defendant's counsel.

Dated 23 this day of October, 2013.

DISTRICT COURT JUDGE

Respectfully Submitted:

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on foreign law: "[I]t is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed." *Id.*

Norwest offered the testimony of Dr. Ruben Segal, who has practiced law in Argentina for almost 40 years and taught law in Argentina for more than 20. *See* Trial Tr. at 341–43; Pl.Ex. 96. Dr. Segal explained that, under Argentine law, labor agreements are characterized by three elements of subordination—economic dependency, technical dependency, and juridicial dependency. *See* Pl.Ex. 54, at 4. Economic dependency means that the employee is receiving a salary and other benefits from his employer. *See* Trial Tr. at 356. Technical and juridicial dependency mean that the employee is part of an organizational structure in which he has superiors and that the employee must follow the orders of his superiors without judging them. *See id.* at 355–56. Dr. Segal then explained that Presidents and Vice Presidents are not considered employees of their companies under Argentine law, because there is no subordinate relationship. *See id.* at 359–60. Dr. Segal offered his opinion that the Director Agreements were not labor agreements under Argentine law, and therefore that they were governed by Argentine commercial law. *See id.* at 354–55. On cross examination, however, defendants established that Dr. Segal did not consider the complicated nature of the relationship between Norwest, Finvercon, and defendants when reaching his conclusion. *See id.* at 375–80. Specifically, Dr. Segal was questioned about a corporate chart, which he had not seen previously, indicating that Iribarren supervised Fernández. *See* Defs. Ex. EEE.

Defendants offered the testimony of Dr. Jorge Rodríguez Mancini, who has served as an appellate and supreme court justice in Argentina and also has practiced in the labor and employment field. *See* Trial Tr. at 840–41, Pl.Ex. 56, at 1–2. Like Dr. Segal, Dr. Rodríguez Mancini emphasized that labor relationships in Argentina are characterized by the dependency of the employee on the employer, noting the specific characteristic of receiving orders but not listing the three requirements outlined by Dr. Segal. *See* Trial Tr. at 843. Dr. Rodríguez Mancini explained that, in his ***228** view, Norwest had contracted the services of defendants to work at Finvercon. *See id.* at 880–82; Pl.Ex. 56, at 4. Finally, Dr. Rodríguez Mancini offered his opinion that, under Argentine labor law, Norwest had not given defendants sufficient notice of their termination, because Argentine labor law requires detailed written notification. *See* Trial Tr. at 855–56.

On cross examination, Norwest exposed two serious flaws in Dr. Rodríguez Mancini's testimony. First, Dr. Rodríguez Mancini thought that the repeated references to "the Company" in the Director Agreements referred to Norwest, when in fact that term referred to Finvercon. *See id.* at 905–06. This confusion was magnified when Dr. Rodríguez Mancini was asked who paid defendants' salary, because much of Dr. Rodríguez Mancini's argument was premised on his belief that Norwest paid defendants. *See id.* at 877–80. Norwest questioned Dr. Rodríguez Mancini about receipts indicating that defendants had received monthly payments, from January through August 1998, from Finvercon. *See id.* at 907–10; Pl.Ex. 62. Dr. Rodríguez Mancini explained his understanding that those payments were not the compensation described in § 1.2(a) of the Director Agreements. *See* Trial Tr. at 909–10.[14]

Second, Norwest demonstrated on cross examination that Dr. Rodríguez Mancini has a potentially large conflict of interest. On direct, Dr. Rodríguez Mancini explained that he represents defendants in a lawsuit against Norwest and Finvercon currently pending in the labor courts of Argentina, based on the same events at issue in this case. *See id.* at 848–50. Dr. Rodríguez Mancini also explained that his original fee was a contingency fee, but that the parties changed the fee arrangement to a flat fee. *See id.* at 851–52. On cross, Dr. Rodríguez Mancini admitted that his original contingency fee was 20% of any recovery. *See id.* at 891–92. Dr. Rodríguez Mancini also admitted that, under his current flat fee arrangement, he retains the right to seek fees from Norwest, if Fernández and Lanzillotta prevail; this is a typical arrangement under Argentine law, allowing for fees of 15–17% of the total recovery. *See id.* at 898. In addition, Dr. Rodríguez Mancini testified that he had found no facts indicating that defendants did not have an employment relationship with Norwest, while admitting that his ethical responsibilities as a lawyer would prevent him from disclosing such information. *See id.* at 931, 937–39.[15]

Any conflict in the testimony of Dr. Segal and Dr. Rodríguez Mancini turns out to be immaterial, as the question of whether the Director Agreements are governed by the commercial or labor law of Argentina can be decided based solely on the areas of agreement between the two experts. Both Dr. Segal and Dr. Rodríguez Mancini stated that Presidents and Vice Presidents cannot be employees of their companies under Argentine law. *See* ***229** *id.* at 359–60, 922–23. Thus, defendants could not have been employees of Finvercon. In addition, both Dr. Segal and Dr. Rodríguez Mancini stated that an employment relationship under Argentine law is characterized by subordination and dependency. *See id.* at 354–56, 843. Dr. Segal mentioned three specific factors, one of which was economic dependency; Dr. Rodríguez Mancini did not mention those factors, but emphasized his belief that Norwest paid the defendants. *See id.* at 356, 877–80. Applying the economic dependency factor to this case, defendants could not have been employees of Norwest because Norwest did not pay them. Receipts from January through August 1998 demonstrate that Finvercon paid defendants a monthly installment equal to the amount provided for in § 1.2(a) of the Director Agreements. *See* Pl.Ex. 62.

Indeed, defendants must have recognized that the payments from Finvercon would cause problems for their case, because both they and their expert pushed the boundaries of logic and reason in an effort to explain how those payments were not the compensation described in § 1.2(a). *See* Trial Tr. at 271–80, 906–22, 973–80. But their verbal gymnastics cannot change the fact that the amounts of the monthly installments equaled 1/12th of the total annual compensation provided for in the Director Agreements.

The conclusion that the Director Agreements are governed by Argentine commercial law rather than Argentine labor law is supported by two other pieces of evidence. *First,* I credit Iribarren's testimony that Fernández was the one who suggested structuring the relationship between Finvercon and defendants as a commercial, not employment, relationship. *See id.* at 75–76. *Second,* on September 3, 1998, Fernández wrote a memo to John Deal, responding to Deal's instructions regarding credit collection, in which he stated:

> I ... inform you of my formal rejection of the instructions, and that I shall continue to conduct the business of [Finvercon] in accordance with the procedures and laws of the Republic of Argentina, given that I believe that your instructions endanger the capital of the company, which I, as a director, must preserve, as required by the charter/bylaws, the shareholders and the law.

Defs. Ex. DD. These statements indicate that, less than three weeks before he was fired, Fernández thought he could disregard Norwest's instructions in favor of his duties as a director of Finvercon.

**2. Did Norwest properly terminate defendants?**

The next question is whether Norwest properly terminated defendants for cause. Their Director Agreements state that defendants could be discharged for "Cause or Unacceptable Performance," with "Cause" defined as, in relevant part: "failure to perform any obligation contained in this Agreement or the Stock Purchase Agreement...." Pl. Exs. 2, 3, at §§ 1.4, 1.5(a). Norwest contends that it properly terminated defendants because they violated the Purchase Agreement by failing to post the collateral required in § 5.11 and by failing to pay the tax judgment as required by §§ 7.2 and 7.3.

**a. Collateral**

[8] First, Norwest contends that it properly terminated defendants because they failed to post the collateral required in § 5.11 of the Purchase Agreement, which states:

> Sellers shall provide to the Company at Closing collateral, satisfactory to Buyers, in the form of dollar-denominated bonds issued by the Republic of Argentina with a residual face value of not less than the amount of Taxes actually deferred as of the Closing.

Pl.Ex. 1, at § 5.11. Defendants admit that they did not provide the collateral at the Closing; Norwest admits that it did not demand the collateral at the Closing. Norwest did demand the collateral on September 10, 1998, after the Argentine tax ***230** authority (the "DGI") obtained a judgment against Finvercon following the disallowance of the February, March and April 1997 tax deferrals. Defendants did not post the collateral in response to the September 1998 demands, and Finvercon paid the tax judgment.

Defendants contend that they did not breach the Purchase Agreement because Norwest waived the collateral requirement. Defendants look to four possible sources for this waiver: (1) Norwest's failure to demand the collateral at the Closing; (2) the joint statement to the Central Bank that "all of the terms and conditions of the [Purchase] Agreement necessary to consummate the transaction have been satisfied;" (3) the alleged statement of Shari Del Carpio, a Norwest employee, to the defendants in February or March of 1998 that they did not have to post the collateral;[16] and (4) a chart attached to a memo prepared by Del Carpio on March 18, 1998, indicating that the posting of the collateral had been completed on January 7, 1998.[17]

None of these sources, however, provides the basis for a finding of waiver. First, Norwest's failure to demand the collateral at the Closing was not a waiver because § 13.6 of the Purchase Agreement states that "[n]either the failure nor any delay by any party in exercising any right, power, or privilege under this Agreement or the documents referred to in this Agreement will operate as a waiver of such right, power, or privilege." *See* Pl.Ex. 1, at § 13.6. "No-waiver" provisions which cover course-of-conduct waivers are enforceable. *See Van-Go Transport Co. v. New York City Board of Education*, 53 F.Supp.2d 278, 297–98 (E.D.N.Y.1999) (noting that "parties seeking to limit the effect of the waiver of contractual rights through a course of conduct inconsistent with the terms of the contract have employed non-waiver provisions" that explicitly include course of conduct and citing cases upholding such clauses). Second, the joint statement to the Central Bank was not a waiver because that statement contained the following limitation:

> This joint statement of Sellers and Buyer is for the sole purpose of satisfying a closing condition of the Central Bank of the Republic of Argentina and is of no force or effect for any other purpose. This joint statement specifically does not limit, in any manner, the continuing obligations, representations and warranties made by Sellers and Buyer in the Agreement or representations or warranties that were made by Sellers and Buyer relating to Finvercon in connection with the purchase of the Finvercon capital stock by Buyer.

Defs. Ex. E–5. Finally, neither the chart attached to Del Carpio's memo nor her alleged statement to defendants was a waiver because the Purchase Agreement states that "no claim or right arising out of this Agreement or the documents referred to in this Agreement can be discharged by one party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by the other party." Pl.Ex. 1, at § 13.6. *See Bigda v. Fischbach Corp.*, 898 F.Supp. 1004, 1013 (S.D.N.Y.1995) (finding no waiver because agreement contained requirement that any waiver had to be in writing). Thus, Norwest did not waive the right to demand the collateral.

Defendants also argue that they did not breach the Purchase Agreement because it was impossible to post the collateral, which consisted of accounting records and not physical objects. This argument is a red herring. Section 5.11 simply states that "Sellers shall provide ... collateral ... in the form of dollar-denominated bonds ..." Pl.Ex. 1, at § 5.11. Nothing in the Purchase Agreement states that the bonds had to be carried physically to the Closing. Similarly, none of Norwest's demand letters contained such a requirement. In its September 17, 1998 letter, Norwest did ***231** demand that defendants "deliver" the bonds to Mario Olive. *See* Pl.Ex. 81. This choice of a single verb, however, is not a strong enough foundation for defendants' claim of impossibility. All defendants had to do—and all Norwest asked them to do—was to comply with their responsibilities under the Purchase Agreement. Defendants failed to do so, and therefore they breached the Purchase Agreement. Because Norwest could have used the collateral to pay the tax judgment, defendants' breach was material and constituted a proper basis for termination.

**b. Tax judgment**

[9] Second, Norwest contends that it terminated defendants because they failed to pay the tax judgment obtained by the DGI. Section 7.2 of the Purchase Agreement states:

> Sellers [defendants] jointly and severally undertake to hold harmless the Buyer [Norwest] and the Company [Finvercon] from any Noncredit Loss and to reimburse the Company upon the occurrence of any Noncredit Loss. This obligation is absolute and binding and Sellers [defendants] waive any defense they may have in connection therewith and any right or claim of offset.

Pl.Ex. 1, at § 7.2. The term "Noncredit Loss" is defined in § 2.2(c) of the Purchase Agreement, which states, in relevant part:

> A Noncredit Loss is any loss incurred by the Company after the Closing and resulting directly or indirectly from a breach of any Sellers' warranty or representation, or any failure by Sellers to perform any of their covenants, agreements or obligations contained in this Agreement, whether said loss is incurred as a result of a judicial determination or otherwise, after all reasonable defenses available, in

> Buyer's reasonable judgment, have been raised by the Company, including, without limitation, any loss incurred in connection with Taxes or penalties imposed by regulatory authorities.

Pl.Ex. 1, at § 2.2(c). In addition, § 7.3 of the Purchase Agreement states, in relevant part:

> Sellers [defendants] jointly and severally undertake to hold harmless the Company [Finvercon] and the Buyer [Norwest] for owning the Tax Benefits Companies and for the Company's obligations under the Tax Benefits Regime. Sellers undertake to pay, and to indemnify the Company against, all expenses, taxes, costs, fees, bank or other guarantees or any disbursement or liability that may have to be made or suffered by the Company by virtue of the Tax Benefits Regime, including, without limitation, payment of any deferred Taxes.

Pl.Ex. 1, at § 7.3

I have already found that Salvador Pristera did not inform anyone at Norwest or Finvercon about the tax problem until late August, when the DGI obtained a judgment against Finvercon. *See* pp. 218–19, *supra*. It is undisputed that this judgment gave the DGI the power to seize Finvercon's assets; Fernández admits that he knew of this possible consequence. Norwest demanded that defendants pay the tax judgment on August 31, September 2, and September 3, 1998. Defendants did not comply with these demands, and Finvercon itself paid the tax judgment on September 3, 1998.

Defendants argue that they did not breach the Purchase Agreement by failing to pay the tax judgment, because Norwest failed to comply with the notification provision found at § 12.3(b), which states:

> Promptly after receipt by an Indemnified Person of notice of any Proceeding or other matter for which an Indemnified Person may claim to be indemnified such Indemnified Person will give notice to Seller of such claim, but the failure to notify the Seller will not relieve the Sellers of any liability that it may have to any Indemnified Person, except to the extent that the Sellers demonstrate that the defense of such Proceeding or other ***232** matter is prejudiced by the Indemnified Person's failure to give such notice.

Pl.Ex. 1, at § 12.3(b). Defendants contend that Norwest learned of the tax problem either in February or April 1998 but failed to notify them until August 1998, and that this failure prejudiced their defense. I have already found, however, that Salvador Pristera was the only Finvercon or Norwest employee who knew about the tax problem before August 1998. The defendants do not argue that Pristera's knowledge can be imputed to Norwest. Therefore, Norwest could not have violated § 12.3(b) by failing to notify the defendants about the tax problem.

Defendants also argue that they did not breach the Purchase Agreement by failing to pay the tax judgment because they needed time to investigate whether Finvercon had raised "all reasonable defenses available," as required by § 2.2(c). Under the Purchase Agreement, however, Norwest—not defendants—makes that determination. *See* Pl.Ex. 1, at § 2.2(c). On September 16 and 17, 1998, Norwest informed defendants of its conclusion that Finvercon had raised all reasonable defenses and that defendants were liable for the tax judgment. Thus, even if Norwest's failure to reach this conclusion by September 3 excuses defendants' failure to reply to the demands made on August 31, September 2, and September 3, defendants had no excuse for not complying with the demands made on September 16 and September 17, after Norwest had made its determination that Finvercon had raised all reasonable defenses.

Defendants eventually reimbursed Finvercon for the tax judgment on October 8, 1998, and now seek to recover that payment by arguing that Finvercon did not raise all reasonable defenses. *See* pp. 232–34, *infra*. Even if defendants had a plausible argument that Finvercon had failed to raise all reasonable defenses, however, the structure of the Purchase Agreement makes clear that, once Norwest made its determination that Finvercon had raised all reasonable defenses, defendants were required to reimburse Finvercon for the tax judgment. Defendants could not refuse to pay the tax judgment because they disagreed with Norwest's determination.

Thus, Norwest properly terminated defendants for cause under § 1.5 of their Director Agreements, because defendants failed to post the collateral required by § 5.11 of the Purchase Agreement and failed to pay the tax judgment as required by §§ 7.2 and 7.3 of the Purchase Agreement.[18]

### C. Specific Performance of Collateral Requirement

[10] In addition to using the failure to post the collateral as cause for terminating defendants, Norwest also seeks specific performance of the collateral requirement. Both parties agree that all of the taxes have been paid, but Norwest argues that the DGI might still seek to recover interest on those payments. Section 5.11 states that defendants were required to provide collateral "with a residual face value of not less than the amount of Taxes actually deferred as of the Closing." Pl.Ex. 1, at § 5.11. Collateral for "the amount of taxes actually deferred" is synonymous with collateral for the amount of the principal. It does not include collateral for any possible interest. The principal has been paid and the collateral requirement therefore rendered moot. Norwest's motion for specific performance of the collateral requirement is denied.

### D. Counterclaim Regarding Tax Payments

[11] Defendants assert that they are entitled to reimbursement of the money ***233** they paid Finvercon for the tax judgment because Norwest and Finvercon failed to comply with their obligations under §§ 12.3(b) and 2.2(c) of the Purchase Agreement. In addition, defendants seek reimbursement for foregoing other tax deferrals.

First, defendants argue that they were not required to pay the tax judgment because Norwest failed to comply with the notification provision of the Purchase Agreement found at § 12.3(b). As explained above, however, Norwest did not learn about the tax problem until August 1998, when the DGI obtained the tax judgment, and therefore could not have violated § 12.3(b) by failing to notify defendants. *See* pp. 231–32, *supra.*

Second, defendants argue that they were not required to pay the tax judgment because Finvercon failed to raise "all reasonable defenses available," as required by § 2.2(c) of the Purchase Agreement. Finvercon received notice of the tax problem in February 1998, when Salvador Pristera, a Finvercon accountant and the person responsible for tax matters at Finvercon, was informed of the problem by the DGI. *See* Undisputed Facts at ¶ E. Pristera did not tell anyone about the tax problem in February 1998. In April 1998, when he received notification that the DGI was commencing legal proceedings against Finvercon, Pristera's only action was the referral of the matter to the Pardo law firm.

But Finvercon's inaction is not enough; the question is whether Finvercon could have raised any reasonable defenses to the disallowance of the tax deferrals. Under the Purchase Agreement, Norwest—not defendants—makes that determination. *See* Pl.Ex. 1, at § 2.2(c). In September 1998, Norwest concluded that Finvercon had raised all reasonable defenses. *See* Pl. Exs. 80, 81. This Court must consider whether Norwest's determination was reasonable.

Norwest offered the testimony of Dr. Adolfo Atchabahain, an expert in Argentine tax law, who explained that Finvercon had filed its VAT applications for February, March, and April 1997 after the filing deadlines had passed and that, under Argentine tax law, the late filing of a VAT application causes that application to be nullified, even if the filing was only one day late. *See* Trial Tr. at 214–15. Dr. Atchabahain then offered his opinion that Finvercon had no hope of appealing this determination, because "neither the law nor the regulations or the rulings from the tax board provide any way to solve, to overcome such a consequence once the tax deferral benefit have [sic] been filed untimely." *See id.* at 218. Nevertheless, Dr. Atchabahain did note that, when it received notification of the problem in February, Finvercon had five days to pay the taxes without incurring penalties and interest. *See id.* at 211, 215.

Defendants did not offer their own expert on Argentine tax law. On cross-examination of Dr. Atchabahain, defendants established that Finvercon could have sought a review of the February notice of deficiency by the Director General, although Dr. Atchabahain remained steadfast in his view that such a proceeding would not have been successful, both because Finvercon was not raising a contention concerning the interpretation of the tax law and because Finvercon had filed the applications late. *See id.* at 215–16, 227–35. In addition, defendants asked Dr. Atchabahain whether there were any cases in which the failure to file VAT deferral applications on time had been ruled a mere technicality that did not invalidate the application; Dr. Atchabahain said he was not aware of any such decisions. *See id.* at 237–40. During this exchange, defendants referred to two specific cases, but did not discuss their facts or holdings. *See id.* at 237–39.

Norwest's determination that Finvercon had raised all reasonable defenses to the payment of the taxes was reasonable. Finvercon was not required to raise every possible defense—only those that might *234 succeed. Dr. Atchabahain's testimony made clear that, once the deferrals had been disallowed, Finvercon had no chance to defend the disallowance successfully. Defendants did not offer any persuasive evidence to contradict that opinion.[19]

On the other hand, Finvercon did not take all reasonable steps to prevent the imposition of penalties and interest, and any determination by Norwest that Finvercon had done so would be unreasonable. When it received the notice in February, Finvercon had a five-day period in which it could have paid the taxes without incurring any penalties or interest. Finvercon did not pay the taxes within that five-day period, because Pristera did not tell anyone about the disallowance of the deferrals. Because Finvercon could have prevented the assessment of penalties and interest on the taxes, defendants should not be liable for them. Accordingly, Norwest should reimburse defendants for any payments of penalties and interest flowing from the tax judgment, although it should not reimburse defendants for the taxes themselves.

Defendants also seek reimbursement from Norwest for their early payment of other deferred taxes. Fernández testified that he paid $1,800,000 in deferred taxes years before their due date. *See id.* at 673–74. Fernández now argues that he made these payments because he feared that Norwest and Finvercon would incur penalties and interest on those deferrals as well. Consequently, he seeks reimbursement for the value of the lost deferrals. But Fernández has failed to provide any evidence as to how Norwest made him forego the deferrals, and therefore Norwest is not liable for any losses he might have suffered.

**E. Counterclaim for Accounting of Reserve Funds**

[12] Defendants seek an order stating that, before defendants must pay any claimed Credit or Noncredit Losses, Norwest must provide defendants with a full and detailed accounting, verified by an independent auditor, of the status and maintenance of the reserve funds known as the Contingent Portion of the Purchase Price (for Credit Losses) and the Reserve Holdback for Noncredit Losses (for Noncredit Losses). "The right to an accounting rests upon a trust or fiduciary relationship and a duty upon the part of the defendant to account, or, under a joint venture agreement whereby the seller is to participate in losses as well as profits, or, where special circumstances are present warranting equitable relief in the interest of justice." *Grossman v. Laurence Handprints–N.J., Inc.*, 90 A.D.2d 95, 455 N.Y.S.2d 852, 858 (2d Dep't 1982) (citations omitted). New York courts have made clear that "[a]n allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstances warranting equitable relief." *Morgulas v. J. Yudell Realty*, 161 A.D.2d 211, 554 N.Y.S.2d 597, 600 (1st Dep't 1990); *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234, 656 N.Y.S.2d 753, 759 (1st Dep't 1997) (citing *Morgulas* ).

Defendants have demonstrated that they are entitled to an accounting of the Contingent Portion of the Purchase Price and the Reserve Holdback for Noncredit Losses, because Norwest has a fiduciary duty to maintain those reserve funds for defendants. *See Stevens v. St. Joseph's Hospital*, 52 A.D.2d 722, 381 N.Y.S.2d 927, 929 (4th Dep't 1976) ("The fiduciary relationship necessary to obtain an accounting is created by the plaintiff entrusting to the defendant some money or property with respect to which the defendant is bound to reveal his dealings."); *see also Chipman v. Steinberg*, 106 A.D.2d 343, 483 N.Y.S.2d 256, 258 (1st Dep't 1984) ("[T]here must be something—property, cash, even services—which has been given over and employed *235 by another before that other can be liable as a fiduciary [to provide an accounting]."). The Purchase Agreement details when Norwest must return both reserve funds to defendants and provides both for interest and for deductions. *See* Pl.Ex. 1, at §§ 2.2, 2.5. Norwest should account for the status of those funds.[20]

Defendants also argue that Norwest must provide the accounting before defendants make any payments for Credit or Noncredit Losses. But because Norwest has no obligation to offset any claimed Credit or Noncredit Losses against either of these reserve funds, the accounting of those funds has no impact on the timing of the payment of the Credit Losses.[21] I have already explained why Norwest has no obligation to offset any Credit Losses against the Contingent Portion of the Purchase Price. *See* pp. 221–23, *supra*. As for Noncredit Losses, § 2.2(c) of the Purchase Agreement states that Norwest has "the right, but not the obligation, to charge the amount of [any] Noncredit Loss, or any portion thereof, against the Reserve Holdback for Noncredit Losses." Pl.Ex. 1, at § 2.2(c). In addition, § 7.2, which details the defendants' guarantee for the Noncredit Losses, states that the defendants waive "any right or claim of offset." Pl.Ex. 1, at § 7.2.

Thus, while defendants' counterclaim for an accounting of the status and maintenance of the reserve funds is granted, the timing of that accounting has no impact on the payment of the Credit Losses.

 

**F. Enforcement of Non–Competition Agreement**

[13] Norwest seeks a preliminary and permanent injunction to prevent defendants from violating their obligations to Finvercon under § 1.3(a) of the Director Agreements, which states:

> (a) The President shall not, directly or indirectly, own, manage, operate, invest in (other than as a personal investment in publicly traded corporations), control, be employed by, participate in, be a financial sponsor of, provide consultation services to, or be connected in any manner with, the ownership, management, or control of any proprietorship or other entity engaged in providing services engaged in by Finvercon at the end of his Appointment Period anywhere in Argentina. The restrictions in this paragraph 3(a) shall be in full force and effect from Closing until three years after the President ceases to hold his position.

Pl.Ex. 2, at § 1.3.[22] Norwest argues that the authority for injunctive relief can be found in § 2 of the Director Agreements, which states:

> The President understands that the Company's [Finvercon's] remedy at law for any breach of any of the President's obligations under this Agreement would be inadequate and agrees that temporary and permanent injunctive relief may be granted in any proceeding which may be brought to enforce any provisions of this Agreement, without the necessity of proof of actual damage. The President agrees that injunctive relief is not an exclusive remedy and the Company shall have the right to seek, in addition to injunctive relief any remedy in law or equity.
>
> Pl.Ex. 2, at § 2.[23]

Although this provision might give Norwest the power to seek an injunction, Norwest ***236** has failed to demonstrate the need for an injunction. Section 1.3(a) bars defendants, broadly speaking, from participating in any entity "engaged in providing services engaged in by Finvercon." Pl.Ex. 2, at § 1.3(a). Finvercon argues that, both before and after their termination, defendants engaged in personal lending, a service also engaged in by Finvercon. But the evidence demonstrates that defendants never made a single loan that otherwise would have been made by Finvercon. Finvercon now has a policy against lending to commercial entities, which made up the bulk of the defendants' loans, and does not lend money to individuals outside Argentina, which means Finvercon could not have lent money to Hugo Iurcovich, a Brazilian. Thus, Finvercon's request for injunctive relief is denied.

**IV. Conclusion**

For the foregoing reasons:

1) Norwest must prepare a revised Credit Loss demand in accordance with the terms of this Opinion and Order. Norwest then must supply a copy of this demand to defendants and to the Accountant. In addition, Norwest must provide the Accountant with the data supporting its Credit Loss demand. Applying the terms of this Opinion and Order to the supporting data, the Accountant will submit a report to the Court which will be incorporated in the final judgment.

2) Norwest properly terminated defendants for cause.

3) Norwest's claim for injunctive relief relating to the non-competition clause is DENIED.

4) Norwest's claim for injunctive relief and specific performance of the collateral requirement is DENIED.

5) Norwest must reimburse defendants for the amount of the tax judgment related to interest and penalties arising from the failure to pay the deferred taxes in February 1998. Defendants' other counterclaims related to reimbursement of tax payments are DENIED.

6) Defendants' counterclaim that Norwest provide them with a report of its good faith collection efforts is DENIED.

7) Norwest must provide the Accountant with the necessary data for the Accountant to conduct an accounting of the status and maintenance of the Contingent Portion of the Purchase Price and the Reserve Holdback for Noncredit Losses. The Accountant will conduct the accounting and send its report to both parties. The timing of the accounting has no impact on defendants' obligation to reimburse Norwest for Credit Losses.

8) Once defendants have paid the Credit Loss for a particular account receivable, Norwest must provide defendants with all right, title and interest in that account

receivable.

9) Defendants' counterclaim for a declaratory judgment related to Norwest's alleged duty to offset is DENIED.

Upon submission of the Accountant's final report, the parties are to prepare a Final Judgment to be entered by the Court.

Footnotes

1 Fernández's assertion that his attorneys never reviewed the Director Agreement is highly suspect, because the Director Agreement is mentioned in the Purchase Agreement, which was reviewed by his attorneys. *See* Trial Tr. at 259–262.

2 Fernández testified as follows: "We were in a company that was being audited by auditors. It would be a redundancy to ask for something that's been audited to be audited." *See* Trial Tr. at 763.

3 As used by the parties in this case, "punitive interest" is not really punitive. Rather, it is compensatory interest on the amount of any missed payment, in order to "account for the lost time value due to [Finvercon] not having received that payment." Trial Tr. at 525.

4 Argentina charges a value added tax ("VAT tax") on accrued interest. *See* Trial Tr. at 93–94. This tax must be paid when the interest accrues, even if the customer has not paid the interest. *See id.*

5 Norwest asked another witness whether compensatory interest was reflected on Finvercon's books, but did not ask about punitive interest. *See* Trial Tr. at 486. This omission supports the finding that punitive interest was not reflected on Finvercon's books.

6 Section 3.16(a) states, in relevant part:

> Exhibit 3.16(a) contains a complete and accurate list, and Sellers have delivered to Buyer true and complete copies (of Written Contracts), of:
>
> (i) each Contract with Argencard, Visa and Mastercard or other company that involves performance of services or delivery of goods or materials or loans by the Company (including, without limitation, each Contract for the sale of loans on which the Company has obligations with respect to said loans ("Sold Obligations")).

7 Norwest seeks punitive interest only for the accounts receivable, not for the sold and repurchased obligations. *See* Trial Tr. at 580–83, 594–96.

8 Although the Purchase Agreement entitles Norwest to recover punitive interest from defendants, that recovery nevertheless represents a windfall to Norwest, which never would have been able to collect the same amount—100% of all missed payments—from the delinquent debtors. Indeed, Norwest might only have collected a fraction of those payments from the debtors. But defendants entered into the Purchase Agreement freely, after months of negotiations, and I cannot rewrite the Purchase Agreement. In addition, defendants could have stopped the mounting punitive interest charges at any time by paying the Credit Loss demands.

9 Because Norwest cannot claim these accounts as Credit Losses, it also cannot charge punitive interest on those accounts.

10 This ruling does not conflict with the ruling above that Norwest was not required to offset Credit Losses against the Contingent Portion of the Purchase Price, *see* pp. 20–25 *supra*, because the accounts that were 180 days past due at the Closing are not Credit Losses.

11 For example, defendants introduced a memo from John Deal to Fernández and several others, dated September 2, 1998, indicating that no more time or money should be spent trying to collect accounts more than 180 days past due. *See* Defendants' Exhibit ("Defs.Ex.") AA. In that same memo, however, Deal stated that "Finvercon employees should only be spending their time working accounts that are 31–60, 61–90, 91–120, and 121–179 days past due." *See id.* In addition, Fernández testified that he refused to implement the policy laid out in Deal's memo. *See* Trial Tr. at 643–46. Thus, the Deal memo does not prove that Norwest or Finvercon stopped trying to collect accounts receivable.

12 In Lanzillotta's Director Agreement, all references to "President" are to "Vice President." *See* Pl.Ex. 3, at § 1.4.

13 In Lanzillotta's Director Agreement, all references to "Fernández" are to "Lanzillotta" and all references to "President" are to

"Vice President." *See* Pl.Ex. 3, at § 1.5.

14 Although it was not mentioned during the cross examination, the Court notes that § 1.2(c) of the Director Agreements indicates that "the Company"—i.e., Finvercon—will pay for medical insurance. *See* Pl. Exs. 2, 3, at § 1.2(c). That is the only contractual indication of who paid defendants.

15 Norwest moved to strike all of Dr. Rodríguez Mancini's testimony, arguing that he cannot serve as a neutral expert on a matter in which he has a financial interest and binding ethical duties to his clients. I will not strike Dr. Rodríguez Mancini's testimony, however, because sources of foreign law do not have to be admissible. "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed.R.Civ.P. 44.1. The Second Circuit has "urge[d] district courts to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations." *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir.1998). On the other hand, I cannot help but consider Dr. Rodríguez Mancini's serious infirmities when deciding what weight to give his testimony. "An expert witness's bias goes to the weight, not the admissibility, of the testimony, and should be brought out on cross-examination." 4 *Weinstein's Federal Evidence* § 702.06[8], at 702–59 (2d ed.1999).

16 *See* Trial Tr. at 676.

17 *See* Defs. Ex. MMM.

18 Norwest also argues that defendants breached the Purchase Agreement by making personal loans while they were employed by Finvercon. Because I conclude that defendants breached the Purchase Agreement by failing to provide the collateral and by failing to pay the tax judgment, I do not need to address this issue.

19 If defendants think they can convince the DGI to permit the deferrals, they have until 2003 to bring such claims. *See* Trial Tr. at 217–18, 226.

20 The Accountant who will be implementing the Court's rulings regarding the payment of Credit Losses also will perform this accounting.

21 The only connection between the Credit Loss demand and the reserve funds is that Norwest must deduct from its Credit Loss demand those accounts receivable that were 180 days past due at the time of the Closing. *See* pp. 224–25, *supra*.

22 In Lanziliotta's Director Agreement, all references to "President" are to "Vice President." *See* Pl.Ex. 3, at § 1.3.

23 In Lanzilkitta's Director Agreement, all references to "President" are to "Vice President." *See* Pl.Ex. 3, at § 2.

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# EXHIBIT "15"

EXHIBIT "15"

KeyCite Yellow Flag - Negative Treatment
**Declined to Extend by** Betchart v. Betchart, Cal.App. 1 Dist., April 19, 2013

159 Cal.App.4th 784
Court of Appeal, Second District, Division 4, California.

Kelly McCLAIN, Plaintiff and Appellant,
v.
OCTAGON PLAZA, LLC, Defendant and Respondent.

No. B194037. | Jan. 31, 2008. | Review Denied April 30, 2008.

**Synopsis**

**Background:** Shopping center tenant brought action against landlords for misrepresentation, breach of the covenant of good faith and fair dealing, and violations of the Consumer Credit Reporting Agencies Act, (CCRAA), and sought declaratory relief and an accounting. The Superior Court, Los Angeles County, No. PC036957, Barbara M. Scheper, J., sustained landlords' demurrer without leave to amend for claims for misrepresentation, breach of covenant, and declaratory relief, and, following trial, entered judgment for landlords on remaining claims. Tenant appealed.

**Holdings:** The Court of Appeal, Manella, J., held that:

[1] tenant's allegations in complaint were sufficient to establish elements of a claim for intentional or negligent misrepresentation;

[2] lease disclaimer which provided that any statement of size set forth in lease or used to calculate rent was a reasonable approximation did not preclude misrepresentation claim;

[3] alleged misrepresentations as to size of space did not violate the implied covenant of good faith and fair dealing;

[4] credit report obtained by landlord from credit bureau without business owner's consent was a "commercial credit report" under the CCRAA;

[5] evidence was sufficient to support finding that landlord did not violate agreement with credit bureau when obtaining credit report; and

[6] tenant was not entitled to an accounting other than disclosure of documents supporting landlords' reasonably detailed statement of tenant's share of the common expenses.

Affirmed in part, reversed in part, and remanded.

West Headnotes (26)

[1] **Fraud**
Elements of Actual Fraud
**Fraud**
Fraudulent Concealment

Generally, the elements of fraud, which give rise to the tort action for deceit, are: (1) misrepresentation (false representation, concealment, or nondisclosure), (2) knowledge of falsity or scienter, (3) intent to defraud or to induce reliance, (4) justifiable reliance, and (5) resulting damage.

7 Cases that cite this headnote

[2] **Fraud**
Statements recklessly made; negligent misrepresentation

The tort of negligent misrepresentation does not require scienter or intent to defraud; it encompasses the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true and the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.

3 Cases that cite this headnote

[3] **Fraud**
Effect of existence of remedy by action on

 

contract

A defrauded party to a contract may elect to rescind the contract and seek restitution, or stand on the contract and recover damages arising from the fraud.

2 Cases that cite this headnote

[4] **Fraud**
Fraudulent representations or concealment as to particular facts

Shopping center tenant's allegations in complaint were sufficient to establish elements of a claim for intentional or negligent misrepresentation; tenant alleged that lease stated that unit was 2,624 square feet and that base rent was calculated at $1.45 per square foot, and also stated that tenant was responsible for 23% of the share of the common expenses of the shopping center based on the size of the leased space, that landlords insisted that tenant could rely on their representations as to the amount of space and that actual measurement of the space would be costly, that landlords had stated on earthquake insurance application that shopping center was larger than represented to tenant and that she discovered that her unit was smaller than represented such that rent and share of common area expenses should have been smaller, and that, as a result of the representations, she was induced to enter into a lease that obliged her to pay excess rent of more than $90,000 over the term of the lease.
*See Cal. Jur. 3d, Fraud and Deceit, § 42; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts § 228; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 820; Annot., Tort liability for damages for misrepresentations as to area of real property sold or exchanged (1957) 54 A.L.R.2d 660.*
3 Cases that cite this headnote

[5] **Fraud**
Defenses

Disclaimer in shopping center lease which provided that any statement of size set forth in lease or used to calculate rent was a reasonable approximation such that any payments based on stated size were not subject to revision did not preclude action by tenant for fraud in the inducement or negligent misrepresentation based on size of leased space and tenant's share of common area expenses, which were specifically set forth in lease. West's Ann.Cal.Civ.Code § 1668.

2 Cases that cite this headnote

[6] **Fraud**
Defenses

Statute providing that all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, whether willful or negligent, "are against the policy of the law" encompasses intentional and negligent misrepresentation. West's Ann.Cal.Civ.Code § 1668.

2 Cases that cite this headnote

[7] **Fraud**
Defenses

A party to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract, either that no representations have been made, or that any right that might be grounded upon them is waived; such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, including the waiver provision. West's Ann.Cal.Civ.Code § 1668.

6 Cases that cite this headnote

[8] **Fraud**
Defenses



JA003188

A contract stipulation intended to bar a party's fraud claims does not bind the party, and thus the insertion of language agreeing that a material misrepresentation is reasonable is of no effect.

[9] **Landlord and Tenant**
Implied covenants in general

Alleged misrepresentations which shopping center landlord made as to size of proposed leased space in negotiations with tenant over lease did not violate the implied covenant of good faith and fair dealing, as covenant did not require landlord to negotiate in good faith but rather only required landlord to operate in good faith in the performance of the contract.

26 Cases that cite this headnote

[10] **Contracts**
Terms implied as part of contract
**Landlord and Tenant**
Implied covenants in general

Generally, every contract, including commercial leases, imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

39 Cases that cite this headnote

[11] **Contracts**
Terms implied as part of contract

The implied covenant of good faith and fair dealing is a supplement to an existing contract, and thus it does not require parties to negotiate in good faith prior to any agreement.

48 Cases that cite this headnote

[12] **Pleading**
Amendment or Further Pleading After Demurrer Sustained

Shopping center tenant who claimed breach of the implied covenant of good faith and fair dealing on the part of landlord in connection with representations as to square footage of leased space and corresponding rent and share of common expenses could not avoid demurrer by amending first amended complaint to allege that landlord and tenant entered into another agreement with materially different terms regarding rent before executing lease such that landlord inserted erroneous figures for base rent and common expense charges into the lease which did not reflect the contract terms upon which the parties had mutually agreed, as such an allegation contradicted the allegations in the first amended complaint that tenant had accepted landlords' representations about the size of the unit.

6 Cases that cite this headnote

[13] **Pleading**
Amendment or Further Pleading After Demurrer Sustained
**Pleading**
Amendment of Declaration, Complaint, Petition, or Statement
**Pleading**
Demurrer to amended pleading

Generally, a plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false; likewise, the plaintiff may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false.

3 Cases that cite this headnote

[14] **Declaratory Judgment**
Leases
**Declaratory Judgment**

Property, conveyances and incumbrances

Shopping center tenant's misrepresentation complaint adequately alleged an actual controversy regarding tenant's obligations to pay rent and other expenses under lease which was sufficient to maintain an action for declaratory relief. West's Ann.Cal.C.C.P. § 1060.

9 Cases that cite this headnote

[15] **Declaratory Judgment**
Nature and elements in general

The existence of an actual controversy relating to the legal rights and duties of the respective parties suffices to maintain an action for declaratory relief. West's Ann.Cal.C.C.P. § 1060.

16 Cases that cite this headnote

[16] **Credit Reporting Agencies**
Credit bureaus and credit reports in general

Generally, the Consumer Credit Reporting Agencies Act (CCRAA) limits the dissemination of consumer credit information. West's Ann.Cal.Civ.Code § 1785.1 et seq.

[17] **Credit Reporting Agencies**
Credit bureaus and credit reports in general

Credit report on business owner obtained by shopping center landlord from credit bureau without business owner's consent was a "commercial credit report" under the Consumer Credit Reporting Agencies Act (CCRAA) such that it was exempt from the provisions of the CCRAA; lease named business owner and her business as the tenant, and landlord obtained the credit report to determine whether business owner could meet her financial obligations under the lease. West's Ann.Cal.Civ.Code §§ 1785.41, 1785.42.

2 Cases that cite this headnote

[18] **Credit Reporting Agencies**
Actions by or against agency; injunction

Evidence was sufficient to support finding that shopping center landlord did not violate agreement with credit bureau when it obtained commercial credit report on business owner who sought to lease space in shopping center without tenant's consent, although credit bureau's standard agreement required landlords to get consent from tenants before credit bureau would run report and credit bureau's custodian of records testified that credit bureau terminated landlord's account when landlord failed to provide tenant's consent; custodian testified that credit bureau had purged all personal documents relating to landlord's account and that he did not know whether landlord had filled out the standard agreement, and landlord testified that had not agreed to standard agreement, that he had informed credit bureau of his purposes in opening the account, that he supplied all the documents they required to open the account, and that he was never asked for a consent form.

[19] **Appeal and Error**
Nature or Subject-Matter of Issues or Questions

Shopping center tenant argued for first time on appeal that credit report obtained by landlord constituted a consumer credit report under the Consumer Credit Reporting Agencies Act (CCRAA) and that the trial court erroneously determined that landlord had a legitimate business purpose within the meaning of the CCRAA in obtaining it, and thus tenant forfeited the contention and the Court of Appeal would not consider it. West's Ann.Cal.Civ.Code § 1785.3.

4 Cases that cite this headnote

[20] **Landlord and Tenant**
Implied covenants in general
**Landlord and Tenant**
Covenants and Agreements as to Taxes and Assessments

Lease and implied covenant of good faith and fair dealing did not impose a fiduciary duty on shopping center landlord regarding common expenses or entitle tenant to an audit or an accounting, as lease obliged the parties to share the common expenses of the shopping mall but accorded landlord exclusive management and control over the expenses while requiring it to provide tenant with a reasonably detailed statement of the expenses, and thus tenant was not permitted to examine landlord's records to verify tenant's share of the common expenses; rather, tenant was entitled only to disclosure of documents supporting landlords' reasonably detailed statement of her share of the common expenses for the limited purpose of verifying that the listed expenses were incurred and that the listed amounts were accurate, as tenant's share of the common expenses under the lease was determined by the actual expenses incurred by the landlord.

2 Cases that cite this headnote

[21] **Contracts**
Terms implied as part of contract

Generally, the implied covenant of good faith and fair dealing operates to protect the express covenants or promises of the contract.

22 Cases that cite this headnote

[22] **Contracts**
Terms implied as part of contract

In essence, the implied covenant of good faith and fair dealing is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which, while not technically transgressing the express covenants, frustrates the other party's rights to the benefits of the contract.

47 Cases that cite this headnote

[23] **Contracts**
Terms implied as part of contract

The implied covenant of good faith and fair dealing imposes not only upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.

27 Cases that cite this headnote

[24] **Contracts**
Terms implied as part of contract

Because the implied covenant of good faith and fair dealing protects only the express terms of the agreement, it cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.

25 Cases that cite this headnote

[25] **Contracts**
Terms implied as part of contract

The precise nature and extent of the duties imposed under the implied covenant of good faith and fair dealing depend upon the purposes of the contract.

1 Cases that cite this headnote

[26] **Contracts**

Terms implied as part of contract

As to acts and conduct authorized by the express provisions of a contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct.

13 Cases that cite this headnote

**Attorneys and Law Firms**

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Law Offices of J. Steven Kennedy and J. Steven Kennedy, Pasadena, for Defendant and Respondent.

**Opinion**

MANELLA, J.

***789** In appellant Kelly McClain's action against respondent Octagon Plaza, LLC, (Octagon), the trial court sustained a demurrer without leave to amend to her claims for misrepresentation, breach of the covenant of good faith and fair dealing, and declaratory relief. Following a trial, the court concluded that she had failed to establish her remaining claims for violation of the Consumer Credit Reporting Agencies Act (Civ.Code, § 1785.1 et seq.) (CCRAA) and an accounting. We affirm the rulings regarding the claims for breach of the covenant of good faith and fair dealing and violation of the CCRAA, and otherwise reverse.

## RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

McClain operates a business known as "A+ Teaching Supplies." Ted and Wanda ****890** Charanian, who are married, are the principals of Octagon, which ***790** owns and manages a shopping center in Valencia. On February 28, 2003, McClain agreed to lease commercial space within the shopping center for a term of five years and two months, with an option to extend the lease for two additional five-year terms. The lease executed by the parties is a standard form agreement prepared by the American Industrial Real Estate Association, and is entitled "Standard Industrial/Commercial Multi-Tenant Lease—Net." The tenant on the lease is identified as "Kelly McClain dba A+ Teaching Supplies."

Paragraph 1.2(a) of the lease describes the size of the unit leased by McClain as "approximately 2,624 square feet," and attached to the lease is a diagram of the shopping center that represents the size of the unit as 2,624 square feet. Paragraph 2.1 states: "... Unless otherwise provided herein, any statement of size set forth in this Lease, or that may have been used in calculating Rent, is an approximation which the Parties agree is reasonable and any payments based thereon are not subject to revision whether or not the actual size is more or less." Paragraph 2.4 further provides: "Lessee acknowledges that: (a) it has been advised by Lessor ... to satisfy itself with respect to the condition of the Premises ..., and their suitability for Lessee's intended use, [and] (b) Lessee had made such investigation as its deems necessary with reference to such matters and assumes all responsibility therefor as the same relate to its occupancy of the Premises...."

With qualifications not relevant here, Paragraph 1.5 of the lease obliges McClain to pay $3,804 per month as "Base Rent." In addition, Paragraphs 1.6 and 4.1 require McClain to pay as additional rent 23 percent of the "Common Area Operating Expenses" (common expenses), which are defined in Paragraph 4.2 as costs incurred by Octagon for enumerated purposes "relating to the ownership and operation" of the shopping center. Paragraph 4.2 provides that McClain's share of the common expenses is due no later than 10 days after Octagon provides her with "a reasonably detailed statement of actual expenses." Paragraph 4.2 also permits Octagon, at its option, to estimate the common expenses for the upcoming calendar year and to require McClain to pay a prorated share of the estimate with her monthly base rent during the year. Under this option, Octagon is obliged to provide McClain with a "reasonably detailed statement" showing her share of the actual annual common expenses within 60 days after the end of the calendar year. If McClain underpays her share of the common expenses, she must pay the balance owing no later than 10 days after receiving the statement; if McClain overpays her share, she is to receive a credit against her share of the common expenses for the forthcoming year.

After a dispute arose concerning McClain's share of the common expenses, she filed an action in small claims court, which was eventually transferred to superior court. The action was resolved by a settlement in November 2004.

***791** On June 17, 2005, McClain initiated the underlying action against Octagon. After the trial court sustained a demurrer with leave to amend to the claims for misrepresentation and declaratory relief asserted in her complaint, McClain filed a first amended complaint (FAC), which contained claims for negligent or intentional misrepresentation, breach of the covenant of good faith and fair dealing, declaratory relief, violation of the CCRAA, and an accounting. Regarding the first three claims, the FAC alleged that the Charanians induced her to agree to pay excessive **891 rent by intentionally or negligently misstating the size of her unit prior to the execution of the lease. The FAC further alleged that Octagon violated the CCRAA by improperly obtaining her credit report in March 2005. Finally, it sought an accounting and declaratory relief with respect to the statement that she received in February 2005 regarding her share of the common expenses for the 2004 calendar year.

On November 11, 2005, the trial court sustained Octagon's demurrer to the first three claims, concluding that the lease, by its plain language, barred McClain from asserting the claims. Following a bench trial, the trial court determined that the Charanians had not violated the CCRAA in obtaining McClain's credit report, and that McClain had no right to an accounting under the lease. Judgment in Octagon's favor was entered on August 15, 2006.

## DISCUSSION

McClain contends that the trial court erred in sustaining the demurrer without leave to amend and in denying her remaining claims after trial.

### A. *Demurrer*

#### 1. *Standard of Review*

"Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] ... Appellate courts first review the complaint de novo to determine whether or not the ... complaint alleges facts sufficient to state a cause of action under any legal theory, [citation], or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879, 6 Cal.Rptr.2d 151, fn. omitted.)

"Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the *792 complaint to state a cause of action. [Citation.]" (*Cantu v. Resolution Trust Corp., supra,* 4 Cal.App.4th at p. 879, fn. 9, 6 Cal.Rptr.2d 151.)

Under the first standard of review, "we examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. [Citation.] We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation], and we may disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken. [Citation.]" (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947, 36 Cal.Rptr.2d 360.) If a proper ground for sustaining the demurrer exists, "this court will ... affirm the demurrers even if the trial court relied on an improper ground, whether or not the defendants asserted the proper ground in the trial court. [Citation.]" (*Cantu v. Resolution Trust Corp., supra,* 4 Cal.App.4th at p. 880, fn. 10, 6 Cal.Rptr.2d 151.)

Under the second standard of review, the burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. (*Cantu v. Resolution Trust Corp., supra,* 4 Cal.App.4th at p. 890, 6 Cal.Rptr.2d 151.) "To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." (*Ibid.*)

#### 2. *Misrepresentation*

[1] [2] [3] McClain contends that the FAC adequately alleges a claim for fraud in the inducement, that is, misrepresentation involving a contract in which "the promisor knows what he or she is signing but consent **892 is induced by fraud." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 297, p. 324, italics omitted.) We agree. Generally, " ' "[t]he elements of fraud, which give [ ] rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." ' [Citation.]" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173, 132 Cal.Rptr.2d 490, 65 P.3d 1255.) Claims for negligent misrepresentation deviate from this set of elements. "The tort of negligent misrepresentation does not require scienter or intent to defraud. [Citation.] It encompasses '[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true'

[citation], and '[t]he positive assertion, in a manner not warranted by the ***793** information of the person making it, of that which is not true, though he believes it to be true' [citations]." (*Id.* at pp. 173–174, 132 Cal.Rptr.2d 490, 65 P.3d 1255.)[1]

[4] [5] Regarding the fraud claim, the FAC alleges the following facts: In January 2003, when McClain investigated leasing space in the shopping center, Octagon informed her that the unit in which she was interested comprised exactly 2,624 square feet. Because the base rent in the shopping center was $1.45 per square foot per month, McClain's total base rent would be $3,804 per month. Moreover, because the unit occupied 23 percent of the shopping center, McClain would be responsible for this share of the common expenses.

Prior to entering into the lease, McClain attempted to confirm the size of the unit. The Charanians, who purported to be offended by her inquiries, responded that measuring the area would be unreasonably costly due to the unit's unusual angles. They insisted that they had intimate knowledge of every detail of the shopping center, and that McClain could rely on their representations regarding the sizes of the unit and the shopping center. Due to the Charanians' pretense that they were offended by her request to confirm the size of the unit and their repeated assurances that McClain could rely on their honesty and accuracy, McClain was induced to accept their representations, and she placed reasonable reliance upon the representations in executing the lease.

The Charanians knew, or had reason to know, that the representations were materially inaccurate. In early 2005, McClain obtained a copy of Octagon's application for earthquake insurance, which disclosed that the correct size of the shopping center was 12,800 square feet, rather than the 11,835 square feet the Charanians had used in calculating McClain's share of the common expenses. Upon investigation, she also discovered that her unit occupied approximately 2,438 square feet, rather than the 2,624 square feet represented. Had she known the correct sizes, she would not have agreed to the base rent and share of the common expenses stated in the lease. Under the agreed-upon rental rate of $1.45 per square foot, the base rent for the unit should have been $3,535.10 per month, rather than $3,804, as recited in the lease; moreover, McClain should have been allocated 19 percent of the common expenses, rather than the 23 percent share that she accepted under the lease. As a result of Octagon's misrepresentations, she was induced to enter into a ****893** lease that obliged her to pay excess rent of more than $90,000 over the term of the lease.

***794** These allegations, considered in isolation, are sufficient to establish the elements of a claim for intentional or negligent misrepresentation. In *O'Hara v. Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 804–806, 142 Cal.Rptr. 487, a tenant asserted a fraud claim against her landlord, alleging that the landlord induced her to rent an apartment by misrepresenting the existence of security measures in the building, and that she suffered injuries as a result of the absence of these measures. The court held that the fraud claim was adequately pleaded, reasoning that "[s]ince [the tenant] did not know the true facts and since [the landlord] had superior knowledge, the allegations, if proved, would support a finding of justifiable reliance." (*Id.* at p. 805, 142 Cal.Rptr. 487.) We reach the same conclusion here.

[6] [7] The key issue, therefore, is whether the terms of the lease rendered McClain's fraud claim untenable.[2] Section 1668 of the Civil Code provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, ... whether willful or negligent, are against the policy of the law." This provision encompasses intentional and negligent misrepresentation. (*Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1471–1473, 266 Cal.Rptr. 593.) Accordingly, as Witkin explains: "A party to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract, either that no representations have been made, or that any right that might be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, *including the waiver provision.*" (1 Witkin, Summary of Cal. Law, *supra,* Contracts, § 304, p. 330.)

Under these principles, California courts have concluded that a variety of contract terms neither bar fraud claims nor establish as a matter of law that reliance upon the defendant's misrepresentations was unjustifiable. (See *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 300–302, 37 Cal.Rptr.3d 364 (*Hinesley* ), and cases cited therein.) For example, in *Hinesley,* the plaintiff asserted a fraud claim against his landlord, alleging that when he leased commercial space in a shopping center, the landlord's agent told him that other units in the shopping center would be occupied by businesses likely to attract heavy "foot traffic." (*Id.* at p. 292, 37 Cal.Rptr.3d 364.) The lease in question contained a provision that expressly accorded the landlord the exclusive right to select other tenants, and recited that the plaintiff had not relied on any representation regarding other tenants. (*Id.* at p. 297, 37 Cal.Rptr.3d 364.) After the



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landlord obtained summary judgment on the plaintiff's claims, the court in ***795** *Hinesley* determined that the lease provision could not by itself absolve the landlord of liability for fraud. (*Id.* at pp. 300–302, 37 Cal.Rptr.3d 364.) In addition, the court reasoned that the provision did not, as a matter of law, preclude a finding of justifiable reliance, and that its presence in the lease was merely a factor to be considered in the determination of justifiable reliance. (*Id.* at pp. 301–302, 37 Cal.Rptr.3d 364.) The court nonetheless affirmed summary ****894** judgment, concluding that the evidence, viewed in its entirety, established that the plaintiff had not placed reasonable reliance on the agent's misrepresentations. (*Id.* at pp. 302–304, 37 Cal.Rptr.3d 364.)

It is well established that the kind of disclaimer in Paragraph 2.4, which asserts that McClain had an adequate opportunity to examine the leased unit, does not insulate Octagon from liability for fraud or prevent McClain from demonstrating justified reliance on the Charanians' representations. (*City of Salinas v. Souza & McCue Construction Co.* (1967) 66 Cal.2d 217, 224–225, 57 Cal.Rptr. 337, 424 P.2d 921, disapproved on another ground in *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 14, 84 Cal.Rptr. 173, 465 P.2d 61 [term in construction agreement requiring contractor to examine project site does not preclude fraud claim or establish unjustified reliance]; *Simmons v. Ratterree Land Co.* (1932) 217 Cal. 201, 203–204, 17 P.2d 727 [provision in real estate contract that buyer had investigated property and relied only on representations in contract did not protect seller from liability for fraud]; *Crawford v. Nastos* (1960) 182 Cal.App.2d 659, 665–666, 6 Cal.Rptr. 425 [provision in real estate contract that buyer had inspected well and accepted it " 'as is' " did not insulate seller for liability for damages from fraud]; *Smith v. Rickards* (1957) 149 Cal.App.2d 648, 653–654, 308 P.2d 758 [contract term stating that buyer had inspected business and was familiar with its location and condition did not bar fraud claim].) Accordingly, the focus of our inquiry is Paragraph 2.1, which asserts that "any statement of size" in the lease or used to calculate rent "is an approximation which the Parties agree is reasonable and any payments based thereon are not subject to revision whether or not the actual size is more or less."

In our view, this provision does not insulate Octagon from liability for fraud or establish that McClain's reliance on the Charanians' alleged misrepresentations was unjustifiable as a matter of law. Our view is informed by our Supreme Court's decision in *E.H. Morrill Co. v. State of California* (1967) 65 Cal.2d 787, 794, 56 Cal.Rptr. 479, 423 P.2d 551 (*E.H. Morrill Co.*). There, a contractor entered into a construction agreement to build a facility for the State of California. The agreement described the subsurface composition of the building site, but recited that the description contained approximations; in addition, it obliged the contractor to make its own investigation. (*Id.* at pp. 789–790, 56 Cal.Rptr. 479, 423 P.2d 551.) The agreement further provided that the description was confined to the actual results of the State's investigation and was " 'only included for the convenience of bidders' "; that the State's investigation of subsurface conditions had been made only " 'for the purpose of design' "; ***796** and that the inclusion of the description in the agreement did not relieve the contractor of its obligation to make its own investigation. (*Id.* at pp. 790–791, 56 Cal.Rptr. 479, 423 P.2d 551.) Notwithstanding the disclaimers and exculpatory terms of the agreement, the court concluded that the description constituted a "positive assertion of fact" which could support a claim for fraudulent misrepresentation. (*Id.* at pp. 791–792, 56 Cal.Rptr. 479, 423 P.2d 551.) It added: "The contention ... that an allegation of justifiable reliance on such representations is precluded as a matter of law because of [the disclaimers and exculpatory terms] ... is ... untenable." (*Id.* at p. 794, 56 Cal.Rptr. 479, 423 P.2d 551.)

Here, the Charanians' alleged pre-contractual figures for the unit's size and McClain's share of the common expenses—respectively, 2,624 square feet and 23 percent-were repeated (with qualifying ****895** language) in the lease. In view of the similarity between the lease and the agreement in *E.H. Morrill Co.*, we conclude that the terms of the lease—including the exculpatory provisions in Paragraph 2.1—do not bar McClain from asserting her fraud claim or showing that the misrepresentations reasonably induced her to accept the lease.

This conclusion finds additional support in *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 76 Cal.Rptr.2d 911 (*Furla* ). There, a homeowner and his brokers represented in a listing service and elsewhere that the house the owner was attempting to sell was 5,500 square feet. (*Id.* at pp. 1072–1075, 76 Cal.Rptr.2d 911.) The buyer's sales agreement with the owner provided in paragraph 18F: " 'Buyer is ... aware that Broker makes no representations with respect to ... square footage of the subject lot or the improvements thereon. Information, if any, on square footage provided in [the listing service] ... and information materials concerning the Property are approximations only. By obtaining a survey of the Property or having a professional appraiser measure the Property, Buyer may verify ... square footage.' " (*Id.* at p. 1079, 76 Cal.Rptr.2d 911.) Following the sale, the buyer discovered the house was only 4,300 square feet, and initiated an action for fraud and rescission. (*Id.* at p. 1072,

KeyCite Red Flag - Severe Negative Treatment
Overruled in Part by Ward v. Magaha, Wash., January 25, 1913

9 Wash. 508
Supreme Court of Washington.

NEIS ET AL.
v.
FARQUHARSON ET AL.

Sept. 4, 1894.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Phillip Neis and Richard Brangon, trading as Phillip Neis & Co., against William Wagner and A. S. Farquharson (afterwards against Christina Wagner, A. J. Miller, and A. S. Farquharson, administrators), for accounting. Judgment for plaintiffs. Defendants appeal. Affirmed.

West Headnotes (5)

[1] **Executors and Administrators**
Claims Which Must Be Presented

A demand for discovery and accounting, since it necessarily involves an uncertain amount, need not be presented to the administrator for allowance.

1 Cases that cite this headnote

[2] **Executors and Administrators**
Appeal and Error

The objection that a claim against an intestate's estate has not been presented to the administrator for allowance or rejection cannot be raised for the first time on appeal.

7 Cases that cite this headnote

[3] **Principal and Agent**
Duty of Agent to Account for Profits of Agency

An agent, under contract to buy produce for his principal exclusively, is liable to the principal for all profits realized on produce bought by him while the agency lasted, and sold by him without the principal's consent.

[4] **Principal and Agent**
Nature and Form of Remedy

An agent, under contract to buy produce for his principal exclusively, is liable to the principal for all profits realized on produce bought by him while the agency lasted, and sold by him without the principal's consent; and, since the amounts are peculiarly within the agent's knowledge, equity will compel an accounting, and will not remit the principal to an action for damages for breach of contract.

1 Cases that cite this headnote

[5] **Witnesses**
Parties and Other Persons Whose Testimony Is Excluded

Code, § 389, providing that, in suits by or against a personal representative, an adverse party shall not testify in his own behalf, will not exclude from a trial had after the death of an original party, and the substitution of his representatives, the deposition of an adverse party duly taken before such death.

12 Cases that cite this headnote

**Attorneys and Law Firms**

***509** W. W. Likens and Ira A. Town, for appellants.

H. F. Garretson, for respondents.

**Opinion**

ANDERS, J.

In the year 1883, the respondents, Phillip Neis and Richard Brangon, partners, under the firm name of Phillip Neis & Co., instituted this action against William Wagner and Alexander S. Farquharson, partners, doing business at Puyallup, under the name and style of William Wagner & Co., to compel the defendants to account for and pay over the proceeds of certain hops alleged to have been purchased by defendants for and on account of plaintiffs in the year 1882. The complaint alleges that on or about June 7, 1882, the plaintiffs and defendants agreed that defendants should, during the year 1882, as agents of said plaintiffs, purchase hops in Washington territory, for the use of and on account of the plaintiffs, to be shipped to plaintiffs at San Francisco, Cal., and that plaintiffs should pay to said defendants a commission of one-half cent for each and every pound of hops so purchased, and that plaintiffs should from time to time make all necessary cash advances to enable the defendants to purchase said hops, and that said purchases should be made under such general instructions and directions as plaintiffs might give from time to time concerning the same. It is further alleged therein, in substance, that the defendants, under said agreement, and as plaintiffs' agents, ***510** did purchase from time to time during said year 1882, and prior to September 1, 1882, large quantities of hops for the use of and on account of plaintiffs, and under their directions and instructions, from divers persons in Pierce county, and, to enable them to make said purchases, the plaintiffs furnished said defendants large sums of money, amounting to the sum of $577.76, which money was received by them, and expended in paying cash advances on said hops to the several persons selling the same. That the plaintiffs have no knowledge or definite information as to the quantity of hops so purchased by said defendants under said agreement, but believe the same to exceed 30,000 pounds; and they do not know the names of the different persons from whom they were so purchased. That the said hops so purchased, being then and there the property of the plaintiffs, came into the possession of the defendants, who thereafter sold the same, contrary to their said agreement, to divers persons to the plaintiffs unknown, and that the proceeds of said sales were paid to defendants, ****698** who now hold and possess the same for the use of plaintiffs. That plaintiffs have no knowledge or means of knowledge as to the amount so received by the defendants, but believe the same exceed the sum of $20,000. That plaintiffs have repeatedly demanded of defendants an accounting of their acts and doings as such agents, and of the quantity of hops so purchased under said agreement, and from whom, and of the money paid defendants by plaintiffs for said cash advances, and of the amount of hops so received by them and the charges thereon, and also an account of the proceeds of said sales, but the defendants have refused, and still refuse, to comply with any of said demands; and that plaintiffs have offered from time to time to pay all commissions due to said defendants, and all personal advances or payments which may have been made by defendants in the purchase of said hops, and now offer to ***511** pay the same whenever ascertained. The answer of the defendants denies each and every allegation of the complaint, and sets up affirmatively that in the summer of 1882 the plaintiffs loaned defendants the sum of $577.76; and that thereafter, and on August 23, 1882, the defendants tendered the same to plaintiffs, together with interest thereon at the rate of 10 per cent. per annum, which the plaintiffs then and there refused, and have ever since refused; and that defendants now are, and ever since have been, ready and willing to pay plaintiffs said sum of money. That at all times mentioned in the complaint, and prior thereto, defendants were engaged in doing a general business as merchants, and were also engaged in buying and selling hops on their own account and for others, which facts were at all times known to these plaintiffs. That defendants, while so engaged in business as aforesaid, agreed to purchase hops for plaintiffs at such prices and in such lots and of such quality as plaintiffs might from time to time instruct them to purchase, but not otherwise. That plaintiffs did from time to time instruct them to purchase hops of certain quality, in certain lots and at certain prices, but that defendants were unable to purchase any hops upon the terms, conditions, and of the quality and at the prices to which they were limited by plaintiffs' said instructions, and that the plaintiffs, during all the times mentioned in the complaint, refused to pay the ruling and market price demanded for hops of the quality and in such lots as plaintiffs instructed them to purchase, and, by reason thereof, these defendants purchased no hops for or on account of plaintiffs. The affirmative matters set forth in the answer were denied by the reply of plaintiffs, and, upon the issues thus raised, a trial was had, resulting in a decree for plaintiffs, and the defendants appealed.

No formal order was made by the trial court for an accounting ***512** between the parties to the action, but a referee was appointed to take the testimony and report it to the court. The referee was appointed in the year 1884, but it seems he did not report and file the testimony taken by him until March, 1888. The final hearing was had upon the testimony so taken and reported by the referee, and the deposition of R. M. Brangon, one of the plaintiffs.

This deposition was regularly taken before a notary public in San Francisco, Cal., on August 13 and 14, 1885; and the defendants were then and there represented by counsel, who appeared and cross-examined the witness fully in their behalf. Thereafter, and on August 6, 1886, William Wagner, one of the defendants, died, intestate; and Christina Wagner, administratrix, and A. J. Miller, administrator, of his estate, were substituted as defendants, and the cause proceeded against them, and judgment was rendered against them and A. S. Farquharson, in their representative capacities (the latter having been appointed administrator of the partnership estate of William Wagner & Co.), on February 25, 1893. Objection is made by the appellants to this judgment, on the alleged ground that the plaintiffs failed to make out a cause for an accounting or any cause within the jurisdiction of a court of equity. It is not disputed that the relation of principal and agent existed between the original parties to this action. In fact, such a relation is virtually admitted by the defendants' answer, the substance of which is above set forth. But the extent and character of the agency are disputed. The testimony of the defendant Farquharson shows that during the summer of 1882, and while their agreement with the respondents was in full force, the firm of Wagner & Co. purchased hops from divers persons for themselves; but he further says they were unable to purchase any for the respondents, owing to the conditions imposed upon them ***513** as to price, quality, and quantity. The record discloses, however, that the firm of William Wagner & Co notified the respondents by letter, on one occasion at least, that they had purchased a certain quantity of hops; but neither in that nor in any other communication during the existence of the agency were the respondents informed that the purchase was not made on their account, but on account of Wagner & Co. We are convinced from the evidence, as a whole, that the respondents had good reason to believe, and did believe, that Wagner & Co. were buying hops on their account exclusively. Indeed, they were not even informed to the contrary by the letter of August 9, 1882, by which they were notified that Wagner & Co. would no longer act as their agents. In that letter Wagner & Co. say: "We feel that our connection with your house has not been a source of much profit to us this year." If they up to that time had purchased no hops for the respondents, it is reasonable to suppose they would then have plainly said so; and in that event there would have been no occasion to mention the subject of "profit" ****699** at all. An examination of all of the evidence in the record leads us to the conclusion that the appellants ought, in equity, to account to the respondents for the proceeds of the hops purchased by Wagner & Co. while acting as the agents of the respondents, and subsequently sold by them without the consent of their principals; and this being so, it follows that under the law existing at the time of the trial, as often construed by this court, a finding of facts by the trial court was not a necessary prerequisite to the validity of the decree, and therefore the omission of such finding is no ground for its reversal.

It is earnestly insisted by the learned counsel for the appellants that inasmuch as no fraud is alleged or proven, and no money of the plaintiffs is shown to have been used ***514** in paying the purchase price of the hops, plaintiffs are not in a situation to claim equitable relief, their remedy being exclusively an action at law for damages for breach of contract. But we think this contention of counsel cannot be sustained. As matter of fact, the defendants had money of the plaintiffs in their hands, which they might have used if they did not, and which the plaintiffs expected they would use in part payment for hops. Equity will not permit a party who undertakes to act for another in any given matter to act for himself in the same matter, or place himself in a position where his own personal interests conflict with the interest of his employer (2 Pom. Eq. Jur. § 959); and this is just what Wagner & Co. did in this instance. The rule is well stated in Dutton v. Willner, 52 N. Y. 312, in which case the court said: "It is a well settled and salutary rule that 'a person who undertakes to act for another in any matter shall not in the same matter act for himself.' *** If the agent make a profit out of the transaction, he is bound to account for it, though made without the knowledge or authority of the principal, and without risk or expense to him." In this case the quantity of hops purchased and the price paid, as well as the amount received for them by Wagner & Co., were peculiarly within their own knowledge; and, under such circumstances, the jurisdiction of equity attaches. 3 Pom. Eq. Jur. § 1420. and note 1.

Nor do we think that the failure of the court below to order a technical accounting is proof that, in the opinion of the court, the plaintiffs were not entitled to an accounting at all. The statute prescribes no method by which an account shall be taken or stated in actions like this, and a mere departure from the recognized procedure under the former practice in chancery is not alone a sufficient ground for the reversal of the judgment. The court itself found the amount due plaintiffs, and, if the amount so found was ***515** not larger than the evidence warranted, the defendants certainly have no legal cause of complaint.

It is next urged that the court erred in admitting in evidence the deposition of Brangon. It is claimed that this deposition, though competent when taken, was incompetent at the time of the final hearing of the cause, by reason of the provisions of section 389 of the Code of Washington, which are as follows: "*** provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased or insane person, or as guardian of a minor under the age of fourteen years, then a party in interest, or to the record, shall not be permitted to testify in his own behalf." This contention on the part of the appellants is based upon the alleged legal proposition that the competency of a witness whose deposition is offered in evidence must be determined by the law in force at the time of the trial, and not by the law existing when the deposition was taken. In support of this proposition, appellants cite Weeks, Dep. § 413, Mitchell v. Haggenmeyer, 51 Cal. 108, Fielden v. Lahens, 6 Abb. Pr. (N. S.) 341, and 5 Am. & Eng. Enc. Law, 582, and they insist that, tested by these authorities, the deposition was inadmissible. Had the action been brought against Wagner's administrators in the first instance, or had Brangon testified after they were substituted as parties defendant, it seems clear that his testimony would have been incompetent under the statute. But it will be remembered that, when he testified, there were no administrators in the case, no one was suing or defending in a representative capacity, and in such cases only is a party in interest or to the record prevented from testifying. It would, in our opinion, be extremely unreasonable to hold that Brangon did not "testify" until his deposition was read at the hearing. He testified at the time his deposition was taken, and when he was a ***516** competent witness. The statutory prohibition is to testifying under certain specified circumstances; and it makes the time of testifying the test of competency, rather than the time of the hearing. If at that time the witness is competent, the prohibition does not apply. We think there was no error in admitting the deposition in evidence; and, as was said in Marlatt v. Warwick, 18 N. J. Eq. 108: "This is in accordance with the well-settled rule of evidence, both at law and in equity, that the objection to the witness must exist at the time of his being sworn. If a witness should, after being examined, die, become interested in the suit, or be convicted of crime, his testimony would not be rejected on that account." See, also, Ford v. Grieshaber, 2 Head, 435; Cameron v. Cameron, 15 Wis. 6; Smith's Ex'x v. Profitt's Adm'x (Va.) 1 S. E. 67; Keran v. Trice, 75 Va. 690. In Comins v. Hetfield, 80 N. Y. 261, it was held that the death of the defendant was no ground for striking out that portion of plaintiff's testimony given before the death occurred. ****700** And in Sheidley v. Aultman, 18 Fed. 666, it was said that it is the rule in chancery that, if the testimony was competent when the deposition was taken and filed, it remains competent; and the court there held that this rule of equity was not changed by section 858 of the Revised Statutes of the United States, which is a statute similar in its object and purpose to ours, but that the administrator merely takes up the case as it stood when the intestate party died. And to the same effect is the case of Vattier v. Hinde, 7 Pet. 252, in which Chief Justice Marshall said: "The new parties plaintiffs are the representatives of Belinda Hinde, an original plaintiff, and the proceedings are revived in their names, by order of the court, on their bill of revivor. Under such circumstances, the settled practice is to use all the testimony which might have been used had no abatement occurred." See, also, 5 Am. & Eng. Enc. Law, 610.

***517** It is further contended that the judgment must be reversed for the reason that there is no proof that plaintiffs ever presented their demand or claim to the administrators for their allowance or rejection, as they were required to do by section 988 of the Code of Procedure. But this contention cannot prevail. In the first place, it is questionable, to say the least, whether plaintiffs' demand was such a claim as is contemplated by our statute. The statute (section 980) provides that "every claim presented to the administrator shall be supported by the affidavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same to the knowledge of the claimant." It is difficult to see how the plaintiffs could have made such an affidavit. Their action was instituted for the very purpose of discovering and ascertaining the "amount" of their claim, which they alleged in their complaint they did not know, and had no means of knowing except an accounting. Where the demand is merely for equitable relief, or for uncertain and unliquidated damages, it has been held, and not without reason, that it is not necessary to present it to the administrator for allowance or rejection, "for it is obvious that in all such cases the exhibition would be but an idle ceremony." 2 Woerner, Adm'n, § 386; Evans v. Hardeman, 15 Tex. 480; Toulouse v. Burkett (Idaho) 10 Pac. 26; Thompson v. Bank, 19 Nev. 242, 9 Pac. 121. In the second place, the appellants are not in a position to urge the objection in this court that there was no presentation of plaintiffs' claim or demand to the administrator. The record does not show that the objection was made in the court below, and it cannot be taken for the first time in the appellate court. Coleman v. Woodworth, 28 Cal. 568; Bank v. Howland, 42 Cal. 129; Drake v. Foster, 52 Cal. 225.

***518** Lastly, it is claimed that the evidence is insufficient to establish a right in plaintiffs to a recovery in this action. But in this action. But in this view we are unable to concur. There is a conflict in the evidence on some material points, but the judgment cannot be disturbed on that account. The judgment must be affirmed and it is so ordered.

HOYT and SCOTT, JJ., concur. 37 P. 697

**Parallel Citations**

# EXHIBIT "14"

EXHIBIT "14"

KeyCite Yellow Flag - Negative Treatment
**Opinion Modified on Reconsideration by** Wells Fargo Financial, Inc. v. Fernandez, S.D.N.Y., November 27, 2000

86 F.Supp.2d 212
United States District Court,
S.D. New York.

NORWEST FINANCIAL, INC., Plaintiff,
v.
Juan Carlos FERNÁNDEZ and Gustavo Carlos Lanzillotta, Defendants.

No. 98 Civ. 6635(SAS). | Jan. 12, 2000.

Buyer of Argentine consumer finance company sued sellers to recover for losses. The District Court, Scheindlin, J., held that: (1) defendants were required to reimburse plaintiff for undisputed credit losses on demand; (2) plaintiff was required to assign to defendants all loan documents needed to foreclose on losses; (3) defendants were properly terminated for cause; (4) defendants would not be enjoined from competing with plaintiff.

Ordered accordingly.

West Headnotes (13)

[1] **Banks and Banking**
Liability of original stockholder

Under terms of stock purchase agreement, sellers of consumer finance company were required to reimburse buyer for undisputed credit losses on demand; agreement contained no audit or verification rights, and portion of purchase price reserved for such losses was available only for unreimbursed losses.

[2] **Banks and Banking**
Liability of original stockholder

Under terms of stock purchase agreement, buyer of consumer finance company was entitled to recover from sellers for losses on sold loans, even though sale contracts were not attached to agreement; sellers had represented in agreement that each contract for sale of loans on which company had obligations with respect to said loans was attached.

[3] **Banks and Banking**
Liability of original stockholder

Under terms of stock purchase agreement, credit losses for which sellers of Argentine consumer finance company were required to reimburse buyer, included (1) unpaid principal, compensatory interest, and tax on compensatory interest, and (2) punitive interest for any missed payments and tax on punitive interest; first category was account receivable itself and second category was includable under agreement's definition of losses as "receivable ... or increase thereof."

1 Cases that cite this headnote

[4] **Banks and Banking**
Liability of original stockholder

Under terms of stock purchase agreement, credit losses for which sellers of Argentine consumer finance company were required to reimburse buyer, did not include accounts receivable that were already overdue at time of closing, or for which buyer had made new agreements with third parties since time of closing.

3 Cases that cite this headnote

[5] **Banks and Banking**
Liability of original stockholder

Under terms of stock purchase agreement, buyer of consumer finance company was not required to present proof of its good faith efforts to collect accounts receivable and prevent liabilities before seeking reimbursement from sellers, absent evidence that buyer had engaged in any bad faith delay in collecting accounts receivable or preventing liabilities.

[6] **Banks and Banking**
Liability of transferee

Under terms of stock purchase agreement, buyer of consumer finance company was required, after recovering credit losses from sellers, to assign to sellers all loan documents needed to foreclose on losses.

[7] **Banks and Banking**
Election or appointment, qualification, and tenure

President's and vice-president's "director agreements," entered into as part of sale of Argentine consumer finance company, were governed by Argentine commercial law rather than Argentine labor law; under Argentine law, president and vice-president were not employees of company, and were not paid salaries by buyer.

[8] **Banks and Banking**
Election or appointment, qualification, and tenure

Under Argentine commercial law, buyer of consumer finance company properly terminated company's president and vice-president for breach of stock purchase agreement obligation to post collateral for deferred taxes; given agreement's non-waiver clause, neither buyer's failure to demand collateral at closing nor alleged statement of buyer's employee that sellers did not have to post collateral was effective to waive obligation.

1 Cases that cite this headnote

[9] **Banks and Banking**
Election or appointment, qualification, and tenure

Under Argentine commercial law, buyer of consumer finance company properly terminated company's president and vice-president for breach of stock purchase agreement obligation to pay tax judgment; terms of agreement gave buyer authority to determine whether it had raised all reasonable defenses to tax liability, and directors could not refuse to pay merely because they disagreed with that determination.

4 Cases that cite this headnote

[10] **Banks and Banking**
Liability of original stockholder

Under terms of stock purchase agreement, consumer finance company sellers' obligation to post collateral for potential tax liability terminated once taxes were paid, even though government might still have sought to recover interest on those payments.

1 Cases that cite this headnote

[11] **Banks and Banking**
Liability of original stockholder
**Banks and Banking**
Liability of transferee

Under terms of stock purchase agreement, sellers of consumer finance company who had paid tax judgment were not entitled to reimbursement for amount of taxes they paid, as buyer had raised every reasonable defense to liability, but were entitled to reimbursement for penalties and interest, which buyer could have avoided through prompt payment.

1 Cases that cite this headnote

[12] **Banks and Banking**
Liability of transferee

Under New York law, sellers of consumer finance company were entitled to accounting of status and maintenance of reserved portions of purchase price, as buyer had fiduciary duty to maintain reserved funds for sellers' benefit, but such right was independent of sellers' duty to pay for any losses for which they were liable under purchase agreement; buyer was not required to offset losses against reserved funds.

[13] **Injunction**
Non-competition and non-solicitation issues

Terminated directors of purchased consumer finance company would not be enjoined from competing against company, though such competition was prohibited by stock purchase agreement, absent evidence that such competition was threatened.

**Attorneys and Law Firms**

***214** David Dunn, Davis Weber & Edwards P.C., New York, NY, for Plaintiff.

Eduardo L. Tabío, Oleg Rivkin, Fox Horan & Camerini LLP, New York, NY, for Defendants.

**Opinion**

**OPINION AND ORDER**

SCHEINDLIN, District Judge.

**I. INTRODUCTION**

In January 1998, plaintiff Norwest Financial, Inc. ("Norwest"), an Iowa corporation, purchased an Argentine consumer finance company named Finvercon S.A. Compañia Financiera ("Finvercon") from defendants Juan Carlos Fernández and Gustavo Carlos Lanzillotta, who remained with Finvercon as President and Vice President respectively. Within a few months, however, this once-promising business relationship turned sour. Norwest terminated defendants in September 1998, and the parties now look to this Court to decide the terms of their divorce.

On September 18, 1998, Norwest filed suit against defendants, seeking: (1) damages and indemnification for defendants' alleged breach of their contract with Norwest; (2) a declaratory judgment stating that Norwest properly terminated defendants; (3) injunctive relief relating to a non-competition clause contained in defendants' contracts with Norwest; and (4) injunctive relief and specific performance of a requirement contained in defendants' contracts with Norwest that defendants post collateral to cover payments of any deferred taxes.

Defendants answered Norwest's claims and filed counterclaims, seeking: (1) reimbursement of money paid to Norwest and Finvercon to satisfy a tax judgment against Finvercon, as well as reimbursement of other tax payments; (2) an order stating that Norwest must provide defendants with a full, detailed and chronological report of its good faith efforts to collect outstanding accounts receivable, verified by an independent auditor or examiner, before Norwest can demand any reimbursement of those accounts receivable; (3) an order stating that Norwest must provide defendants with a full and detailed accounting of the status and maintenance of certain reserve funds, verified by an independent auditor or examiner; (4) a declaratory judgment stating that Norwest is required to assign all of its right, title and interest in certain accounts receivable to defendants simultaneously with defendants' reimbursement of those accounts receivable to Norwest; and (5) a declaratory judgment stating that Norwest is required to offset certain losses against a ***215** reserve fund before demanding reimbursement from defendants.

Jurisdiction is based on 28 U.S.C. § 1332. Norwest is a citizen of Iowa, and defendants each are citizens of the Republic of Argentina; the amount-in-controversy exceeds $75,000. *See* Joint Pretrial Order ("JPTO"), at ¶ 2. Venue is proper and personal jurisdiction is established by the agreement and consent of the parties, pursuant to the terms of the contracts between Norwest and defendants. *See id.* A non-jury trial was held on October 21–November 2, 1999. The following constitutes the Court's findings of fact and conclusions of law.

## II. FINDINGS OF FACT

### A. Negotiation and Execution of the Agreements

On or about July 30, 1997, Norwest entered into a series of three agreements with defendants to acquire all of the outstanding stock of Finvercon. The three agreements consisted of a Stock Purchase Agreement ("Purchase Agreement") and two Seller's Director Agreements ("Director Agreements"). The parties entered into all three agreements contemporaneously. *See* JPTO, Undisputed Facts at ¶ A ("Undisputed Facts"). Both sides agree that the Purchase Agreement and Director Agreements documented a single, integrated transaction by which Norwest acquired Finvercon. *See* JPTO, Plaintiff's Contentions at ¶ 19 ("Pl.Cont."); JPTO, Defendants' Contentions at ¶ 10 ("Def.Cont.").

The Purchase Agreement details the terms and conditions of the stock purchase. The Purchase Agreement also contains representations and warranties of both the buyer (Norwest) and the sellers (defendants). *See* Plaintiff's Exhibit ("Pl.Ex.") 1. The Purchase Agreement is governed by New York law. *See* Pl.Ex. 1, at § 13.12.

Each Director Agreement details the terms and conditions under which Fernández and Lanzillotta would remain as members of Finvercon's Board of Directors following the sale of Finvercon to Norwest. In addition, Fernández's Director Agreement provided that Norwest would appoint Fernández as Finvercon's President, while Lanzillotta's Director Agreement provided that Norwest would appoint Lanzillotta as Finvercon's Vice President. The Director Agreements, which are substantially similar to each other, contain provisions relating to compensation, restrictions, and discharge; they also provided that Fernández and Lanzillotta would serve for a term of three years, although each could be removed immediately for cause or unacceptable performance, as defined in the Director Agreements. *See* Undisputed Facts at ¶ B; Pl. Exs. 2, 3. The Director Agreements are governed by Argentine law. *See* Pl. Exs. 2, 3, at § 5.

The Purchase Agreement and the Director Agreements were negotiated over an extended period, with each party advised by Argentine and American counsel of its choosing. *See* Undisputed Facts at ¶ C. Both Fernández and Lanzillotta were experienced businessmen. *See* Trial Transcript ("Trial Tr.") at 609–14, 953–56. Although Fernández testified that neither his Argentine nor his American counsel reviewed his Director Agreement, he also stated that he read and understood his Director Agreement and made a conscious choice not to consult counsel. *See id.* at 253–54, 259–64.[3]

The purchase and sale provided for in the Purchase Agreement took place on January 7, 1998 (the "Closing"). *See* Undisputed Facts at ¶ A. On that day, Norwest appointed Fernández and Lanzillotta as President and Vice President, respectively, of Finvercon. *See* Trial Tr. at 623, 975–76.

***216** Emilio Iribarren, the former President of Island Finance, a subsidiary of Norwest, testified that Norwest originally preferred to enter into employment contracts with defendants but was dissuaded by Fernández. *See id.* at 75–76. According to Iribarren, Fernández explained to Norwest that it was common in Argentina for Presidents and Vice–Presidents not to be employees of their companies and that the arrangement would have tax advantages both for Norwest and for defendants. *See id.* Iribarren testified that, as a result of this request, defendants were paid compensation instead of a salary and were named to Finvercon's board of directors. *See id.* at 76. While defendants dispute this testimony, I find that Iribarren's version is accurate.

Under their Director Agreements, Fernández and Lanzillotta were paid yearly compensation of $230,000, plus $^1/_{12}$ of that figure, for a total of $249,166.67. *See* Pl. Exs. 2, 3, at § 1.2(a). In addition, the Director Agreements provided for a bonus linked to Finvercon's net profit. *See id.* From January through August 1998, defendants received monthly payments of $20,763.89 from Finvercon. *See* Pl.Ex. 62. Those monthly installments, if multiplied by 12 months, would total $249,166.67. Thus, Finvercon paid defendants the compensation described in § 1.2 of their Director Agreements for January through August 1998.

### B. Credit Losses

Before its purchase by Norwest, Finvercon was a consumer finance company that carried out a diverse range of banking operations. *See* Trial Tr. at 610. Among other activities, Finvercon made loans to individuals, either through unions or other intermediaries known as "mutuales," and to commercial entities. *See id.* at 124, 145–47, 610. Collectively, these loans constituted Finvercon's accounts receivable. *See id.* at 88, 521. In addition, Finvercon sold packages of its loans to other finance companies; these packages constituted

Finvercon's "sold obligations." *See id.* at 89–90, 525–531. On occasion, Finvercon would repurchase some of these sold obligations, and those loans were called "repurchased obligations." *See id.* at 531–33.

During the negotiations to purchase Finvercon, Norwest expressed concern that Fernández and Lanzillotta did not have sufficient reserves to cover Finvercon's outstanding credits. *See id.* at 86–88. Fernández and Lanzillotta took full responsibility for the collectability of Finvercon's portfolio, and they allowed Norwest to withhold a portion of the purchase price in order to guarantee the portfolio. *See id.* at 86–88. This withheld portion became known as the "Contingent Portion of the Purchase Price." *See id.* at 86–88; Pl.Ex. 1, at § 2.2(b).

At the time of the sale, Finvercon's financial statements reflected a number of outstanding loans that were severely past due. *See* Trial Tr. at 88. Finvercon had a reserve fund covering the full amount of these loans. *See id.* at 88–89. Pursuant to the sale, Fernández and Lanzillotta transferred that reserve fund to Norwest, as part of the Contingent Portion of the Purchase Price, and the severely past due loans remained on Finvercon's financial statements. *See id.* Fernández and Lanzillotta chose this arrangement because they believed the loans might still be collectible. *See id.* at 88–89, 114–15.

As part of the purchase of Finvercon by Norwest, the parties wrote several guarantees regarding these outstanding credits into the Purchase Agreement. *See* Pl.Ex. 1, at §§ 2.2(b), 7.1. Most important, defendants agreed to reimburse Finvercon and Norwest for any Credit Losses "[up]on demand." *See id.* Fernández admitted that he did not negotiate any right to audit or verify Norwest's Credit Loss determinations before paying them. *See* Trial Tr. at 99–100, 763.[2]

***217** On September 28, 1998, in compliance with the notice provisions of the Purchase Agreement, Norwest demanded that defendants pay to Finvercon the sum of $2,405,794.43 on account of Credit Losses incurred by Finvercon. *See* Undisputed Facts at ¶ T; Pl.Ex. 34. In response to a request from defendants, Norwest provided an explanation of the amounts contained in its demand, but defendants did not pay. *See* Pl.Ex. 36.

During the following twelve months, Norwest made four more demands for payment of the Credit Losses—on October 21, 1998, February 5, 1999, July 27, 1999, and September 23, 1999. *See* Undisputed Facts at ¶¶ U, V, W, X; Pl. Exs. 37, 38, 39, 40. The amounts demanded by Norwest increased with each letter. On October 21, 1998, Norwest demanded $5,559,857.81, because it had added different accounts to its calculation of Credit Losses. *See* Pl.Ex. 37. On February 5, 1999, Norwest demanded $6,644,059.19, because of additional Credit Losses in the intervening months. *See* Pl.Ex. 38. On July 27, 1999, Norwest demanded $10,457,556.60, because of some corrections and additional Credit Losses in the intervening months. *See* Pl.Ex. 39. On September 23, 1999, Norwest demanded $13,561,984.29, because of additional Credit Losses in the intervening months. *See* Pl.Ex. 40. The supporting data attached to the September 1999 letter corrects several mistakes that Finvercon found in its earlier data. *See* Trial Tr. at 533–35, 539–40. During his deposition in connection with this matter, Fernández discovered an error in the September 1999 demand. *See id.* at 535, 539–42. Norwest corrected the error and sent a revised demand on October 22, 1999. *See id.* at 535–37; Pl.Ex. 102.

Norwest obtained the data for these demands from Finvercon's computer system. For the first three demands, the data was in Argentina. *See* Trial Tr. at 149–53, 518–19. Around May or June of 1998, however, the data was transferred to Norwest's headquarters in Des Moines. *See id.* at 519–21. The parties stipulated that this transfer of information was complete and accurate. *See id.* at 82.

In its demands, Norwest charged the following for each account receivable that had become a Credit Loss: unpaid principal and compensatory interest computed for the original life of the loan, punitive interest on any missed payments,[3] and unpaid VAT tax[4] on both the compensatory and punitive interest. *See id.* at 94–97, 484–86, 524–25. The rate of punitive interest was equal to one-half the rate of compensatory interest. *See id.* at 93–97, 524–25. Although the Purchase Agreement defines "Credit Loss" and "account receivable," it does not mention punitive interest. *See* Pl.Ex. 1, at §§ 2.2(b), 3.8. In addition, punitive interest was not reflected on Finvercon's books, because Finvercon charged punitive interest but did not accrue those charges in the customer accounts. *See* Trial Tr. at 96.[5]

Three categories of claimed Credit Losses deserve special note. First, Norwest claimed as Credit Losses the loans that were severely past due at the time of the Closing and for which Finvercon had a reserve fund. *See id.* at 88–89, 114–15. Second, Norwest claimed as Credit Losses ***218** certain loans for which debtors had made payments to the intermediaries—the unions or mutuales—who did not forward the payments to Finvercon; Finvercon negotiated with the intermediaries to secure those payments. *See id.* at 176–82. Third, Norwest claimed as Credit Losses several sold obligations that were not listed in the Purchase Agreement. *See id.* at 562–65.

**C. Deferrals of VAT Tax**

Argentine law permits taxpayers to defer VAT taxes provided that they invest in certain promoted activities in specified geographic areas, a procedure known as the Tax Benefits Regime. *See id.* at 209–10. Prior to Norwest's acquisition of Finvercon, Finvercon had filed applications to defer various payments of VAT taxes, including applications for the months of February, March, and April 1997 to defer taxes totaling $317,500.00. *See* Undisputed Facts at ¶ D. Those applications were prepared by Salvador Pristera, an accountant who worked at Finvercon. *See* Trial Tr. at 789–790.

In February 1998, the Argentine branch of government responsible for the administration of taxation, known as the DGI, provided written notice to Finvercon that it had rejected Finvercon's applications to defer the VAT taxes. *See* Undisputed Facts at ¶ E. Pristera received this notification. *See* Trial Tr. at 767–68. Pristera testified that he informed Mario Olive, Finvercon's controller, of the problem. *See id.* at 769–70. Olive denied that Pristera notified him. *See id.* at 157. I credit Olive's testimony and find that Pristera did not inform him of the DGI's notification.

In April 1998, the DGI commenced legal proceedings against Finvercon to collect VAT taxes due and unpaid, for, among other periods, the months of February, March and April 1997. *See* Undisputed Facts at ¶ F. Pristera received notification of this claim. *See* Trial Tr. at 771. Pristera contacted the office of Ruben Pardo, a lawyer who regularly handled work for Finvercon; Pardo and one of his associates, Carla Baldini, handled the matter and, until July 1998, spoke only with Pristera. *See id.* at 773–74, 999–1007.

Pristera testified that he also informed Olive of the DGI's April claim. *See id.* at 771. According to Pristera, Olive told him to refer the matter to Pardo. *See id.* at 772. Pristera also testified that he informed Chris Keiser, the Norwest assistant general counsel overseeing the Carribean, Central America, and South America, that Finvercon had received a claim from the DGI. *See id.* at 772–73. Both Olive and Keiser denied that Pristera told them about the DGI's claim in April. *See id.* at 155–56, 489–91. I credit the testimony of Olive and Keiser and find that they did not learn about the DGI's claim in April.

In addition, both Olive and Keiser testified that Pristera had told them in September that he had notified Fernández of the tax problem, either in February or in April. *See id.* at 159–63, 497–98. Both also testified that Pristera told them that Fernández had instructed Pristera to refer the tax problem to Pardo. *See id.* at 159–64, 499. Finally, Keiser testified that Pristera told Keiser that he would deny ever making those statements. *See id.* at 514. At trial, Pristera testified that he never informed Fernández or Lanzillotta of the tax problem. *See id.* at 770–72. Pristera also stated that he did not tell Keiser that he would deny making certain statements. *See id.* at 814–15. Fernández and Lanzillotta testified that they first learned about the tax problem in August 1998. *See id.* at 312, 665, 969.

Regardless of what Pristera may or may not have said to Keiser or Olive, I credit the testimony of Fernández and Lanzillotta and find that they did not learn about the tax problem until August 1998. First, had Fernández or Lanzillotta learned of the tax problem any earlier, they would have engaged in the same flurry of phone ***219** calls and meetings that marked late August and early September 1998. They certainly would not have allowed the interest and penalties to accumulate for months. Second, Fernández's testimony is supported by the testimony of Horacio Seligra, a public accountant whom Fernández regularly consulted on tax deferral matters. Seligra testified that Fernández first contacted him about the tax problem in August 1998. *See id.* at 949–53.

On August 26, Pardo called Fernández to inform him that the DGI had obtained a judgment against Finvercon. *See id.* at 312, 665. This judgment obligated Finvercon to pay the deferred VAT taxes, plus punitive and compensatory interest and other costs (the "tax judgment"). *See* Undisputed Facts at ¶ G. Pardo explained to Fernández that Finvercon's accounts might be seized as a result of this judgment. *See* Trial Tr. at 665. Fernández understood that Finvercon had to pay promptly in order to avoid seizure. *See id.* at 324. Fernández demanded that Pardo send him all of the information on the matter and then spoke with Pristera. *See id.* at 319–24, 665. After discussing the matter with Pristera, Fernández informed Keiser, Olive, and Iribarren. *See id.* at 313, 669. Olive, who was on vacation at the time, notified Eric Torkelson, Norwest's Controller, and Keiser. *See id.* at 157. Keiser informed Jim Goodson, Norwest's general counsel, John Sondereker, a Senior Vice President at Norwest, and Iribarren. *See id.* at 491–92. On the same day that Fernández learned of the tax judgment—August 26—he sent a fax to Iribarren and Keiser, in which he stated: "This matter does not cause any damage to Finvercon, and if it does, Gustavo and I will compensate for it." *See* Pl.Ex. 19. In addition, Iribarren, Olive, and Keiser all testified that Fernández had told them that he and Lanzillotta would compensate Finvercon for the tax judgment. *See* Trial Tr. at 110–11, 167, 493–94.

The Purchase Agreement contains several guarantees related to the tax deferrals. *See* Pl.Ex. 1, at §§ 2.2(c), 7.2, 7.3. On August 31, 1998, Norwest demanded, verbally and in writing, that defendants immediately pay to Finvercon the sum of $481,920.67 for the tax judgment. *See* Undisputed Facts at ¶ K; Pl.Ex. 20. Norwest repeated this demand, in writing, on September 2, 1998, and on September 3, 1998. *See* Undisputed Facts at ¶ K; Pl. Exs. 21, 22. Defendants did not satisfy these demands. *See* Trial Tr. at 496. On September 3, 1998, Finvercon paid the sum of $441,494.17 to Banco Hipotecario Nacional for the tax judgment. *See* Undisputed Facts at ¶ H. On September 8, 1998, Finvercon paid the additional sum of $41,529.00 to Banco Hipotecario Nacional for the attorneys' fees charged by the Argentine government to collect the tax judgment. *See id.*

On September 9, 1998, Ezequiel Camerini, a lawyer representing defendants, informed Norwest that, in his view, Norwest had failed to notify defendants about the tax problem in a timely fashion, as required by § 12.3(b) of the Purchase Agreement, and Finvercon had failed to raise all reasonable defenses to the tax judgment, as required by § 2.2(c) of the Purchase Agreement. *See* Pl.Ex. 25. On September 10, 1998, Norwest replied, stating that it had not learned of the tax problem until August 1998 but alleging that Fernández had known earlier. *See* Pl.Ex. 26. On September 14, 1998, Camerini stated that Fernández did not learn about the tax problem in February and indicated that defendants were trying to determine whether Norwest had raised all reasonable defenses. *See* Pl.Ex. 27. On September 16 and 17, 1998, Norwest sent letters to Camerini relating its view that it had raised all reasonable defenses and that defendants were liable for the tax judgment. *See* Pl. Exs. 80, 81. On October 8, 1998, defendants paid to Finvercon the amounts that had been demanded of them to satisfy the tax judgment. *See* Undisputed Facts at ¶ L. Fernández testified that he also paid off other deferred taxes ***220** before their due date, in the amount of $1,800,000, between October 1998 and October 1999. *See* Trial Tr. at 673–74.

**D. Collateral for Deferred Taxes**

Section 5.11 of the Purchase Agreement states:

> Sellers shall provide to the Company at Closing collateral, satisfactory to Buyers, in the form of dollar-denominated bonds issued by the Republic of Argentina with a residual face value of not less than the amount of Taxes actually deferred as of the Closing.

Pl.Ex. 1, at § 5.11. At the Closing, defendants did not provide this collateral and Norwest did not demand it. *See* Trial Tr. at 332, 500–01, 675–76.

On September 10, 1998, Norwest demanded that defendants provide the collateral immediately. *See* Undisputed Facts at ¶ M; Pl.Ex. 26. On September 14, 1998, Camerini responded that Norwest had waived the posting of the collateral, both by failing to demand it at the Closing and through the statements of Shari Del Carpio, a Norwest employee. *See* Pl.Ex. 27. On September 16, 1998, Norwest indicated that it did not consider the collateral requirement to be waived and demanded that defendants post the collateral. *See* Pl.Ex. 80. Norwest reiterated its demand on September 17, 1998. *See* Pl.Ex. 81.

**E. Personal Lending by Fernández and Lanzillotta**

In 1998, Fernández made personal loans to several companies and one individual while serving as President of Finvercon. *See* Trial Tr. at 292–307, 653–65. Four of the companies—Torrance S.A., Poliequipos S.A., Colomba Viajes S.A., and Obtener—had outstanding loans with Finvercon. *See id.* at 292–93. Two of the companies—Adicom S.A. and Lanci Impersores, S.R.L.—had never done any business with Finvercon. *See id.* at 306. The individual, Hugo Iurcovich, lived in Brazil and was either the President or Vice President of Colomba Viajes, which had outstanding loans with Finvercon. *See id.* at 296–97. In 1998, Lanzillotta made loans to two commercial entities—Obtener, which had outstanding loans with Finvercon, and Suriser, which did not—while serving as Vice President of Finvercon. *See id.* at 966–68.

Fernández admits that he did not notify Norwest about most of his personal lending. *See id.* at 294, 307–08. He testified that he did ask Iribarren for permission to make some loans to Colomba Viajes and Obtener, although Iribarren stated at trial that Fernández only asked him about a short-term loan to Obtener. *See id.* at 103–08, 294–95, 311–12. I credit Iribarren's testimony and find that Fernández only asked permission to make a single loan to Obtener.

Prior to its purchase by Norwest, Finvercon had made a number of loans to commercial entities. *See id.* at 124. Norwest made clear, even before it purchased Finvercon, that Finvercon could not continue to make commercial loans after the Closing. *See id.* at 124. Indeed, once the Closing took place, Norwest instituted a policy against making commercial loans. *See id.* at 147–48, 623–24. In addition, Fernández testified that Finvercon could not and did not make loans to individuals outside Argentina. *See id.* at 663.

**F. Termination**

On September 18, 1998, the shareholders of Finvercon, at a shareholders' meeting, removed Fernández and Lanzillotta as directors of Finvercon. *See* Undisputed Facts at ¶ O; Trial Tr. at 508–09. This shareholders' meeting consisted of John Sondereker, Mario Olive, Chris Keiser, and John Deal, head of Norwest's quality support unit. *See* Trial Tr. at 389, 508–09. Following this meeting, Olive became the President of Finvercon. *See id.* at 510.

On September 21, 1998, Sondereker met with Fernández and Lanzillotta. *See id.* at 389, 647, 970–73. The participants offer very different versions of what transpired at that meeting. According to Sondereker, ***221** he told Fernández and Lanzillotta that they were being removed for cause, because they had not paid the tax judgment or posted the collateral; he also noted concerns with mismanagement. *See id.* at 389–90. According to Fernández and Lanzillotta, Sondereker did not mention the tax judgment or the collateral; rather, they claim that Sondereker said that Fernández was being terminated because he did not fit Norwest's "style" and Lanzillotta was being terminated because he was Fernández's partner. *See id.* at 647, 652–53, 970–73. Sondereker denies making these statements. *See id.* at 390–91.

I credit Sondereker's testimony and find that he told defendants that they were being terminated because they had not paid the tax judgment or posted the collateral. This finding is supported by the fact that, on the day of their termination, Norwest sent both Fernández and Lanzillotta written notice of their removal, indicating that "such revocation constitutes a termination with Cause as defined in clauses 1.4 and 1.5(a) of the Agreement, for reasons and events that are known to you." *See* Pl. Exs. 30, 31.

The removal of defendants was part of a larger shakeup at Finvercon. On the same day that defendants were notified of their removal, Norwest fired Pristera. *See* Trial Tr. at 154–55, 510–14, 811–14. In addition, Norwest already had removed Iribarren from his role of supervisor of Finvercon in early September. *See id.* at 129. Iribarren testified that this decision probably was related to the removal of defendants. *See id.*

**III. CONCLUSIONS OF LAW**

**A. Credit Losses**

**1. Payment of Credit Losses**

**a. Were defendants required to pay on demand?**

[1] The parties dispute when defendants were required to pay Norwest for claimed Credit Losses. Norwest argues that, under §§ 2.2(b) and 7.1 of the Purchase Agreement, defendants were required to reimburse Finvercon and Norwest for claimed Credit Losses on demand. Defendants contend that Norwest was required to offset any Credit Losses against the Contingent Portion of the Purchase Price, a reserve fund detailed in the Purchase Agreement, before demanding payment. Defendants also argue that they were not required to pay the claimed Credit Losses on demand, because they had concerns about the accuracy of those claims.

Section 2.2(b) of the Purchase Agreement states, in relevant part:

> As referred hereinbelow, the Sellers [defendants] guarantee without limitation the Company [Finvercon] against any and all Credit Losses.... Sellers shall reimburse the Company for any guaranteed Credit Loss upon demand by the Company. However, if the accumulated guaranteed Credit Losses that are not reimbursed to the Company by the Sellers upon demand by the Company are less than the Contingent Portion of the Purchase Price, then Buyer [Norwest] shall pay Sellers an amount equal to the Contingent Portion of the Purchase Price less the accumulated guaranteed unreimbursed Credit Losses as set forth below.

Pl.Ex. 1, at § 2.2(b). Section 7.1 of the Purchase Agreement states:

> Sellers jointly and severally undertake to reimburse Buyer on demand upon the occurrence of any Credit Loss and, thus, guarantee to Buyer that the Accounts Receivable shall be collected by the Company

> when and as due and that the Company shall not have to disburse any funds for any Sold Obligation. This guarantee obligation is absolute and Sellers waive any defense they may have against Buyer, including, but not limited to, any defense that the borrowers of the Company may have and any request that the Company exhaust all actions against any assets of the debtors of the ***222** Company; Sellers also waive any right or claim of offset.

Pl.Ex. 1, at § 7.1.

Defendants breached the Purchase Agreement when they failed to pay Norwest for the claimed Credit Losses on demand. Sections 2.2 and 7.1 both clearly state that defendants had to pay "[up]on demand." *See PaineWebber Inc. v. Bybyk,* 81 F.3d 1193, 1199 (2d Cir.1996) ("In interpreting a contract, '[w]ords and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.' ") (quoting *American Express Bank Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 562 N.Y.S.2d 613, 614 (1st Dep't 1990)). Norwest made its first demand in September 1998 and made several subsequent demands over the next thirteen months. Defendants were obligated to satisfy those demands.

Defendants seek a declaratory judgment stating that Norwest was required to offset any Credit Losses against the Contingent Portion of the Purchase Price before demanding payment from them. Defendants rely heavily on the clause in § 2.2(b) that allows Norwest to deduct unreimbursed Credit Losses from the Contingent Portion of the Purchase Price (the "deduction clause"), but there are three reasons why that clause does not establish an offset requirement. *First,* nothing in the plain language of that clause indicates that Norwest was required to offset Credit Losses against the Contingent Portion of the Purchase Price *before* demanding payment from defendants. *Second,* the use of the phrase "Credit Losses that are not *reimbursed*" demonstrates that Finvercon had to demand reimbursement before Norwest could deduct the claimed Credit Losses from the Contingent Portion of the Purchase Price. *Third,* defendants' reading of the deduction clause creates an unnecessary conflict between that clause and the "upon demand" clause. *See Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assocs.,* 63 N.Y.2d 396, 482 N.Y.S.2d 465, 468, 472 N.E.2d 315 (1984) ( "In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless."). The two clauses can be harmonized by reading the deduction clause to apply only when Norwest is ready to pay defendants the Contingent Portion of the Purchase Price, which will not happen until all of the accounts receivable and sold obligations guaranteed by defendants have been liquidated. *See* Pl.Ex. 1, at § 2.2(b).

Other parts of the Purchase Agreement support this reading of § 2.2(b). First, § 2.2(a), which defines the Contingent Portion of the Purchase Price, states in relevant part:

> The Contingent Portion of the Purchase Price shall be equal to the provisions for credit losses reflected in the Closing Financial Statements (the "Closing Provisions") after the Closing Financial Statements are adjusted in accordance with Section 2.5(a), and it shall be reduced by Credit Losses guaranteed by the Sellers that are not reimbursed to the Company by the Sellers upon demand by the Company, and shall be paid to Sellers as set forth in Section 2.2(b).

Pl.Ex. 1, at § 2.2(a). As with § 2.2(b), § 2.2(a) does not mention any right of offset and the most natural reading of its language, which mirrors the language in § 2.2(b), is that the deduction takes place when Norwest is ready to pay defendants the Contingent Portion of the Purchase Price. Second, any lingering doubt about the Court's reading of § 2.2(b) is erased by the following unambiguous language from § 7.1: "Sellers also waive any right or claim of offset." *See* Pl.Ex. 1, at § 7.1. Thus, defendants' counterclaim for a declaratory judgment stating that Norwest is required to offset Credit Losses against the Contingent Portion of the Purchase Price is denied.

Defendants also argue that, even if Norwest was not required to offset the Credit Losses against the Contingent Portion of the Purchase Price, they did not have to ***223** pay Norwest "on demand" because they had concerns about the accuracy of those demands. To support their argument, defendants have cited several examples of errors in Norwest's supporting data, some caught by Norwest and others identified by defendants. *See* pp. 216–17, *supra.* Nevertheless, Fernández admitted that defendants did not bargain for any audit or verification rights. *See* Trial Tr. at 99–100, 763. The lack of audit or verification rights is made all the more stark by the detailed provisions in the Purchase Agreement for making adjustments to Finvercon's financial statements after the Closing. *See* Pl.Ex. 1, at § 2.5. Because the Purchase Agreement contained no audit or verification rights, which the parties knew how to create, defendants were required to pay the Credit Losses "on demand" and breached the Purchase Agreement when they failed to do so. *See Lowy and Donnath, Inc. v. City of New York*, 98 A.D.2d 42, 469 N.Y.S.2d 760, 761–62 (1st Dep't 1983) (holding that defendant was required to make immediate payment where purchase order did not contain any language suggesting that payment was subject to prior audit or verification).

Separate from the issue of audit or verification rights, defendants could have refused to pay the specific Credit Losses about which they had concerns. In *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 341 (2d Cir.1993), the Second Circuit approved the following jury instruction regarding New York law in this area: "[I]f you find that [defendant's] bills were false or materially inaccurate and that [plaintiff] made timely requests for correction of errors or documentation of the work done, then ... the failure to pay the *disputed* bills was not a breach of contract." Although defendants asked for clarification in response to the September 1998 demand, they did not raise any further concerns after receiving the clarification: they simply refused to pay. While defendants no longer worked at Finvercon, and therefore did not have access to the underlying data, they could have—and should have—gone through the Credit Loss demands and initially identified the accounts about which they had concerns, because they could justifiably refuse to pay only those specific demands. Instead, defendants refused to pay the entire Credit Loss demand, without itemization. That refusal constituted a breach of the Purchase Agreement. *See id.* at 341 (jury instruction did not mislead jury into thinking that "a billing dispute over any one of the bills would relieve [plaintiff] from paying any or all of them").

**b. What were defendants required to pay?**

The parties also dispute what defendants were obligated to pay. Defendants agreed to reimburse Norwest and Finvercon for all Credit Losses, a term defined in § 2.2(b) as follows:

> Credit Losses are (i) any Account Receivable as of the Closing Date, or renewal or increase thereof, on which a full scheduled payment has not been made by an obligor thereon for 180 days, and (ii) satisfaction by the Company of any recourse or other obligation under Contracts identified at Exhibit 3.16(a)(1) ("Sold Obligations").

Pl.Ex. 1, at § 2.2(b). There are three types of Credit Losses: accounts receivable, sold obligations, and repurchased obligations. *See* p. 216, *supra*.

[2] First, defendants argue that Norwest should not be allowed to claim as Credit Losses the seven or eight sold obligations that were not attached to the Purchase Agreement. But defendants were the ones who represented, in § 3.16(a)(i) of the Purchase Agreement, that "each Contract for the sale of loans on which the Company has obligations with respect to said loans ('Sold Obligations')" was attached. *See* Pl.Ex. 1, at § 3.16(a)(i).[6] Although ***224** Norwest should have notified defendants of the missing sold obligations, instead of simply adding those items as Credit Losses, that does not change the fact that Norwest assumed those obligations and should be allowed to recover for them.

[3] Second, the parties do not agree about the proper amount owed on the accounts receivable. The term "account receivable" is defined in § 3.8 of the Purchase Agreement:

> All accounts receivable of the Company that are reflected on the Balance Sheet or the Interim Balance Sheet or on the Closing Financial Statements or on the accounting records of the Company as of the Closing Date (collectively, the "Accounts Receivable") represent valid obligations arising from loans actually made in the ordinary course of business and are collectible. All payments shown on the records of the Company relating to the Accounts Receivable were made on the dates indicated on said records and were made by the obligor(s) thereon. The amounts shown on the records as being owing and unpaid on the respective Accounts Receivable represent the true and correct outstanding balances thereon. The information shown on the Company records relating to the respective Accounts

> Receivable is correct. There is no contest, claim, or right of offset with any obligor on an Account Receivable relating to the amount or validity of such Account Receivable.

Pl.Ex. 1, at § 3.8. With the exceptions set forth below, I conclude that, for each account receivable that qualifies as a Credit Loss, Norwest properly may demand from defendants: (1) unpaid principal, compensatory interest, and VAT tax on the compensatory interest; and (2) punitive interest for any missed payments and VAT tax on the punitive interest.[7]

The principal, compensatory interest and VAT tax on the compensatory interest simply constitute the account receivable itself—the amount on Finvercon's books under that account's entry. Punitive interest presents a more difficult problem, because it is neither recorded on Finvercon's books nor explicitly mentioned in the Purchase Agreement. Norwest argues, however, that the definition of "Credit Loss" includes punitive interest based on the following language in the Purchase Agreement: "Credit Losses are ... any Account Receivable as of the Closing Date, or renewal or increase thereof...." Pl.Ex. 1, at § 2.2(b). Norwest's interpretation of the word "increase" to mean punitive interest is indisputably correct, because the only way to increase an account receivable is to add interest on missed payments. Defendants, on the other hand, have offered no logical reading of the word "increase" that does not include punitive interest. In addition, Norwest's reading of the contract language is supported by the fact that Finvercon routinely charged punitive interest for missed payments while defendants were running Finvercon. *See* Trial Tr. at 484–86. Thus, Norwest's demand for punitive interest should have been no surprise to defendants.[8]

***225** [4] Two types of accounts receivable are exceptions to this general rule. First, defendants argue that Norwest should not have claimed as Credit Losses the accounts receivable for which it has made new agreements with the intermediaries. *See id.* at 176–82. Norwest can claim these accounts as Credit Losses up to the amount owed on the loan at the time of the Closing, because defendants guaranteed those amounts and Finvercon did not receive the money. But defendants do not owe any money for any breach of the new agreements that the intermediaries made with Norwest, because defendants did not guarantee payments by the intermediaries. Similarly, Norwest may not assess punitive interest on any payments missed once the intermediaries assumed responsibility for the accounts, because defendants did not guarantee that the intermediaries would pay on time.

Second, Norwest may not claim as Credit Losses accounts that already were 180 days past due at the time of the Closing. Defendants undertook to reimburse Norwest "upon the occurrence of any Credit Loss." Pl.Ex. 1, at § 7.1. Where an account already was 180 days past due at the Closing, that account is not covered by § 7.1 because the "occurrence" took place before the Purchase Agreement came into effect.[9] Norwest may still recover the money it lost on those accounts, however, because Finvercon was fully reserved for those accounts at the time of the sale. *See* Trial Tr. at 88–89, 114–15. In order to cover those accounts, Finvercon transferred its reserves to Norwest as part of the Contingent Portion of the Purchase Price. *See id.* Norwest is entitled to keep those reserves if the accounts are not collectible.[10]

**c. Review by neutral accountant**

The parties have agreed to submit the implementation of the Court's rulings regarding the payment of Credit Losses to an accountant (the "Accountant"). The Accountant, who will be appointed by the Court, will apply this Court's rulings to Finvercon's data and submit a report to the Court which will be incorporated in the final judgment.

**2. Counterclaim Regarding Proof of Collection Activities**

[5] Defendants seek an order that Norwest must present proof of its good faith efforts to collect accounts receivable and prevent liabilities before seeking reimbursement from defendants, who cannot monitor collection activities now that they have been fired. This counterclaim is denied for three reasons. *First,* defendants premise the counterclaim on the fact that Norwest wrongfully terminated them but, as discussed below, their termination was proper. *See* pp. 226–32, *infra*. *Second,* defendants have presented no evidence that Norwest engaged in any bad faith delay in collecting accounts receivable or preventing liabilities. Defendants alleged that Norwest stopped trying to collect accounts receivable because they knew that defendants eventually would pay for them, but offered no evidence to support this allegation.[11] In addition, Fernández ***226** blamed mounting Credit Losses on a number of factors—computer system problems, Norwest's demand for clean credit records, delays in getting decisions made, Norwest's requests for reports and other documentation, and Norwest's insistence that Finvercon employees call customers at inconvenient times—but none of those factors is evidence that Norwest ceased collection activity

in reliance on defendants' obligation to reimburse it for Credit Losses. *See* Trial Tr. at 629–34, 638–41. *Third,* defendants did not bargain for a right to demand this proof during their protracted negotiations with Norwest. Their inability to verify the collection activities represents another unfortunate consequence of the bad deal struck by defendants—once Norwest properly fired them for cause, the defendants had no way to monitor efforts to collect the accounts for which they were responsible.

**3. Counterclaim Regarding Assignment of Right, Title and Interest**

[6] Defendants seek a declaratory judgment stating that Norwest must assign to them all promissory notes and documentation required to foreclose on the Credit Losses simultaneously with their reimbursement of the Credit Losses to Norwest. Section 2.2(b) of the Purchase Agreement states, in relevant part:

> When the Company determines that an Account Receivable is a guaranteed Credit Loss, and provided that such Credit Loss is within the Closing Provisions and has been reimbursed to the Company by Sellers pursuant to the terms hereof, then the Company shall assign to Sellers, without recourse, all of Company's right, title and interest in said Account Receivable.

Pl.Ex. 1, at § 2.2(b). Because defendants are ordered to reimburse Norwest for its claimed Credit Losses, it makes sense to clarify defendants' rights under this provision.

Defendants argue that Norwest's transfer of its right, title, and interest in a particular account receivable should be simultaneous with defendants' reimbursement to Norwest of the Credit Loss from that account. By using the language "provided that such Credit Loss ... has been reimbursed ..., *then* the Company shall assign ...," however, § 2.2(b) makes clear that the assignment takes place after the reimbursement—they are not simultaneous. Once defendants have reimbursed Norwest for a claimed Credit Loss, Norwest must assign "all of [its] right, title and interest" in that account. Defendants express some concern about whether Norwest will be able to make this assignment, but they have failed to substantiate their concern.

**B. Termination**

Norwest seeks a declaratory judgment that its termination of defendants was proper. Although both sides agree that the Director Agreements are governed by Argentine law, they disagree over which branch of Argentine law controls. According to Norwest, the Director Agreements are controlled by Argentine commercial law and defendants were terminated properly because they violated §§ 1.4 and 1.5 of those agreements. Defendants, on the other hand, contend that the Director Agreements are governed by Argentine labor law, under which Norwest did not have good cause to terminate them.

Section 1.4 of the Director Agreements states:

> The President may be immediately discharged for Cause or Unacceptable Performance without liability for directors fees or other compensation after the date of the discharge and without any other liability to the President.

***227** Pl.Ex. 2, at § 1.4.[12] Section 1.5 of the Director Agreements states:

> (a) Cause means: violation of a company policy including, without limitation, Norwest's Code of Ethics, a copy of which is attached hereto as Annex I; personal dishonesty, misconduct, or a breach of fiduciary duty; or failure to perform any obligation contained in this Agreement or the Stock Purchase Agreement; or violation of any criminal law (other than traffic violations or similar minor offenses).
>
> (b) Unacceptable Performance means failure to attain reasonable business goals established by the Company and communicated in writing to [Fernández], when said failure has continued for 30 days without adequate measures being taken to correct the failure, after notice specifically identifying the goal(s) not being attained.

Pl.Ex. 2, at § 1.5.[13]

**1. Which law applies?**

[7] The first issue is whether the Director Agreements are governed by the commercial law or the labor law of Argentina. Each side offered testimony from an expert in Argentine law. "Determination of a foreign country's law is an issue of law." *Itar–Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir.1998) (citing Fed.R.Civ.P. 44.1). The Second Circuit has explained how courts should treat the testimony of experts

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

**Case No.: 72371**

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PARDEE HOMES OF NEVADA

Appellant,

v.

JAMES WOLFRAM and WALT WILKES, et al.

Respondents.

Appeal Regarding Judgment and Post-Judgment Orders
Eighth Judicial District Court
District Court Case No.: A-10-632338-C

**JOINT APPENDIX – VOLUME 21 OF 88**

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Docket 72371 Document 2018-07930

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| 11/07/2012 | Opposition to Defendant's Motion for Summary Judgment and Plaintiffs' Counter Motion for Partial Summary Judgment | 2 | JA000322-JA000351 |
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| 11/13/2012 | Appendix of Exhibits to Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Counter Motion for Summary Judgment | 7-12 | JA001333-JA002053 |
| 11/29/2012 | Defendant's Opposition to Plaintiff's Counter Motion for Partial Summary Judgment Re: Real Parties in Interest | 13 | JA002054-JA002065 |
| 12/06/2012 | Transcript re Status Check | 13 | JA002066-JA002080 |
| 01/07/2013 | Reply Brief in Support of Defendant's Motion for Summary Judgment | 13 | JA002081-JA002101 |

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| 01/17/2013 | Plaintiffs' Reply in Further Support of Their Counter Motion for Partial Summary Judgment | 13 | JA002102-JA002144 |
| 03/01/2013 | Defendant's Motion in Limine to Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages (MIL #1) | 13 | JA002145-JA002175 |
| 03/01/2013 | Defendant's Motion in Limine to Exclude Plaintiffs' Claim for Damages in the Form of Compensation for Time (MIL #2) | 13 | JA002176-JA002210 |
| 03/05/2013 | Transcript of Proceedings - March 5, 2013 | 14 | JA002211-JA002350 |
| 03/14/2013 | Order re Order Granting Plaintiffs Countermotion for Summary Judgment | 14 | JA002351-JA002353 |
| 03/15/2013 | Notice of Entry of Order re Order Granting Plaintiffs Countermotion for Summary Judgment | 14 | JA002354-JA002358 |
| 03/20/2013 | Plaintiffs Opposition to Defendant's Motion in Limine to Exclude Plaintiffs Claim for Attorney’s Fees as an Element of Damages MIL 1 | 15 | JA002359-JA002408 |
| 03/20/2013 | Plaintiffs Opposition to Defendants Motion in Limine to Plaintiffs Claim for Damages in the form of compensation for time MIL 2 | 15 | JA002409-JA002433 |
| 03/21/2013 | Motion to File Second Amended Complaint | 15 | JA002434-JA002461 |
| 04/02/2013 | Order re Order Denying Defendants Motion for Summary Judgment | 16 | JA002462-JA002464 |
| 04/03/2013 | Notice of Entry of Order re Order Denying Defendants Motion for Summary Judgment | 16 | JA002465-JA002470 |

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| 04/08/2013 | Defendant's Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint | 16 | JA002471-JA002500 |
| 04/17/2013 | Second Amended Order Setting Civil Non-Jury Trial | 16 | JA002501-JA002502 |
| 04/23/2013 | Plaintiffs Reply in Further Support of Motion for Leave to File Second Amended Complaint | 16 | JA002503-JA002526 |
| 04/26/2013 | Transcript re Hearing | 16 | JA002527-JA002626 |
| 05/10/2013 | Plaintiffs Supplement to Motion for Leave to File a Second Amended Complaint Pursuant to the Courts order on Hearing on April 26, 2013 | 16 | JA002627-JA002651 |
| 05/10/2013 | Defendant's Supplemental Brief in Support of Its Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint | 16 | JA002652-JA002658 |
| 05/30/2013 | Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint | 16 | JA002659-JA002661 |
| 06/05/2013 | Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint | 16 | JA002662-JA002664 |
| 06/05/2013 | Notice of Entry of Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint | 16 | JA002665-JA002669 |
| 06/06/2013 | Second Amended Complaint | 16 | JA002670-JA002677 |
| 07/03/2013 | Answer to Second Amended Complaint and Counterclaim | 16 | JA002678-JA002687 |
| 07/09/2013 | Transcript re Hearing | 17 | JA002688-JA002723 |

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| 07/15/2013 | Plaintiffs Reply to Defendants Counterclaim | 17 | JA002724-JA002731 |
| 07/18/2013 | Plaintiffs' Motion in Limine To Permit James J. Jimmerson, Esq. To Testify Concerning Plaintiffs' Attorney's Fees and Costs (MIL #25) | 17 | JA002732-JA002771 |
| 07/22/2013 | Defendant's Motion for Partial Summary Judgment | 17 | JA002772-JA002786 |
| 07/22/2013 | Plaintiffs Supplemental Opposition to Defendants Motion in Limine to Plaintiffs Claim for Damages in the Form of Compensation for Time MIL 2 | 17 | JA002787-JA002808 |
| 07/23/2013 | Transcript re Status Check | 17 | JA002809-JA002814 |
| 08/05/2013 | Defendant Pardee Homes of Nevada's Response to Plaintiffs' Motions in Limine #1-5; And #20-25 | 17 | JA002815-JA002829 |
| 08/06/2013 | Plaintiffs Opposition to Defendants Motion for Partial Summary Judgment | 17 | JA002830-JA002857 |
| 09/16/2013 | Reply in Support of Defendant's Motion for Partial Summary Judgment | 17 | JA002858-JA002864 |
| 09/16/2013 | Reply in Support of Defendant's Motion in Limine to Exclude Plaintiff's Claim for Attorney's Fees As An Element of Damages | 17 | JA002865-JA002869 |
| 09/16/2013 | Reply in Support of Defendant's Motion in Limine to Exclude Plaintiffs' Claim For Damages in the Form of Compensation for Time | 17 | JA002870-JA002874 |
| 09/23/2013 | Transcript re Hearing | 18 | JA002875-JA002987 |

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| 09/27/2013 | Plaintiffs Supplement to Their Opposition to Defendants Motion for Partial Summary Judgment | 19-21 | JA002988-JA003203 |
| 09/27/2013 | Supplemental Brief in Support of Defendant's Motion for Partial Summary Judgment | 21 | JA003204-JA003209 |
| 10/23/2013 | Order Denying Motion for Partial Summary Judgment | 21 | JA003210-JA003212 |
| 10/23/2013 | Transcript re Trial | 22 | JA003213-JA003403 |
| 10/23/2013 | Trial Exhibit A | 23 | JA003404-JA003544 |
| 10/23/2013 | Trial Exhibit B **– filed under seal** | 23 | JA003545-JA003625 |
| 10/23/2013 | Trial Exhibit C | 23 | JA003626-JA003628 |
| 10/23/2013 | Trial Exhibit D | 23 | JA003629-JA003631 |
| 10/23/2013 | Trial Exhibit E **– filed under seal** | 23 | JA003632-JA003634 |
| 10/23/2013 | Trial Exhibit F | 23 | JA003635-JA003637 |
| 10/23/2013 | Trial Exhibit G | 23 | JA003638 |
| 10/23/2013 | Trial Exhibit H | 23 | JA003639-JA003640 |
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| 10/23/2013 | Trial Exhibit J – **filed under seal** | 24 | JA003644-JA003669 |
| 10/23/2013 | Trial Exhibit K | 24 | JA003670-JA003674 |
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| 10/23/2013 | Trial Exhibit N | 24 | JA003681-JA003683 |
| 10/23/2013 | Trial Exhibit O – **filed under seal** | 25-26 | JA003684-JA004083 |
| 10/23/2013 | Trial Exhibit P | 27 | JA004084 |
| 10/23/2013 | Trial Exhibit Q | 27 | JA004085 |
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| 10/23/2013 | Trial Exhibit S | 27 | JA004090 |
| 10/23/2013 | Trial Exhibit T | 27 | JA004091-JA004092 |
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| 10/23/2013 | Trial Exhibit V | 27 | JA004094 |
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| 10/23/2013 | Trial Exhibit X | 27 | JA004097 |
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| 10/23/2013 | Trial Exhibit AA | 27 | JA004101-JA004102 |
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| 10/23/2013 | Trial Exhibit FF | 27 | JA004114-JA004118 |
| 10/23/2013 | Trial Exhibit GG | 27 | JA004119-JA004122 |
| 10/23/2013 | Trial Exhibit HH | 27 | JA004123 |
| 10/23/2013 | Trial Exhibit II | 27 | JA004124 |
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| 10/23/2013 | Trial Exhibit LL | 27 | JA004168 |
| 10/23/2013 | Trial Exhibit MM | 27 | JA004169 |
| 10/23/2013 | Trial Exhibit NN | 27 | JA004170-JA004174 |
| 10/23/2013 | Trial Exhibit OO | 27 | JA004175-JA004183 |
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| 10/23/2013 | Trial Exhibit SS | 27 | JA004249-JA004255 |
| 10/23/2013 | Trial Exhibit TT | 27 | JA004256-JA004262 |
| 10/23/2013 | Trial Exhibit UU | 27 | JA004263-JA004288 |
| 10/23/2013 | Trial Exhibit 1 | 27 | JA004289-JA004292 |
| 10/23/2013 | Trial Exhibit 6 **– filed under seal** | 27 | JA004293-JA004307 |
| 10/23/2013 | Trial Exhibit 7 **– filed under seal** | 27 | JA004308-JA004310 |
| 10/23/2013 | Trial Exhibit 8 **– filed under seal** | 27 | JA004311-JA004312 |

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| 10/23/2013 | Trial Exhibit 9 – **filed under seal** | 27 | JA004313-JA004319 |
| 10/23/2013 | Trial Exhibit 10 – **filed under seal** | 27 | JA004320-JA004329 |
| 10/23/2013 | Trial Exhibit 11 – **filed under seal** | 28 | JA004330-JA004340 |
| 10/23/2013 | Trial Exhibit 12 – **filed under seal** | 28 | JA004341-JA004360 |
| 10/23/2013 | Trial Exhibit 13 – **filed under seal** | 28 | JA004361-JA004453 |
| 10/23/2013 | Trial Exhibit 21 | 28 | JA004454 |
| 10/23/2013 | Trial Exhibit 25 | 28 | JA004455-JA004462 |
| 10/24/2013 | Transcript re Trial | 29-30 | JA004463-JA004790 |
| 10/24/2013 | Trial Exhibit VV | 31 | JA004791 |
| 10/24/2013 | Trial Exhibit 26 | 31 | JA004792-JA004804 |
| 10/24/2013 | Trial Exhibit 30 | 31 | JA004805-JA004811 |
| 10/25/2013 | Notice of Entry of Order Denying Motion for Partial Summary Judgment | 31 | JA004812-JA004817 |
| 10/25/2013 | Plaintiffs Trial Brief Pursuant to EDCR 7.27 | 31 | JA004818-JA004847 |
| 10/28/2013 | Transcript re Trial – **filed under seal** | 32-33 | JA004848-JA005227 |

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| 10/28/2013 | Trial Exhibit 15 | 34 | JA005228-JA005232 |
| 10/28/2013 | Trial Exhibit 18 | 34 | JA005233-JA005235 |
| 10/28/2013 | Trial Exhibit 19 | 34 | JA005236-JA005237 |
| 10/28/2013 | Trial Exhibit 20 | 34 | JA005238-JA005254 |
| 10/28/2013 | Trial Exhibit 23 | 34 | JA005255-JA005260 |
| 10/28/2013 | Trial Exhibit 24 | 34 | JA005261-JA005263 |
| 10/29/2013 | Transcript re Trial **– filed under seal** | 35 | JA005264-JA005493 |
| 10/29/2013 | Trial Exhibit 28 | 36 | JA005494-JA005497 |
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| 10/30/2013 | Transcript re Trial | 37-38 | JA005512-JA005815 |
| 10/30/2013 | Trial Exhibit 23a | 39 | JA005816-JA005817 |
| 10/30/2013 | Trial Exhibit 27 | 39 | JA005818-JA005820 |
| 12/09/2013 | Transcript re Trial **– filed under seal** | 40-41 | JA005821-JA006192 |
| 12/10/2013 | Transcript re Trial | 42-43 | JA006193-JA006530 |

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| 12/10/2013 | Trial Exhibit WW | 43 | JA006531-JA006532 |
| 12/12/2013 | Transcript re Trial **– filed under seal** | 44-45 | JA006533-JA006878 |
| 12/12/2013 | Trial Exhibit XX | 46 | JA006879-JA006935 |
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| 12/12/2013 | Trial Exhibit 40 | 46 | JA006949-JA006950 |
| 12/12/2013 | Trial Exhibit 41 | 46 | JA006951-JA006952 |
| 12/13/2013 | Transcript re Trial - Part 1 | 46 | JA006953-JA007107 |
| 12/13/2013 | Transcript re Trial - Part 2 | 47-48 | JA007108-JA007384 |
| 12/13/2013 | Trial Exhibit 31a | 48 | JA007385-JA007410 |
| 06/24/2014 | Pardee's Motion to Expunge Lis Pendens **– section filed under seal** | 48 | JA007411-JA007456 |
| 06/25/2014 | Findings of Fact, Conclusions of Law and Order | 48 | JA007457-JA007474 |
| 06/27/2014 | Notice of Entry of Findings of Fact, Conclusions of Law and Order | 48 | JA007475-JA007494 |
| 07/14/2014 | Opposition to Pardee's Motion to Expunge Lis Pendens | 48 | JA007495-JA007559 |
| 07/15/2014 | Reply in Support of Pardee's Motion to Expunge Lis Pendens | 48 | JA007560-JA007570 |

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| 07/24/2014 | Order Granting Motion to Expunge Lis Pendens | 48 | JA007571-JA007573 |
| 07/25/2014 | Notice of Entry of Order Granting Motion to Expunge Lis Pendens | 48 | JA007574-JA007578 |
| 07/17/2014 | Transcript re Hearing | 49 | JA007579-JA007629 |
| 07/31/2014 | Transcript re Hearing | 49 | JA007630-JA007646 |
| 08/25/2014 | Plaintiff's Accounting Brief Pursuant to the court's Order Entered on June 25, 2014 | 49 | JA007647-JA007698 |
| 08/25/2014 | Pardee Homes of Nevada's Supplemental Brief Regarding Future Accounting | 49 | JA007699-JA007707 |
| 05/13/2015 | Findings of Fact and Conclusions of Law and Supplemental Briefing re Future Accounting | 49 | JA007708-JA007711 |
| 05/13/2015 | Notice of Entry of Order on Findings of Fact and Conclusions of Law and Supplemental Briefing re Future Accounting | 49 | JA007712-JA007717 |
| 05/28/2015 | Pardee's Motion for Attorney's Fees and Costs | 49 | JA007718-JA007734 |
| 05/28/2015 | Appendix of Exhibits to Pardee's Motion for Attorney's Fees and Costs | 50-51 | JA007735-JA008150 |
| 06/15/2015 | Judgment | 52 | JA008151-JA008153 |
| 06/15/2015 | Notice of Entry of Judgment | 52 | JA008154-JA008158 |
| 06/19/2015 | Plaintiffs, James Wolfram and Walt Wilkes' Memorandum of Costs and Disbursements | 52 | JA008159-JA008191 |

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| 06/24/2015 | Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed June 19, 2015 | 52 | JA008192-JA008215 |
| 06/29/2015 | Plaintiffs' Motion for Attorney's Fees and Costs | 52-53 | JA008216-JA008327 |
| 06/29/2015 | Motion to Strike "Judgment", Entered June 15, 2015 Pursuant To NRCP. 52 (B) And N.R.C.P. 59, As Unnecessary and Duplicative Orders Of Final Orders Entered on June 25, 2014 and May 13, 2015, and as Such, is a Fugitive Document | 53 | JA008328-JA008394 |
| 06/29/2015 | Plaintiffs' Motion Pursuant to NRCP 52(b) and 59 to Amend The Court's Judgment Entered on June 15, 2015, to Amend the Findings of Fact/conclusions of Law and Judgment Contained Therein, Specifically Referred to in the Language Included in the Judgment at Page 2, Lines 8 Through 13 and the Judgment At Page 2, Lines 18 Through 23 to Delete the Same or Amend The Same to Reflect the True Fact That Plaintiff Prevailed On Their Entitlement to the First Claim for Relief For an Accounting, and Damages for Their Second Claim for Relief of Breach of Contract, and Their Third Claim for Relief for Breach of the Implied Covenant for Good Faith and Fair Dealing and That Defendant Never Received a Judgment in its Form and Against Plaintiffs Whatsoever as Mistakenly Stated Within the Court's Latest "Judgment – **sections filed under seal** | 54-56 | JA008395-JA008922 |
| 06/30/2015 | Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs | 57-58 | JA008923-JA009109 |

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| 06/30/2015 | Supplement to Plaintiffs' Pending Motion for Attorney's Fees and Costs, Motion to Strike Judgment, Motion Pursuant to NRCP 52(b) and NRCP 59 to Amend the Court's Judgment, and Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs | 59 | JA009110-JA009206 |
| 07/02/2015 | Pardee Homes of Nevada's Motion to Amend Judgment | 59 | JA009207-JA009283 |
| 07/08/2015 | Plaintiffs' Opposition to Pardee's Motion to Retax Costs | 60-61 | JA009284-JA009644 |
| 07/08/2015 | Errata to Motion to Strike "Judgment", Entered June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59, as Unnecessary and Duplicative Orders of Final Orders Entered on June 25, 2014 and May 13, 2015, and as such, is a Fugitive Document | 62 | JA009645-JA009652 |

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| 07/08/2015 | Errata to Plaintiffs' Motion Pursuant to NRCP 52(b) and 59 to Amend the Court's Judgment Entered on June 15, 2015, to Amend the Findings of Fact/Conclusions of Law and Judgment Contained Therein, Specifically Referred to in the Language Included in the Judgment at Page, 2, Lines 8 through 13 and the Judgment at Page 2, Lines 18 through 23 to Delete the Same or Amend the Same to Reflect the True Fact that Plaintiff Prevailed on their Entitlement to the First Claim for Relief for an Accounting, and Damages for their Second Claim for Relief of Breach of Contract, and Their Third Claim for Relief for Breach of the Implied Covenant for Good Faith and Fair Dealing and that Defendant Never Received a Judgment in its form and Against Plaintiffs Whatsoever as Mistakenly Stated Within the Court's Latest "Judgment" | 62 | JA009653-JA009662 |
| 07/08/2015 | Pardee's Emergency Motion to Stay Execution of Judgment: and Ex Parte Order Shortening Time | 62 | JA009663-JA009710 |
| 07/08/2015 | Pardee's Supplemental Briefing in Support of its Emergency Motion to Stay Execution of Judgment | 62 | JA009711-JA009733 |
| 07/10/2015 | Transcript re Hearing | 62 | JA009734-JA009752 |
| 07/10/2015 | Order on Pardee's Emergency Motion to Stay Execution of Judgment; and Ex Parte Order Shortening Time | 62 | JA009753-JA009754 |

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| 07/10/2015 | Notice of Entry of Order on Pardee's Emergency Motion to Stay Execution of Judgment; and Ex Parte Order Shortening Time | 62 | JA009755-JA009758 |
| 07/15/2015 | Pardee Homes of Nevada's Opposition to Plaintiff's Motion for Attorney's Fees and Costs | 62 | JA009759-JA009771 |
| 07/15/2015 | Appendix of Exhibits to Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs | 63 | JA009772-JA009918 |
| 07/15/2015 | Pardee Homes of Nevada's Consolidated Opposition To: (1) Plaintiff's Motion to Strike Judgment Entered on June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59; and (2) Plaintiffs' Motion Pursuant to NRCP 52(b) and 59 to Amend the Court's Judgment Entered on June 15, 2015 | 63 | JA009919-JA009943 |
| 07/15/2015 | Appendix of Exhibits to Pardee Homes of Nevada's Consolidated Opposition to: (1) Plaintiff's Motion to Strike Judgment Entered on June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59; and Plaintiffs' Motion Pursuant to NRCP 52(b) and 59 to Amend the Court's Judgment Entered on June 15, 2015 | 64 | JA009944-JA010185 |
| 07/16/2015 | Errata to Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs | 65 | JA010186-JA010202 |
| 07/17/2015 | Plaintiffs' Opposition to Pardee Homes of Nevada's Motion to Amend Judgment and Countermotion for Attorney's Fees | 65-67 | JA010203-JA010481 |

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| 07/24/2015 | Plaintiffs' Motion for Reconsideration, Ex Parte (With Notice) of Application for Order Shortening Time Regarding Stay of Execution and Order Shortening Time Regarding Stay of Execution | 67 | JA010482-JA010522 |
| 07/24/2015 | Declaration of John W. Muije, Esq. In Support of Motion for Reconsideration | 67 | JA010523-JA010581 |
| 08/10/2015 | Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Reconsideration of the Order on Pardee's Emergency Motion to Stay Execution of Judgment | 67 | JA010582-JA010669 |
| 08/17/2015 | Reply Points and Authorities in Support of Motion for Reconsideration | 67 | JA010670-JA010678 |
| 08/24/2015 | Minute Order Denying Plaintiff's Motion for Reconsideration, Ex Parte (With Notice) of Application for Order Shortening Time Regarding Stay of Execution and Order Shortening Time Regarding Stay of Execution | 67 | JA010679 |
| 09/11/2015 | Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion for Attorney's Fees and Costs | 68 | JA010680-JA010722 |
| 09/11/2015 | Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion to Strike "Judgment" Entered June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59 | 68 | JA010723-JA010767 |
| 09/11/2015 | Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion Pursuant to NRCP 52(b) and NRCP 59 to Amend the Court's Judgment Entered on June 15, 2015 | 68 | JA010768-JA010811 |

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| 09/12/2015 | Pardee Homes of Nevada's Consolidated Reply in Support of (1) Motion to Retax Plaintiffs' Memorandum of Costs Filed June 19, 2015; and (2) Motion for Attorney's Fees and Costs | 68 | JA010812-JA010865 |
| 12/08/2015 | Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs | 68 | JA010866-JA010895 |
| 12/08/2015 | Notice of Defendant Pardee Homes of Nevada's Non-Reply and Non-Opposition to "Plaintiff's Opposition to Pardee Homes of Nevada's Motion to Amend Judgment and Countermotion for Attorney's Fees" | 69 | JA010896-JA010945 |
| 12/30/2015 | Pardee Homes of Nevada's Consolidated Response to: (1) Plaintiffs' Notice of Non-Reply and Non-Opposition to Plaintiffs' Opposition to Pardee's Motion to Amend Judgment and Countermotion for Attorney's Fees; and (2) Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs | 69 | JA010946-JA010953 |
| 01/11/2016 | Plaintiffs' Reply to Defendants Consolidated Response to (1) Plaintiffs' Notice of Non-Reply and Non-Opposition to Plaintiff's Opposition to Pardee's Motion to Amend Judgment and Countermotion for Attorney's Fees And (2) Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs | 69 | JA010954-JA010961 |
| 01/15/2016 | Transcript re Hearing | 70 | JA010962-JA011167 |

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| 03/14/2016 | Plaintiffs' Motion to Settle Two (2) Competing Judgments and Orders | 70 | JA011168-JA011210 |
| 03/16/2016 | Release of Judgment | 71 | JA011211-JA011213 |
| 03/23/2016 | Pardee Homes of Nevada's Response to Plaintiffs' Motion to Settle Two (2) Sets of Competing Judgments and Orders | 71 | JA011214-JA011270 |
| 04/20/2016 | Plaintiffs' Reply to Defendant's Response and Supplement to Plaintiffs' Motion to Settle Two (2) Sets of Competing Judgments and Orders | 71 | JA011271-JA011384 |
| 04/26/2016 | Order from January 15, 2016 Hearings | 71 | JA011385-JA011388 |
| 05/16/2016 | Judgment | 71 | JA011389-JA011391 |
| 05/17/2016 | Notice of Entry of Judgment | 71 | JA011392-JA011396 |
| 05/23/2016 | Plaintiffs' Memorandum of Costs and Disbursements | 71 | JA011397-JA011441 |
| 05/31/2016 | Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016 | 71 | JA011442-JA011454 |
| 06/01/2016 | Pardee Homes of Nevada's Motion to Amend Judgment | 72 | JA011455-JA011589 |
| 06/06/2016 | Pardee's Motion for Attorney's Fees and Costs | 72 | JA011590-JA011614 |
| 06/06/2016 | Appendix of Exhibits to Pardee Homes Motion for Attorney Fees and Costs - Volume 1 | 73-74 | JA011615-JA011866 |

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| 06/06/2016 | Appendix of Exhibits to Pardee Homes Motion for Attorney Fees and Costs - Volume 2 | 75-76 | JA011867-JA012114 |
| 06/08/2016 | Plaintiffs' Motion for Attorney's Fees and Costs | 77 | JA012115-JA012182 |
| 06/20/2016 | Plaintiffs' Opposition to Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016 | 77-79 | JA012183-JA012624 |
| 06/21/2016 | Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs | 80 | JA012625-JA012812 |
| 06/21/2016 | Plaintiffs' Opposition to Defendant, Pardee Homes of Nevada's, Motion to Amend Judgment and Plaintiffs' Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.010 and EDCR 7.60 | 81 | JA012813-JA013024 |
| 06/27/2016 | Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs | 82 | JA013025-JA013170 |
| 06/30/2016 | Pardee Homes of Nevada's Reply in Support of Motion for Attorney's Fees and Costs | 82 | JA013171-JA013182 |
| 06/30/2016 | Pardee Homes of Nevada's Reply in Support of Motion to Amend Judgment; and Opposition to Plaintiffs' Countermotion for Attorney's Fees | 82 | JA013183-JA013196 |
| 07/01/2016 | Pardee Homes of Nevada's Reply in Support of Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016 | 82 | JA013197-JA013204 |
| 08/02/2016 | Plaintiffs' Reply in Support of Motion for Attorney's Fees and Costs | 83-84 | JA013205-JA013357 |

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| 08/02/2016 | Plaintiffs' Reply in Support of Countermotion for Attorney's Fees and Costs | 84-85 | JA013358-JA013444 |
| 08/15/2016 | Transcript re Hearing - August 15, 2016 | 86 | JA013445-JA013565 |
| 09/12/2016 | Plaintiffs' Brief on Interest Pursuant to the Court's Order Entered on August 15, 2016 | 86 | JA013566-JA013590 |
| 10/17/2016 | Pardee's Supplemental Brief Regarding Pre- and Post-Judgment Interest Pursuant to the Court's Order | 86 | JA013591-JA013602 |
| 11/04/2016 | Plaintiffs' Reply Brief in Support of Brief on Interest Pursuant to the Court's Order Entered on August 15, 2016 | 86 | JA013603-JA013612 |
| 01/09/2017 | Order and Judgment from August 15, 2016 Hearings Regarding Defendants Motion to Amend Judgment | 86 | JA013613-JA013615 |
| 01/09/2017 | Order and Judgment from August 15, 2016 Hearings Regarding Plaintiff's Motion for Attorney's Fees and Costs | 86 | JA013616-JA013618 |
| 01/09/2017 | Order and Judgment from August 15, 2016 Hearings Regarding Defendant's Motion for Attorney's Fees and Costs | 86 | JA013619-JA013621 |
| 01/10/2017 | Notice of Entry of Order and Judgment from August 15, 2016 Hearings Regarding Plaintiff's Motion for Attorney's Fees and Costs | 86 | JA013622-JA013628 |
| 01/10/2017 | Notice of Entry of Order and Judgment from August 15, 2016 Hearings Regarding Defendant's Motion for Attorney's Fees and Costs | 86 | JA013629-JA013635 |

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Dated this 28th day of February, 2018.

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## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 28th day of February, 2018, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

/s/ Beau Nelson
An Employee of McDonald Carano LLP

# EXHIBIT "12"

EXHIBIT "12"

KeyCite Yellow Flag - Negative Treatment
**Distinguished by** 1899 Holdings, LLC v. 1899 Ltd. Liability Co., D.Md., January 8, 2013

2012 WL 1819284
Only the Westlaw citation is currently available.
United States District Court,
D. Maryland.

Charles R. GOLDSTEIN, Chapter 7 Trustee for K Capital Corporation, Plaintiff,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver of K Bank, Defendant.

Civil Action No. ELH–11–1604. | May 16, 2012.

**Attorneys and Law Firms**

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Bryan D. Bolton, Michael Edward McCabe, Jr., Funk and Bolton PA, Baltimore, MD, for Defendant.

**Opinion**

**MEMORANDUM OPINION**

ELLEN LIPTON HOLLANDER, District Judge.

*1 Charles R. Goldstein (the "Trustee"), plaintiff, is the Chapter 7 Trustee in Bankruptcy for K Capital Corporation ("K Capital"), a Maryland corporation that, in November 2010, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. *See* Complaint ¶ 1 (ECF 1); *see also In re K Capital Corp.*, Case No. 10–35540 (Bankr.D.Md.). K Capital is a "bank holding company" that wholly owned a Maryland bank, K Bank, as its subsidiary. Complaint at 1 & ¶ 6. K Bank is now under the receivership of the Federal Deposit Insurance Corporation ("FDIC"), defendant. *Id.* ¶ 2.

The Trustee filed suit[1] against the FDIC, in its capacity as receiver, seeking damages of at least $20 million and other relief stemming from an alleged "scheme" of coordinated lending by K Capital and K Bank. The scheme purportedly was designed to permit K Bank to extend financing to borrowers at extraordinarily high aggregate loan-to-value ratios of between 95% and over 100%—ratios that K Bank could not have achieved on its own under its charter and within "standard underwriting policies" and "regulatory constraints" applicable to K Bank as a "regulated banking institution." Complaint ¶¶ 7–9.

The FDIC has filed a Motion to Dismiss (ECF 9), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Motion has been fully briefed,[2] and no hearing is necessary to resolve it. *See* Local Rule 105.6. For the reasons that follow, I will grant the Motion in part and deny it in part.

**Factual Background**

Under the alleged lending "scheme," K Bank would typically lend a borrower between 80% and 90% of the value of real estate used as collateral to secure the loan, and would obtain a first-priority lien on the real estate collateral. *Id.* ¶ 13. Simultaneously, K Capital would extend a further loan to the borrower in an amount between 5% and 15% of the value of the collateral, and would receive a second-priority lien on the collateral. *Id.* ¶ 14. K Bank then would act as the servicer for both loans. *Id.* ¶ 16.

The "scheme was fraught with risk" because the borrowers' collateral was so highly leveraged. *Id.* ¶ 9. According to the Trustee, the risk fell "disproportionately on K Capital" because, if a borrower defaulted (and the Trustee alleges that the "majority" of the borrowers defaulted), K Capital's junior lien position meant that K Capital would recover nothing until and unless K Bank was repaid in full. *Id.* ¶ 9; *see id.* ¶¶ 10–23. Moreover, the financing extended by K Capital "was not made with economic terms commensurate with the risk." *Id.* ¶ 18. The Trustee contends that the scheme was made possible because although the two entities were "nominally independent" of each other, they were "consolidated on an accounting and tax basis," *id.* ¶ 8, and the "boards of K Capital and K Bank were populated by the same individuals who made decisions for both entities, despite conflicting interests." *Id.* ¶ 18. "On information and belief," the Trustee contends that, at the time the loans were made, K Bank and K Capital agreed to "share the proceeds of payments" from each pair of loans or from collateral *pari passu, i.e.*, in proportion to each entity's contribution to the total amount loaned to the borrower, at the time any proceeds were received. *Id.* ¶ 19.

*2 Based on these allegations, the Trustee, in the exercise of his duty to administer the estate of K Capital for the benefit of its creditors, *see id.* ¶ 5, asserts five claims against the FDIC in its capacity as receiver for K Bank: unjust enrichment (Count I); promissory estoppel (Count II); declaratory judgment (Count III); constructive trust (Count IV); and accounting (Count V). All of the counts arise under Maryland common law, and are premised on the proposition that each pair of loans issued by the two entities as part of the alleged "scheme" should be treated as a *de facto* "joint loan," Complaint ¶ 11, and that the K Capital bankruptcy estate is entitled to recover from any proceeds of the subject loans received by the FDIC or K Bank in proportion to the amount of funding provided by K Capital for each "joint loan."[3]

This suit is, in some sense, a dispute by proxy. The Trustee stands in the shoes of K Capital, while the FDIC stands in the shoes of K Bank. Asserting the alleged rights of K Capital, the Trustee has lodged various claims against the FDIC, as receiver for K Bank.

## Discussion

### *A. Standard of Review*

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of the Rule is to provide the defendant with "fair notice" of the claim and the "grounds" for entitlement to relief. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555–56 n. 3, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citation omitted). To be sure, the plaintiff need not include "detailed factual allegations in order to satisfy" Rule 8(a)(2). *Id.* at 555. But, the Rule demands more than bald accusations or mere speculation. *Id.* Thus, a complaint that provides no more than "labels and conclusions," or "a formulaic recitation of the elements of a cause of action," is insufficient under the Rule. *Id.*

A defendant may " 'test the sufficiency of a complaint' " by way of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *McBurney v. Cuccinelli,* 616 F.3d 393, 408 (4th Cir.2010) (citation omitted). A Rule 12(b)(6) motion constitutes an assertion by the defendant that, even if the facts that the plaintiff alleges are true, the complaint fails, as a matter of law, "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). Ordinarily, a motion pursuant to Rule 12(b)(6) "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro,* 178 F.3d 231, 243 (4th Cir.1999) (internal quotation marks omitted). But, "in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint," the court may resolve the applicability of a defense by way of a Rule 12(b)(6) motion. *Goodman v. Praxair, Inc.,* 494 F.3d 458, 464 (4th Cir.2007). "This principle only applies, however, if all facts necessary to the affirmative defense *'clearly appear[ ] on the face of the complaint.'* " *Id.* (quoting *Richmond, Fredericksburg & Potomac R.R. v. Forst,* 4 F.3d 244, 250 (4th Cir.1993)) (emphasis in Goodman).

*3 "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Thus, a Rule 12(b)(6) motion will be granted if the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal,* 556 U.S. at 679 (citation omitted). "A court decides whether this standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer" that the plaintiff is entitled to relief. *A Society Without A Name v. Virginia,* 655 F.3d 342, 346 (4th Cir.2011). Dismissal "is inappropriate unless, accepting as true the well-pled facts in the complaint and viewing them in the light most favorable to the plaintiff, the plaintiff is unable to 'state a claim to relief.' " *Brockington v. Boykins,* 637 F.3d 503, 505–06 (4th Cir.2011) (citation omitted).

### *B. The D'Oench, Duhme Doctrine and 12 U.S.C. § 1823(e)*

The FDIC's primary argument is that the Trustee's claims are barred by the federal common law *D'Oench, Duhme* doctrine and its statutory counterparts, 12 U.S.C. §§ 1821(d)(9)(A) and 1823(e). The *D'Oench, Duhme* doctrine takes its name from the Supreme Court's decision in *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). That case involved a promissory note, originally held by a bank, that was acquired by the FDIC "in connection with the assumption of the [original bank's] deposit liabilities by another bank." *Id.* at 454. When the FDIC sued to collect on the note, the maker of the note contended that it had "sold the [original] bank certain bonds which later defaulted," and that the promissory note had been "executed to enable the bank to carry the note[ ] and not show any past due bonds" on its books. *Id.* Thus, the receipt for the note contained an alleged proviso: " 'This note is given with the understanding it will not be called for payment.' " *Id.* at 454 (quoting receipt). The Supreme Court held that the purported agreement that the promissory note would not be repaid was unenforceable against the FDIC, pursuant to "a general policy" of federal common law "to protect the institution of banking from such secret agreements." *Id.* at 458. It said: " 'Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in the form of a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced.' " *Id* . at 459 (citation omitted). In the Supreme Court's view, "[p]lainly one who gives such a note to a bank with a secret agreement that it will not be enforced must be presumed to know that it will conceal the truth from the vigilant eyes of the bank examiners." *Id.* at 460.

*4 In *Young v. FDIC,* 103 F.3d 1180 (4th Cir.), *cert. denied,* 522 U.S. 928, 118 S.Ct. 329, 139 L.Ed.2d 255 (1997), the Fourth Circuit described the contours of the *D'Oench, Duhme* doctrine as it has subsequently developed:

> The *D'Oench* doctrine ... "prohibits claims based upon agreements which are not properly reflected in the official books or records of a failed bank or thrift." *Resolution Trust Corp. v. Allen,* 16 F.3d 568, 574 (4th Cir.1994). The doctrine serves two purposes. First, it allows federal and state examiners to rely on a bank's records in evaluating the institution's fiscal soundness. *Id.* at 574. Second, it "ensure[s] mature consideration of unusual loan transactions by senior bank officials, and prevent[s] fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Langley v. FDIC,* 484 U.S. 86, 92, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987).
>
> The original test for determining whether claims were barred under the *D'Oench* doctrine was whether the agreement, oral or written, either was designed to deceive the public authority or would tend to have that effect. Courts, however, have expanded the doctrine, and it now applies in virtually all cases where the FDIC is confronted with an agreement not documented in the institution's records.

*Id.* at 1187 (some internal citations omitted).

In the Federal Deposit Insurance Act of 1950, as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Congress "codified elements of the common law *D'Oench Duhme* doctrine in 12 U.S.C.A. §§ 1823(e) and 1821(d)(9) in order to protect taxpayer, depositors, and creditors of failed financial institutions and federal deposit insurance funds." *Resolution Trust Corp. v. Allen,* 16 F.3d 568, 574 (4th Cir.1994). 12 U.S.C. § 1823(e) provides, with exceptions not relevant here:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it ..., either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

In addition, 12 U.S.C. § 1821(d)(9)(A) provides (with exceptions not relevant), that "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation."

*5 The Fourth Circuit has explained that § 1823(e) "essentially codifies the common law *D'Oench* doctrine," although "the two remain separate and independent grounds for decision." *Nat'l Enters., Inc. v. Barnes,* 201 F.3d 331, 333 n. 4 (4th Cir.2000). Indeed, "the Fourth Circuit and other courts often construe the *D'Oench* doctrine and section 1823(e) in tandem." *Young,* 103 F.3d at 1187. Here, the FDIC relies primarily upon the statutes. But, neither party contends that the common law doctrine and its statutory counterparts should produce differing results.[4]

The FDIC argues that the Trustee's claims fail because they are predicated on an alleged "agreement" between K Capital and K Bank to share proceeds from the loans *pari passu,* and the Trustee's complaint does not allege that the purported "agreement" complies with the requirements of *D'Oench, Duhme* and the statutes. *See* Motion at 12–14. In response, the Trustee contends that *D'Oench, Duhme* and the statutes do not apply to this case for two reasons. First, according to the Trustee, the FDIC was appointed receiver of K Bank "by the Maryland Office of Financial Regulation, and not by a Federal banking agency." Opposition at 26. In that circumstance, claims the Trustee, *D'Oench, Duhme* and its statutory counterparts are made inapplicable by another statutory provision, 12 U.S.C. § 1821(g)(4), which provides that, when the FDIC is appointed as receiver by a state regulator, "the rights of depositors and other creditors of any State depository institution shall be determined in accordance with the applicable provisions of State law." Second, the Trustee maintains that his claims do not depend on contradicting a written agreement with a secret unwritten agreement. Rather, he asserts that "the written loan agreements themselves evidence the inequality of the arrangement between K Bank and K Capital." *Id.* at 27. But, even if *D'Oench, Duhme* or its statutory counterparts apply to this case, the Trustee contends that the Court "should defer a ruling on the applicability of *D'Oench Duhme* until the parties have had an opportunity to conduct discovery," providing the Trustee "with an opportunity to discover what agreements were and were not in the bank's official records." Opposition at 29.

The scope of the *D'Oench, Duhme* doctrine and its statutory counterparts is not altogether clear. In some decisions, they are described in terms akin to a statute of frauds, *i.e.*, prohibiting the enforcement of any agreement that does not conform to the requirements of the doctrine. *See, e.g., Nat'l Enters., Inc. v. Barnes,* '201 F.3d 331, 333 n. 3 (4th Cir.2000) ("The *D'Oench* doctrine prohibits claims based upon agreements which are not properly reflected in the official books or records of a failed bank or thrift."); *Young, supra,* 103 F.3d at 1187 (stating that *D'Oench, Duhme* "applies in virtually all cases where the FDIC is confronted with an agreement not documented in the institution's records").

*6 In other cases, however, *D'Oench* and § 1823(e) have been described in terms more akin to a parol evidence rule, *i.e.*, prohibiting the use of an agreement that does not conform to the requirements of the doctrine for the purpose of varying or contradicting the terms of another, written agreement. For instance, in *E.J. Sebastian Associates v. Resolution Trust Corp.*, 43 F.3d 106 (4th Cir.1994), the Fourth Circuit "question[ed] the applicability of the *D'Oench* Doctrine" in a circumstance where a claim was "based upon an oral agreement" with a failed bank that did not "contradict any prior written contract between the parties." *Id.* at 109. The Court said, *id.:*

> Cases applying the *D'Oench* Doctrine traditionally involve a claim based upon an oral side agreement which contradicts a written document. Typically, *D'Oench* arises to bar a claimant from disputing the enforcement of a written loan agreement based upon an oral agreement that the claimant professes to have entered into with a bank official. *D'Oench* declared that such oral agreements are unenforceable; and therefore, the written loan agreement prevails .... [T]his case does not appear to present the traditional *D'Oench* Doctrine scenario.

Similarly, in a subsequent decision in this district, Judge Benson E. Legg stated: "The application of the [*D'Oench* ] doctrine necessarily requires a conflict between the alleged side agreement and the written document; if the side agreement comports with the written document, *D'Oench* does not [prevent] its assertion against the banking authority." *Md. Nat'l Bank v. Resolution Trust Corp.*, 895 F.Supp. 762, 769 (D.Md.1995) (citing *E.J. Sebastian and John v. Resolution Trust Corp.*, 39 F.3d 773 (7th Cir.1994)).

Based on the conception of *D'Oench* as articulated in *E.J. Sebastian* and *Maryland National Bank,* it may be that *D'Oench* does not apply here. None of the loans at issue are in the record before me. But, based on the facts alleged, there would not necessarily be a contradiction between loan agreements with borrowers as described by the Trustee, and a separate agreement between K Bank and K Capital to redistribute *pari passu* any proceeds received by either entity pursuant to such loans.

It is also salient that Count I of the complaint, which asserts a claim of unjust enrichment, does not depend upon an actual agreement between K Bank and K Capital regarding distribution of the loan proceeds. As the FDIC recognizes, Count I does not contain any express allegation regarding the alleged agreement.

Under Maryland law, a claim of unjust enrichment has three elements: (1) "the plaintiff confers a benefit upon the defendant"; (2) "the defendant knows or appreciates the benefit"; and (3) "the defendant's acceptance or retention of the benefit under the circumstances is such that it would be inequitable to allow the defendant to retain the benefit without the paying of value in return." *Benson v. State,* 389 Md. 615, 651–52, 887 A.2d 525, 546 (2005); *accord Jackson v. 2109 Brandywine, LLC,* 180

Md.App. 535, 574, 952 A.2d 304, 327, *cert. denied,* 406 Md. 444, 959 A.2d 793 (2008). An actual agreement by the defendant to pay the plaintiff is not an element of unjust enrichment; indeed, establishment of an actual agreement between the parties would ordinarily defeat an unjust enrichment claim. *See, e.g., Janusz v. Gilliam,* 404 Md. 524, 537, 947 A.2d 560, 567 (2008) ("In Maryland, a claim of unjust enrichment, which is a quasi-contract claim, [with some exceptions] 'may not be brought where the subject matter of the claim is covered by an express contract between the parties.' ").[5]

***7** Writing for the Maryland Court of Special Appeals, Judge Charles E. Moylan, Jr. explained in *Alternatives Unlimited, Inc. v. New Baltimore City Board of School Commissioners,* 155 Md.App. 415, 494, 843 A.2d 252, 298 (2004): "A claim of unjust enrichment ... is not based on contract, even an implied [-in-fact] contract. It is based on quasi-contract, and a quasi-contract, notwithstanding its name, is not a real contract." Quoting *Mass Transit Administration v. Granite Construction Co.,* 57 Md.App. 766, 775, 471 A.2d 1121, 1125–26 (1984), Judge Moylan continued:

> "A quasi-contract or *implied in law contract ... involves no assent between the parties, no 'meeting of the minds.'* Instead the law implies a promise on the part of the defendant to pay a particular 'debt.' Thus, '[*t* ]*he implied in law contract is indeed no contract at all,* it is simply a rule of law that requires restitution to the plaintiff of something that came into defendant's hands but belongs to the plaintiff in some sense.' "

*Alternatives Unlimited,* 155 Md.App. at 480, 843 A.2d at 290 (emphasis in *Alternatives Unlimited* ) (internal citations omitted); *accord Mogavero v. Silverstein,* 142 Md.App. 259, 274–76, 790 A.2d 43, 51–53, *cert. denied,* 369 Md. 181, 798 A.2d 553 (2002). In other words, "[t]o prevent unjust enrichment, the law created a contract, as an unabashed legal fiction." *Alternatives Unlimited,* 155 Md.App. at 472, 843 A.2d at 286. Therefore, it is by no means clear that D'Oench, Duhme and its statutory counterparts have any application to an unjust enrichment claim. *See FDIC v. Gulf Life Ins. Co.,* 737 F.2d 1513, 1516 (11th Cir.1984) ("Because Gulf Life's theor[y] of ... unjust enrichment [is] not ... based on the parties' mutual assent, section 1823(e) is inapplicable ....") (rejecting unjust enrichment claim on other grounds).[6]

The import of 12 U.S.C. § 1821(g)(4), upon which the Trustee relies, is also elusive. In asserting that § 1821(g)(4) precludes application of *D'Oench* and its statutory counterparts where the FDIC is appointed receiver by a state regulator, the Trustee relies on a single unreported district court decision that reached that conclusion. *See MVB Mortg. Corp. v. FDIC,* No. 2:08–cv–771, 2009 WL 2047896, at *3 (S.D.Ohio July 9, 2009); *see also id.,* 2009 WL 3259413, at *5 (S.D.Ohio Oct.6, 2009) (declining to reconsider prior ruling).[7] The FDIC argues that *MVB* is wrongly decided, and cites a handful of cases (notably including the Supreme Court's only decision applying § 1823(e), *Langley v. FDIC, supra,* 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340), in which the *D'Oench* doctrine or its statutory analogs were applied in cases where the FDIC had been appointed receiver by a state regulator.[8] However, none of the cases cited by the FDIC mentioned or addressed the impact of § 1821(g)(4) on a *D'Oench, Duhme* claim. Indeed, to my knowledge, the *MVB* Court is the only one that has squarely decided whether § 1821(g)(4) precludes *D'Oench,* and that court held that it does. Perhaps *MVB* is an outlier. But, at this juncture, there is no need to reach a definitive resolution of the thorny issues concerning the extent to which *D'Oench* applies or the effect of § 1821(g)(4); I agree with the Trustee that resolution of these issues at the motion to dismiss stage is premature.

***8** The FDIC argues that "unless all requirements of § 1823(e) are pled with respect to an alleged 'agreement,' no cause of action is stated and no relief can be granted." Motion at 9. It contends that a plaintiff must plead satisfaction of *D'Oench* or its statutory counterparts in the plaintiff's complaint, *id.* and relies for this proposition upon the Fourth Circuit's decisions in *Young* and *Allen.* These cases are inapt. To be sure, the *Young* Court iterated that a "plaintiff must satisfy all four requirements [of § 1823(e) ] before it can enforce an agreement against the FDIC." *Young,* 103 F.3d at 1187. Similarly, the *Allen* Court said: "All four [statutory] requirements must be satisfied for an agreement to be enforceable against [the receiver]." *Allen,* 16 F.3d at 574. But, neither *Young* nor *Allen* held that satisfaction of the statutory requirements must be pleaded in a complaint in order to survive a Rule 12(b)(6) motion; *Young* was decided on review of a grant of summary judgment, *see* 103 F.3d at 1186, and *Allen* on appeal from a directed verdict after trial on the merits. *See* 16 F.3d at 572. Indeed, the Court's research has uncovered no Fourth Circuit case in which a *D'Oench, Duhme* defense was resolved on a Rule 12(b)(6) motion.

As noted, motions practice under Rule 12(b)(6) typically cannot determine the applicability of defenses, unless the facts supporting the defense are pleaded in the complaint. *See Goodman, supra,* 494 F.3d at 464. Here, the Trustee's complaint does not specifically allege that the agreement between K Bank and K Capital was unwritten, nor does the complaint contain any express allegation that is inconsistent with the other requirements of 12 U.S.C. § 1823(e). Even if *D'Oench* and § 1823(e) are applicable, discovery may reveal that the alleged agreement is memorialized in a writing in K Bank's records that satisfies the statutory requirements. To be sure, the FDIC argues that it is "inherently implausible" that "such an agreement would actually be in writing." Motion at 14 n. 6. Although it may be unlikely that a written agreement will be produced, I do not view it as so unlikely as to be implausible as a matter of law, under the *Iqbal* and *Twombly* standard.

Stated another way, no facts concerning the alleged agreement between K Bank and K Capital (aside from its alleged existence) are presently before the Court, nor are any of the loan agreements between either entity and the borrowers. Development of a factual record will illuminate the issues and provide a sound platform from which to analyze the legal issues raised by the FDIC regarding *D'Oench, Duhme* and 12 U.S.C. § 1823(e).

Accordingly, I will deny the Motion to the extent it is premised on *D'Oench, Duhme* and its statutory counterparts, without prejudice to the FDIC's right to reassert its *D'Oench* defense at the summary judgment stage.

### *C. FIRREA's "Anti–Injunction" Provision: 12 U.S.C. § 1821(j)*

***9** The FDIC also argues that the Trustee's claims are barred by another provision of FIRREA, the so-called "anti-injunction" statute: 12 U.S.C. § 1821(j). Section 1821(j) provides, with exceptions not applicable here: "Except as provided in [§ 1821], no court may take any action ... to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." According to the FDIC, § 1821(j) is a bar to any equitable remedy against it in its capacity as receiver. *See* Motion at 30–32.

In response, the Trustee makes two arguments. First, the Trustee points out that, in his claims for unjust enrichment and promissory estoppel (Counts I & II), he seeks only an award of money damages. According to the Trustee, money damages claims are not barred by § 1821(j) because they are legal, not equitable, and because claims for money damages are otherwise provided for in § 1821. Second, the Trustee contends that § 1821(j) bars only injunctions, and not other forms of equitable relief that do not "restrain or affect the exercise" of the FDIC's powers. *See* Opposition at 13–20.

The Trustee is correct that, under Maryland law, unjust enrichment and promissory estoppel claims for money damages are claims at law, rather than claims in equity. *See Ver Brycke v. Ver Brycke,* 379 Md. 669, 698, 843 A.2d 758, 775 (2004) (holding that plaintiffs' unjust enrichment and promissory estoppel claims "were claims at law because they were claims seeking the remedy of restitution for money"). Nevertheless, both doctrines have an equitable basis. As noted, the third element of an unjust enrichment claim is that "the defendant's acceptance or retention of the benefit under the circumstances is such that it would be inequitable to allow the defendant to retain the benefit without the paying of value in return." *Benson,* 389 Md. at 651–52, 887 A.2d at 546.

The elements of a promissory estoppel claim in Maryland were established in the touchstone case of *Pavel Enterprises, Inc. v. A .S. Johnson Co.,* 342 Md. 143, 166, 674 A.2d 521, 533 (1996):

> 1. a clear and definite promise;
>
> 2. where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee;
>
> 3. which does induce actual and reasonable action or forbearance by the promisee; and
>
> 4. causes a detriment which can only be avoided by the enforcement of the promise.

The *Pavel* Court made clear the equitable considerations that underpin the fourth element, *id.* at 168, 674 A.2d 521, 674 A.2d at 533–34:

> [T]he trial court, and not a jury, must determine that binding the subcontractor is necessary to prevent injustice. This element is to be enforced as required by common law equity courts—the general contractor must have "clean hands." This requirement includes ... the further determination that justice compels the result.

Despite the equitable foundations of both doctrines, it does not follow that any relief awarded pursuant to an unjust enrichment or promissory estoppel claim will be equitable in nature. Of course, "[i]n the broadest sense, almost every legal principle is based on its being 'equitable' in the sense that the law, whenever it reasonably can, seeks a result that is fair and just." *Alternatives Unlimited,* 155 Md.App. at 457–58, 843 A.2d at 277. But, as this Court explained in *Sedghi v. Patchlink Corp.,* 823 F.Supp.2d 298 (D.Md.2011):

> *10 "[O]verwhelmingly, courts characterize claims according to the remedies sought rather than according to subject matter or substantive rules involved. If the remedy sought is a coercive order, the claim is equitable; if the remedy sought is a judgment to be enforced in rem by seizure of property, the claim is legal. An action for ordinary money judgment, for replevin, or for ejectment is an action at law. In contrast, a suit for injunction or one for specific performance is equitable."

*Id.* at 305 (quoting 1 DAN B. DOBBS, LAW OF REMEDIES at 156–57 (2d ed. 1993) ("DOBBS")); *accord Ver Brycke,* 379 Md. at 773, 843 A.2d at 773 ("[R]emedies sought serve to delineate the type of action, whether it be in law or equity.").

As to unjust enrichment, relief "in the form of a money judgment for unjust enrichment based on quasi-contract is ... clearly a remedy at law." *Alternatives Unlimited,* 155 Md.App. at 462, 843 A.2d at 279–80; *see also Bennett Heating & Air Conditioning, Inc. v. NationsBank of Md.,* 342 Md. 169, 180, 674 A.2d 534, 539 (1996) ("Restitution claims for money are usually claims 'at law.' ") (citation and internal quotation marks omitted). Conversely, "a restitutionary remedy [for unjust enrichment] that is coercive in nature and *in personam* in focus is an equitable remedy." *Alternatives Unlimited,* 155 Md.App. at 462, 843 A.2d at 280.

As with unjust enrichment, a promissory estoppel claim for money damages sounds in law, not equity. "[I]n Maryland, promissory estoppel is an alternative means of obtaining contractual relief." *Md. Transp. Auth. Police Lodge No. 34 of Fraternal Order of Police v. Md. Transp. Auth.,* 195 Md.App. 124, 215, 5 A.3d 1174, 1227 (2010), *rev'd in part on other grounds,* 420 Md. 141, 21 A.3d 1098 (2011); *see also Pavel Enters.,* 342 Md. at 169, 674 A.2d at 534 ("[T]here are different ways to prove that a contractual relationship exists .... Traditional bilateral contract theory is one. Detrimental reliance [a.k.a. promissory estoppel] can be another."); *Suburban Hosp., Inc. v. Sampson,* 807 F.Supp. 31, 33 (D.Md.1992) (applying Maryland law, and stating that "the nature of a lawsuit in which promissory estoppel is invoked remains that of an action to enforce a contract"). To the extent that a promissory estoppel claim seeks money damages, such damages " 'are, of course, the classic form of *legal* relief.' " *Sedghi,* 823 F.Supp.2d at 305 (quoting *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 255, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993)) (emphasis in Mertens) (holding that plaintiff seeking money damages via Maryland promissory estoppel claim sought legal, rather than equitable, relief and therefore was entitled to trial by jury); *accord Ver Brycke,* 379 Md. at 698, 843 A.2d at 775.

A monetary award is the only relief requested by the Trustee in counts I and II. Therefore, these counts, by their own terms, do not seek equitable relief and do not appear to be subject to the bar of 12 U.S.C. § 1821(j).[9]

*11 Nevertheless, the FDIC argues that, although these counts "ostensibly seek money damages," they "by necessity, seek reformation of the separate loans into 'Joint Loans.' " Motion at 32. Contending that contract reformation is an equitable remedy, the FDIC cites *Flester v. Ohio Cas. Ins. Co.,* 269 Md. 544, 556, 307 A.2d 663, 669 (1973), in which the Maryland Court of Appeals stated that "courts exercising equity powers may reform an instrument to conform it to the intention of the parties." As the FDIC sees it, counts I and II must be dismissed, not only pursuant to 12 U.S.C. § 1821(j), but also because the complaint fails to plead the elements of a cause of action for contract reformation, and because the Trustee failed to include necessary parties, specifically the borrowers who executed the various loans with K Capital and K Bank.

The gist of the FDIC's argument regarding contract reformation is that recognition of the Trustee's "joint loan" theory would require the modification of all of the loans, including "changes in the priority of liens, the allocation of payment priority, and/or the outstanding loan amounts." Motion at 26. The Trustee responds that this argument is a "classic 'straw man.' " Opposition at 20.

The Trustee has not sought contract reformation, and so it is neither surprising nor dispositive that his complaint does not state a claim for reformation. And, I am not convinced that the relief the Trustee seeks is contract reformation in other clothing. It is by no means obvious that the terms of the loans executed by the borrowers and K Capital and K Bank would be altered in any way by a separate agreement between K Bank and K Capital (or a restitutionary remedy having the same effect as such an agreement) to split between the two entities *pari passu* the loan proceeds recovered from the borrowers. At the very least, it would be impossible for the Court to determine that reformation would be necessary at the pleading stage, when none of the loan instruments is in the record before me.

I agree with the FDIC, however, that the Trustee's claims for a declaratory judgment (Count III) and a constructive trust (Count IV) are barred by 12 U.S.C. § 1821(j). Notwithstanding the Trustee's argument to the contrary, courts routinely interpret § 1821(j) to provide, with very few exceptions, that "no court may grant equitable relief against the FDIC except as provided by FIRREA." *Henrichs v. Valley View Development,* 474 F.3d 609, 614 (9th Cir.2007); *see also Sharpe v. FDIC,* 126 F.3d 1147, 1154 (9th Cir.1997) ( "Section 1821(j) prevents courts from granting any equitable relief against the FDIC."); *Hanson v. FDIC,* 113 F.3d 866, 871 (8th Cir.1997) ("Section 1821(j) ... 'effect[s] a sweeping ouster of courts' power to grant equitable remedies ....' ") (quoting *Freeman v. FDIC,* 56 F.3d 1394, 1399 (D.C.Cir.1995)); *Tri-State Hotels, Inc. v. FDIC,* 79 F.3d 707, 715 (8th Cir.1996) (also quoting *Freeman* ). *But see Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n,* 94 F.3d 914, 923 (4th Ci r.1996) (holding that § 1821(j) does not bar an injunction prohibiting a federal receiver from violating the Constitution, because "enjoining the [receiver] from doing so cannot infringe on its statutorily granted powers"); *James Madison, Ltd. ex rel. Hecht v. Ludwig,* 82 F.3d 1085, 1093 (D.C.Cir.1996) ("We ... read section 1821(j) to prevent courts from interfering with the FDIC only when the agency acts within the scope of its authorized powers, not when the agency was improperly appointed in the first place.").

***12** "Under certain circumstances, declaratory relief has been deemed 'functionally equivalent' to injunctive relief." *Alli v. Decker,* 650 F.3d 1007, 1014 (3d Cir.2011) (citing *California v. Grace Brethren Church,* 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982) (holding that the Tax Injunction Act prohibits declaratory as well as injunctive relief)). Where a claimant seeks "a declaratory judgment that would effectively 'restrain' the FDIC" in the exercise of its powers, in the same manner that an injunction would, courts have held that " § 1821(j) deprives the court of power to grant that remedy as well." *Freeman, supra,* 56 F.3d at 1399; *accord Courtney v. Halleran,* 485 F.3d 942, 948 (7th Cir.2007); *Tri-State Hotels, supra,* 79 F.3d at 715. Here, the Trustee seeks a declaration that "K Capital is entitled to receive its share, on a *pari passu* basis, of past, *current, and future* proceeds of payments on the Joint Loans and/or collateral ...." Complaint at 7 (emphasis added). Such a declaration would affect the FDIC's exercise of its powers in virtually the same manner as an injunction directing the FDIC to make future payments. Accordingly, it is the functional equivalent of an injunction and is barred by § 1821(j).

The same is true of the Trustee's claim for a constructive trust. As the FDIC points out, although the Trustee pleaded constructive trust as a separate "count," a constructive trust is "a type of equitable remedy, and not a cause of action." *Stewart Title Guar. Co. v. Sanford Title Servs., LLC,* Civ. No. ELH-11-260, 2011 WL 2681196, at *4 (D.Md. July 8, 2011); *accord Lyon v. Campbell,* 33 F. App'x 659, 663 (4th Cir.2002) (applying Maryland law and stating: "A constructive trust is an equitable remedy, not a cause of action in and of itself."). In *Washington Suburban Sanitary Commission v. Utilities, Inc.,* 365 Md. 1, 39, 775 A.2d 1178, 1200 (2001) (citation omitted), the Maryland Court of Appeals explained that the " 'constructive trust, like its counterpart remedies "at law," is a remedy for unjust enrichment.' " In other words, a constructive trust is a "remedial request[ ] that depend[s] upon [the] plaintiff's substantive causes of action," such as unjust enrichment. *Stewart Title,* 2011 WL 2681196, at *5; *see also Alternatives Unlimited,* 155 Md.App. at 460, 843 A.2d at 279.

A constructive trust "is the remedy employed by a court of equity to convert the holder of the legal title to property into a trustee for one who in good conscience should reap the benefits of the possession of said property." *Wimmer v. Wimmer,* 287 Md. 663, 668, 414 A.2d 1254 (1980). "[T]he constructive trust plaintiff who proves his claim ... wins an *in personam* order that requires the defendant to transfer legal rights and title of specific property or intangibles to the plaintiff." 1 DOBBS, § 4.3(2), at 590–91; *see also De Arriz v. Klingler-De Arriz,* 179 Md.App. 458, 480, 947 A.2d 59, 71 (" 'Equity declares the [constructive] trust in order that it may lay its hand on the thing and wrest it from the possession of the wrongdoer.' ") (citation omitted), *cert. denied,* 405 Md. 349, 952 A.2d 225 (2008). The imposition of a constructive trust would have sweeping effects on the FDIC's exercise of its powers, akin to an injunction. "By imposing a constructive trust" on property held by a failed bank in receivership, a "district court would ... make [the plaintiff] the beneficial owner of that property." *Hanson, supra,* 113 F.3d at 871. Thus, "[i]mposition of a constructive trust would necessarily 'restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver.' " *Id.* (quoting 12 U.S.C. § 1821(j)); *accord Hindes, supra,* 137 F.3d at 159. Therefore, Counts III and IV of the Trustee's complaint will be dismissed.

***13** The FDIC also argues that the Trustee's claim for an accounting (Count V) should meet the same fate, but this is not so clear. To be sure, an accounting is considered an equitable remedy. *See Mass Transit Admin., supra,* 57 Md.App. at 774, 471 A.2d at 1125 (*"In equity,* the principal restitutionary remedies are the constructive trust, the equitable lien, subrogation, *and the accounting for* *profits."* ) (emphasis added). However, the FDIC has cited no cases holding that an accounting is the type of equitable remedy that would "restrain or affect the exercise of powers or functions" of the FDIC, within the meaning of § 1821(j). Indeed, the only reported federal opinion that appears to have addressed this question is *Heno v. FDIC,* 996 F.2d 429, 432 n. 6 (1st Cir.1993), *withdrawn and substituted on reh'g on other grounds by* 20 F.3d 1204 (1st Cir.1994), cited by the Trustee, in which the First Circuit stated: "[W]e note, without deciding, that § 1821(j)'s express language does not appear to bar *non* injunctive equitable relief against the FDIC, such as the accounting Heno seeks ...." (Emphasis in original.)[10]

The FDIC argues that another provision of FIRREA, 12 U.S.C. § 1821(d)(15), establishes the FDIC's responsibilities to provide an accounting for a receivership.[11] According to the FDIC, "plaintiff has no private right to compel any additional accounting ." Reply at 23. For this proposition, the FDIC cites *Hindes, supra,* 137 F.3d at 171, in which the Third Circuit held that shareholders of a failed bank had no private right of action to compel the FDIC to comply with the accounting requirement of § 1821(d)(15). Notably, however, a member of the *Hindes* panel dissented on this point, *see id.* at 172–73 (Roth, J., concurring and dissenting), and the Ninth Circuit expressly disagreed with the *Hindes* Court's conclusion. *See First Pacific Bancorp, Inc. v. Helfer,* 224 F.3d 1117, 1127 (9th Cir.2000) (finding private right of action under § 1821(d)(15) and acknowledging conflict with *Hindes* ); *see also Courtney, supra,* 485 F.3d at 947–48 (noting conflict between *Hindes* and *First Pacific,* and concluding that whether private right of action existed under § 1821(d) "is sufficiently complex ... that it should not be handled as ... at most ... an alternative ground for decision"). More important, neither *Hindes* nor any of the other cases just cited considered the viability of a common law claim for an accounting, based on an obligation of the failed institution in receivership arising from its pre-receivership conduct, rather than the FDIC's own obligations as receiver. In sum, I have found no authority for the proposition that § 1821(d) (15) precludes a claim based on another source of entitlement for accounting against the FDIC as receiver.

The FDIC also argues that Maryland law does not recognize a freestanding claim for an accounting, but rather treats accounting only as a remedy. Although assertion of an independent cause of action for accounting is no longer necessary in most cases, it has not been entirely abolished in Maryland.

***14** In the recent case of *Polek v. J.P. Morgan Chase Bank, N.A.,* 424 Md. 333, 36 A.3d 399 (2012), decided after the FDIC's Motion was briefed, the Maryland Court of Appeals stated: "In Maryland, a claim for an accounting is available when 'one party is under [an] obligation to pay money to another based on facts and records that are known and kept exclusively by the party to whom the obligation is owed, or where there is a [confidential or] fiduciary relationship between the parties ....' " *Id.* at 365, 36 A.2d at 418 (quoting *P.V. Props., Inc. v. Rock Creek Village Assocs. Ltd. P'ship,* 77 Md.App. 77, 89, 549 A.2d 403, 409 (1988)) (alteration to restore accurate quotation of *P.V. Properties); see also Ahmad v. Eastpines Terrace Apts., Inc.,* 200 Md.App. 362, 378, 28 A.3d 1, 10, *cert. denied,* 424 Md. 55, 33 A.3d 982 (2011).

As the Maryland Court of Special Appeals recognized in *Alternatives Unlimited,* 155 Md.App. at 510, 843 A.2d at 307–08, "whereas an equitable claim for an accounting once served a necessary discovery function, that function has been superseded by modern rules of discovery" in the ordinary run of cases.[12] "Because the relief sought in an accounting claim is access to information, discovery is the remedy given to plaintiffs who prove they are entitled to an accounting." *Golub ex rel. Golub v. Cohen,* 138 Md.App. 508, 523, 772 A.2d 880, 889 (2001). In short, when a plaintiff properly pleads another cause of action that will entitle the plaintiff to discovery, the remedy of accounting is generally superfluous.

*P.V. Properties* provides an example under Maryland law of when a freestanding claim for accounting is appropriate. In that case, a commercial tenant in a shopping center sought "an itemized listing of common area maintenance expenses where the lease [was] silent in that respect and the landlord [was] unwilling to provide the desired information." 77 Md.App. at 80, 549 A.2d at 404. The Maryland Court of Special Appeals explained the "general rule" that "a suit in equity for an accounting may be maintained when the remedies at law are inadequate," and said: "An accounting may be had ... where there is a confidential or fiduciary relation between the parties, and a duty rests upon the defendant to render an account." *Id.* at 89, 549 A.2d at 409 (citing, *inter alia, Nagel v. Todd,* 185 Md. 512, 45 A.2d 326 (1946)).

According to the *P.V. Properties* Court, there was a "limited fiduciary relationship" between the landlord and tenant, because the landlord "maintain [ed] and exclusively control[led] the records which document its expenses," and the tenant was "forced to rely o n the good faith and fair dealing of the landlord in assessing the charges." *Id.* at 91, 549 A.2d 403, 549 A.2d at 410. In that circumstance, the court rejected the landlord's assertion that the tenant had an adequate remedy at law, stating, *id.* at 91–92, 549 A.2d at 410:

> [Landlord] assert[s] that [tenant] could sue ... for breach of contract and then through the civil discovery procedures obtain from [landlord] an itemized accounting. This suggestion is ludicrous, and certainly not one that leads to an adequate remedy at law. What [landlord is] suggesting is a reversal of proper litigation procedures. Generally, a claimant has a cause of action against a defendant that the parties have not been able to resolve, and therefore the claimant files suit. In its proposed scenario, [landlord] recommends that [tenant] first institute legal proceedings and then determine through discovery whether or not it has a cause of action. This course of action is a waste of both the court's and the litigants' time and expense. In addition, should [tenant] refuse to tender payment, [it runs] the risk of being sued for breach of contract and further, run[s] the risk of being evicted from the shopping center. This can hardly be considered an adequate remedy at law.

***15** In contrast, accounting claims have been rejected where the "plaintiff was fully capable of ascertaining, through its own efforts, the information it sought from the defendant by way of an accounting," *Alternatives Unlimited,* 155 Md.App. at 510, 843 A.2d at 307, where "discovery was otherwise available," *id.* at 511, 843 A.2d at 308 (citing cases), or where "there was no basis for inferring that [defendant] was in any sort of confidential relationship with or bore any fiduciary duty toward [plaintiff]." *Id.* at 508, 843 A.2d at 306.

Here, the Trustee alleges that K Bank was the servicer of the loans extended to borrowers by K Capital. *See* Complaint ¶ 16. He also contends, on information and belief, that K Bank "retained the full proceeds of payments on the Joint Loans and/or collateral" securing the loans. *Id.* ¶ 43, 843 A.2d 252. Moreover, according to the complaint, the "FDIC, as receiver of K Bank, refuses to allow K Capital to inspect its account books, records, and documents so that it may determine the full extent of the proceeds of payments on the Joint Loans and/or collateral." *Id.* ¶ 44, 843 A.2d 252.[13]

In my view, these allegations are sufficient to state a claim for accounting.[14] Accordingly, I decline to dismiss Count V.[15]

### *D. Unclean Hands and In Pari Delicto*

The FDIC also contends that the Trustee's claims are barred by the equitable doctrines of unclean hands and *in pari delicto.* The Maryland Court of Appeals recapitulated the unclean hands doctrine in *Dickerson v. Longoria,* 414 Md. 419, 995 A.2d 721 (2010):

> "The [un]clean hands doctrine states that 'courts of equity will not lend their aid to anyone seeking their active interposition, who has been guilty of fraudulent, illegal, or inequitable conduct in the matter with relation to which he seeks assistance.' *Hlista [v. Altevogt],* 239 Md. [43,] 48, 210 A.2d [153,] 156 [ (1965) ]; *see also Hicks v. Gilbert,* 135 Md.App. 394, 400, 762 A.2d 986, 989–90 (2000). The doctrine does not mandate that those seeking equitable relief must have exhibited unblemished conduct in every transaction to which they have ever been a party, but rather that the particular matter for which a litigant seeks equitable relief must not be marred by any fraudulent, illegal, or inequitable conduct. *Hlista,* 239 Md. at 48, 210 A.2d at 156; *Hicks,* 135 Md.App. at 400–01, 762 A.2d at 990 ('There must be a nexus between the misconduct and the transaction, because "[w]hat is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts." ') (quoting *Adams v. Manown,* 328 Md. 463, 476, 615 A.2d 611, 617 (1992))."

*Id.* at 455, 995 A.2d 721, 955 A.2d at 743 (quoting *Wells Fargo v. Neal,* 398 Md. 705, 729–30, 922 A.2d 538, 552–53 (2007)) (alterations in Dickerson).

The related doctrine of *in pari delicto* is a general rule (subject to exceptions) that, " '[w]hen plaintiff and defendant have participated in fraudulent or illegal conduct, contrary to law or public policy or in fraud of the law itself, and are *in pari delicto,* plaintiff cannot maintain suit—at law or in equity—directly arising out of the misconduct.' " *Adams v. Manown,* 328 Md. 463, 487, 615 A.2d 611, 623 (1992) (Chasanow, J., concurring and dissenting) (quoting *Messick v. Smith,* 193 Md. 659, 669, 69 A.2d 478, 481 (1949)); *see also Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship,* 109

Md.App. 217, 277, 674 A.2d 106, 135 (1996), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997). Its name derives from the Latin maxim, *"in pari delicto potior est conditio defendentis,"* which means that, in cases of equal fault, the defendant has the better position, or in other words, "where fault is mutual, the law will leave the case as it finds it." *Schneider v. Schneider*, 335 Md. 500, 508, 644 A.2d 510, 514 (1994).

***16** Of course, the FDIC does not contend that the Trustee personally is guilty of inequitable conduct. Rather, the FDIC argues that the Trustee stands in the shoes of K Capital, and that K Capital's complicity in the alleged loan scheme defeats the Trustee's claims (on behalf of K Capital) against K Bank (via the receiver) for unjust enrichment. *See* Motion at 22–25. In response, the Trustee argues that his responsibility is to maximize the value of the K Capital estate for the benefit of K Capital's creditors, and that, "absent any indication that the *creditors* were substantially involved in the alleged wrongdoing," *in pari delicto* and unclean hands should not apply. Opposition at 24 (emphasis in original).

There is precedent from several other circuits that supports the legal position advanced by the FDIC, *i.e.*, that a defense of *in pari delicto* may be asserted against a trustee in bankruptcy on the basis of the debtor's complicity in the alleged inequitable or illegal conduct of the defendant. *See, e.g., Mosier v. Callister, Nebeker & McCullogh*, 546 F.3d 1271, 1276 (10th Cir.2008) ("[I]t is well established that *in pari delicto* may bar an action by a bankruptcy trustee against third parties who participated in or facilitated wrongful conduct of the debtor.") (citing cases); *Nisselson v. Lernout*, 469 F.3d 143, 153 (1st Cir.2006) (stating that "the in pari delicto defense must be available to a defendant in an action by a bankruptcy trustee whenever that defense would have been available in an action by the debtor," and that, "[a]s a necessary corollary of that proposition, there is no 'innocent successor' exception available to a bankruptcy trustee in a case in which the defendant successfully could have mounted an in pari delicto defense against the debtor"); *Off. Cmte. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1150 (11th Cir.2006) ("If a claim of [the debtor] would have been subject to the defense of *in pari delicto* at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense."); *Grassmueck v. Amer. Shorthorn Ass'n*, 402 F.3d 833, 836 (8th Cir.2005) ("[T]he equitable defense of *in pari delicto* is available in an action by a bankruptcy trustee against another party if the defense could have been raised against the debtor."); *Off. Cmte. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 355–60 (3d Cir.2001) ("[T]he *in pari delicto* doctrine bars the Committee, standing in the shoes of the Debtors, from bringing its claims against [defendant]."); *see also Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 967–68 (5th Cir.2012) (citing cases applying *in pari delicto* to bankruptcy trustees, but distinguishing them on the basis that the case at bar concerned application of *in pari delicto* to a receiver).

However, the courts of appeal are not unanimous. The Second Circuit has espoused the view that *in pari delicto* does not apply to claims brought by a trustee, stating that "[t]he trustee in bankruptcy stands not only in the shoes of the bankrupt[;] he fits as well into the overshoes of the bankrupt's creditors," and that "[p]ermitting [the creditors] to recover does not involve the Court in a dispute between scoundrels but rather extends aid to innocent creditors, in furtherance of the aims of the Bankruptcy Act ." *In re Leasing Consultants, Inc.*, 592 F.2d 103, 110–11 (2d Cir.1979). Other courts, while affirming the general viability of the defense against trustees, have applied exceptions to the doctrine. *See, e.g., In re Lexington Home for the Aged*, 659 F.3d 282, 292–93 (3d Cir.2011) (stating that, "[w]ith respect to *in pari delicto* in a bankruptcy context, 'the trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor. [Conversely,] [t]he trustee is, of course, subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor,' " but applying "an exception to the applicability of *in pari delicto*, when the complained-of action did not actually benefit the corporation"). And, not all of the circuits have resolved the issue. *See, e.g., Parmalat Capital Finance Ltd. v. Bank of America Corp.*, 671 F.3d 261, 267 (7th Cir.2012) ( " '[T]here is no controlling authority in the Seventh Circuit or Illinois on whether the defense of in pari delicto is available against a bankruptcy trustee.' ") (citation omitted).

***17** Moreover, commentators have suggested that application of the *in pari delicto* defense to bankruptcy trustees is inappropriate. *See, e.g.*, Jeffrey Davis, *Ending the Nonsense: The In Pari Delicto Doctrine Has Nothing to Do With What is § 541 Property of the Bankruptcy Estate*, 21 EMORY BANKR.DEV. J. 519 (2005); Risa Lynn Wolf–Smith, *Innocent Trustee/Creditors Barred by Debtors' Past Wrongs: It Just Ain't Right*, 26 Am. Bankr.Inst. J., No. 2, at 42 (Apr.2007); William McGrane, *The Erroneous Application of the Defense of In Pari Delicto to Bankruptcy Trustees*, 29 CAL. BANKR. J. 275 (2007); Gerald L. Baldwin, *in pari delicto Should Not Bar a Trustee's Recovery*, 23 AM. BANKR.INST. J. 8 (Oct.2004); Tanvir Alam, *Fraudulent Advisors Exploit*

*Confusion in the Bankruptcy Code: How in pari delicto Has Been Perverted to Prevent Recovery for Innocent Creditors,* 77 AM. BANKR. L.J. 305 (Summer 2003).

To the extent that the Fourth Circuit has addressed the issue, it does not appear to have endorsed the use of the *in pari delicto* defense against a bankruptcy trustee. In *In re Bogdan,* 414 F.3d 507 (4th Cir.2005), the Court rejected the application of *in pari delicto* to a bankruptcy trustee who, on behalf of several mortgage lenders who were creditors of the debtor, brought an adversary proceeding against the debtor's co-conspirators in an alleged mortgage fraud scheme. In reversing as legally erroneous application of *in pari delicto* by both the bankruptcy and district courts, *see id.* at 515 n. 3, the Fourth Circuit said that the doctrine of *in pari delicto* had "no application in this adversary proceeding because the trustee is suing on behalf of the estate as assignee of the mortgage lenders." *Id.* at 514. As such, the Court reasoned, "the trustee stands in the shoes of the mortgage lenders, thereby ... becoming subject to all defenses that could have been asserted against the mortgage lenders, not [the debtor]." *Id.*[16]

The Maryland Court of Appeals also has expressed hostility to the view that a debtor's inequitable conduct should bar a bankruptcy trustee's claims based on the doctrine of *in pari delicto.* In *Adams v. Manown, supra,* 328 Md. 463, 615 A.2d 611 (1992), the Maryland court considered a lawsuit brought by a "discharged bankrupt," who sought "the repayment of numerous alleged loans, none of which were scheduled by the [debtor] as assets of the bankruptcy estate." *Id.* at 465, 615 A.2d at 612. The defendant asserted that the claims were barred by unclean hands and *in pari delicto,* due to the debtor's concealment of the debts in his bankruptcy, but the debtor prevailed at trial. *Id.* On appeal, the Court also rejected the *in pari delicto* defense, albeit on different grounds than the lower court. The *Adams* Court held that "the trustee in bankruptcy, and not the [debtor], is the real party in interest as plaintiff." *Id.* at 465–66, 615 A.2d at 612. It explained, *id.* at 477, 615 A.2d at 617–18:

> ***18** By raising cries of unclean hands and in pari delicto, [the defendant] has successfully presented this case as if the only alternatives were either to give [the debtor] the benefit of his fraud or to give [defendant] the benefit of a windfall. What has become obfuscated ... is that those who are entitled to benefit from the judicial determination of [defendant]'s indebtedness to [the debtor] are the creditors of [the debtor]. His trustee in bankruptcy is the real party in interest in the instant case. It is not too late to apply and carry out the correct analysis.

The court remanded the case to the trial court with directions to enter a stay, so as to permit the bankruptcy trustee to determine whether to reopen the estate in order to administer the judgment in the debtor's favor as an asset of the bankruptcy estate. *Id.* at 481, 615 A.2d at 619–20.

As I see it, I need not resolve at this juncture whether an *in pari delicto* or unclean hands defense may be asserted against a bankruptcy trustee. The defenses of *in pari delicto* and unclean hands "involve factual questions," and their "purpose is to protect institutional interests" of the court. *Manown v. Adams,* 89 Md.App. 503, 513, 598 A.2d 821, 826 (1991), *rev'd on RQ other grounds,* 328 Md. 463, 615 A.2d 611 (1992). " 'The clean hands doctrine is not applied for the protection of the parties nor as a punishment to the wrongdoer; rather, the doctrine is intended to protect the courts from having to endorse or reward inequitable conduct.' " *Standard Fire Ins. Co. v. Berrett,* 395 Md. 439, 465, 910 A.2d 1072, 1088 (2006) (citation and some internal quotation marks omitted); *see also Turner v. Turner,* 147 Md.App. 350, 419, 809 A.2d 18, 58 (2002). And, it is "the judge, who is capable of identifying such interests and weighing them against other considerations, who must determine when the doctrine[s] should be invoked to bar a claim." *Manown,* 89 Md.App. At 513, 598 A.2d at 826.

Because the defenses are highly fact-specific, I will not resolve them at the pleading stage. Even if unclean hands or *in pari delicto* may be asserted against a bankruptcy trustee, the record before me is insufficient to determine whether the defenses should bar the Trustee's claims in this case. The FDIC may reassert its defenses of unclean hands and *in pari delicto* after a factual record has been developed through discovery.

### *E. Implausibility*

Finally, the FDIC argues that the Trustee's claims are facially implausible as a matter of law because, in the FDIC's view, the claims hinge upon the notion that "K Bank controlled K Capital." Motion at 16. To the contrary, as the FDIC points out, K Bank was wholly owned by K Capital. Thus, the receiver argues, K Capital had the capability to dictate the terms of the loans by both entities and to countermand any improper conduct by K Bank. Therefore, in the FDIC's view, "[a]ny 'unfair' or inequitable' loans were the responsibility of K Capital, the corporate parent that controlled K Bank." *Id.* at 21, 598 A.2d 821.

***19** I disagree. The gravamen of the Trustee's complaint is that K Bank and K Capital were controlled by the same individuals who, in essence, breached their fiduciary duties as officers of K Capital by conducting the alleged lending scheme at inordinate risk to K Capital and its creditors. There is nothing factually implausible about these contentions. The facts the Trustee alleges may ultimately be disproved, or may not establish legal entitlement to relief on the part of the K Capital bankruptcy estate. But, I do not view the Trustee's allegations as implausible under the *Iqbal/Twombly* standard, and will not dismiss the Trustee's complaint on this basis.

### Conclusion

For the foregoing reasons, I will grant the FDIC's Motion in part and deny it in part. In particular, the Trustee's claims for declaratory judgment and constructive trust (Counts III and IV) will be dismissed. The Motion will be denied in all other respects. An Order implementing my ruling follows.

### ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is, this 16th day of May, 2012, by the United States District Court for the District of Maryland, ORDERED:

1. The Motion to Dismiss (ECF 9) filed by the Federal Deposit Insurance Corporation, as receiver for K Bank, is GRANTED IN PART and DENIED IN PART.

2. In particular, Counts III and IV of plaintiff's Complaint (ECF 1) are DISMISSED; to that extent, the FDIC's motion is GRANTED.

3. In all other respects, the FDIC's motion is DENIED.

Footnotes

1 Mr. Goldstein filed his complaint *pro se*, but is now represented by counsel.

2 Along with ECF 9 and its supporting memorandum (ECF 9-1) (collectively, "Motion"), I have considered the Trustee's Opposition (ECF 14) and the FDIC's Reply (ECF 17).

3 Subject matter jurisdiction is based on 12 U.S.C. § 1821(d) (6), which authorizes and establishes subject matter jurisdiction over a claim against the FDIC as receiver of a depository institution "in the district ... court of the United States for the district within which the depository institution's principal place of business is located." A civil action under § 1821(d)(6) must be filed within sixty days after the FDIC's denial of the plaintiff's claim. Here, the Trustee's complaint does not expressly allege that the claim was submitted to the FDIC and denied. However, the parties appear to agree that the Trustee satisfied this condition precedent. Substantive state law ordinarily governs claims brought under 12 U.S.C. § 1821 against the FDIC as receiver of a failed financial institution. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (" § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent [bank], to work out its claims under state law, except where some provision in [federal law] provides otherwise").

4 The Fourth Circuit has continued to apply the federal common law *D'Oench, Duhme* doctrine, notwithstanding the enactment of FIRREA and the Supreme Court's decision in *O'Melveny, supra*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67, in which the Supreme Court held that claims against the FDIC as receiver are generally governed by substantive state law. *See Young*, 103 F.3d at 1187; *see also Fed. Fin. Co. v. Hall*, 108 F.3d 46, 49 (4th Cir.1997) (stating that "the *D'Oench, Duhme* holding may well fit into the 'few and restricted' cases that the Supreme Court in *O'Melveny* held do require federal common law rules of decision"). However, there is a division of opinion on the continued vitality of the common law *D'Oench, Duhme* doctrine among federal circuit courts of appeal that have considered the issue. *See generally Murphy v. FDIC*, 208 F.3d 959, 964 (11th Cir.) (agreeing with Fourth Circuit that *D'Oench* survives, and surveying cases, including from the D.C. and Eighth Circuits, holding to the contrary), *cert. granted sub nom. Murphy v. Beck*, 530 U.S. 1306, 121 S.Ct. 30, 147 L.Ed.2d 1052 (2000), *cert. dismissed*, 531 U.S. 1107, 121 S.Ct. 849, 148 L.Ed.2d 733 (2001); *FDIC v. Deglau*, 207 F.3d 153, 171 (3d Cir.2000) ("We agree with the Eighth, Ninth and D.C. Circuits that *D'Oench* is not applicable federal common law in light of *O'Melveny* ...."). Nevertheless, because the parties do not suggest that the statutes and *D'Oench* produce differing results, there is no need to explore further the import of *O'Melveny*.

5 The fact that the Trustee has pleaded the existence of an actual agreement does not undermine his unjust enrichment claim at the motion to dismiss stage, because Fed.R.Civ.P. 8(d)(3) permits pleading in the alternative. *See, e.g., Swedish Civil Aviation Admin. v. Project Mgmt. Enters., Inc.,* 190 F.Supp.2d 785, 792 (D.Md.2002) ("[A]lthough [plaintiff] may not recover under both contract and quasi-contract theories, it is not barred from pleading these theories in the alternative ....").

6 In a subsequent decision, *Bufman Organization v. FDIC,* 82 F.3d 1020 (11th Cir.1996), decided under Florida law, the Eleventh Circuit rejected an unjust enrichment claim on the basis of *D'Oench, Duhme.* But, it did so without citation to *Gulf Life,* and based on an analysis that did not account for the quasi-contractual nature of unjust enrichment, at least as it is understood in Maryland. *See id.* at 1028 ("Bufman's unjust enrichment claim is barred by *D'Oench* because it is premised on an unrecorded condition to the repayment of the Bufman note. Implicit in this claim is the allegation that the bank had an obligation to give Bufman notice .... If the bank agreed to give Bufman such notice, § 1823(e)(1)(D) requires the agreement to be included in the bank's records.").

7 The Trustee also cites another case that applied state law to resolve a claim against the FDIC as receiver under 12 U.S.C. § 1821(g)(4), but that case did not involve the *D'Oench* doctrine or §§ 1821(d)(9)(A) or 1823(e). *See Stebbins Realty Corp. v. FDIC,* Civ. No. 91–568–JD, 1994 WL 312916, at * 1 (D.N.H. June 29, 1994).

8 In addition to *Langley,* the FDIC cites *Bufman Organization v. FDIC,* 82 F.3d 1020 (11th Cir.1996), and *FDIC v. 32 Edwardsville, Inc.,* 873 F.Supp. 1474 (D.Kan.1995). The FDIC also cites *D'Oench,* which preceded the enactment of § 1821(g) (4).

9 In an action such as this, filed under 12 U.S.C. § 1821(d)(6) against the FDIC as receiver of a failed bank, the FDIC is permitted to satisfy monetary damages claims by issuance of receivership certificates. *See, e.g., Battista v. FDIC,* 195 F.3d 1113, 1116 (9th Cir.1999) ("There is no question that the FDIC may pay creditors with receiver's certificates instead of with cash."); *Adagio Inv. Holding Ltd. v. FDIC,* 338 F.Supp.2d 71, 74 n. 4 (D.D.C.2004); *Franklin Bank v. FDIC,* 850 F.Supp. 845, 847–49 (N.D.Cal.1994). A claimant whose claim is satisfied by issuance of a certificate may ultimately receive monetary payments from the FDIC, potentially up to the amount of the certificate, as and to the extent that the assets of the bank are distributed by the receiver according to a statutory system of priority established by 12 U.S.C. § 1821(d)(11)(A). Nevertheless, this does not defeat the legal viability of a claim for money damages against the FDIC as receiver, nor does the FDIC so argue. "Courts uniformly have held that the preclusion of section 1821(j) does not affect a damages claim." *Hindes v. FDIC,* 137 F.3d 148, 161 (3d Cir.1998).

10 Because the original panel opinion in *Heno* was withdrawn, it no longer has precedential force. The substituted opinion does not contain any discussion regarding the viability of claims for accounting against the FDIC as receiver. In any event, even if the original panel opinion had not been withdrawn, its comment regarding accounting claims was stated in a footnote and expressly labeled as *dictum.* Nevertheless, I do not fault the Trustee for citing the *Heno* decision because, as noted, it appears to be the only federal decision that has commented to any significant extent on the effect of § 1821(j) on an accounting claim.

11 Section 1821(d)(15) states, in part:

> (A) In general
> The [FDIC] as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the [FDIC], maintain a full accounting of each conservatorship and receivership or other disposition of institutions in default.
> (B) Annual accounting or report
> With respect to each conservatorship or receivership to which the [FDIC] was appointed, the [FDIC] shall make an annual accounting or report, as appropriate, available to the Secretary of the Treasury, the Comptroller General of the United States, and the authority which appointed the [FDIC] as conservator or receiver.
> (C) Availability of reports
> Any report prepared pursuant to subparagraph (B) shall be made available by the [FDIC] upon request to any shareholder of the depository institution for which the [FDIC] was appointed conservator or receiver or any other member of the public.

12 Based in part on this statement in *Alternatives Unlimited,* some recent decisions in this district, beginning with *IFAST, Ltd. v. Alliance for Telecommc'ns Indus. Sols., Inc.,* Civ. No. CCB–06–2088, 2007 WL 3224582, at *11 (D.Md. Sept.27, 2007), have stated that an accounting is only a remedy and is not an independent cause of action under Maryland law. *See, e.g., West v. Koehler,* Civ. No. RDB–11–3051, 2012 WL 868657, at *7 (D.Md. Mar.13, 2012); *Johnson v. Prosperity Mortg. Corp.,* Civ. No. AW–11–2532, 2011 WL 5513231, at *5 (D.Md. Nov.3, 2011); *Makowski v. Bovis Lend Lease, Inc.,* Civ. No. RDB–10–1844, 2011 WL 1045635, at * 11 (D.Md. Mar.17, 2011); *Solid Concepts, LLC v. Fallen Soldiers, Inc.,* Civ. No. D KC–09–2377, 2010 WL 3123269, at * 5 (D.Md. Aug.9, 2010); *Orteck Int'l, Inc. v. Transpacific Tire Wheel, Inc.,* 704 F.Supp.2d 499, 521 (D.Md.2010). *But see Gephardt v. Mortg. Consultants, Inc.,* Civ. No. JFM–10–1537, 2011 WL 531976, at *4–5 (D.Md. Feb.8, 2011) (recognizing availability of accounting as a cause of action where confidential or fiduciary relationship is present). In PAUL MARK SANDLER & JAMES K. ARCHIBALD, PLEADING CAUSES OF ACTION IN MARYLAND (4th ed.2008, 2010 Supp.), the authors noted that, before the decision in *IFAST,* they had "assumed that an accounting was a[n] independent cause of action, rather than simply a remedy," and suggested that it "remains to be seen" how the *IFAST* Court's assertion would "be

viewed by the Maryland appellate courts ...."

In my view, the Maryland Court of Appeals's recent reiteration in *Polek* of the principles of liability for accounting indicates that, in some circumstances, an accounting may serve as an independent cause of action.

13 With his Opposition, the Trustee has submitted a declaration detailing his attempts to obtain K Capital's records from the FDIC. *See* Declaration of Charles R. Goldstein, Ex.A to Opposition (ECF 14–1). The FDIC argues that I cannot consider Mr. Goldstein's declaration in resolving the FDIC's Rule 12(b)(6) Motion, because the declaration constitutes matter outside of the pleadings. *See* Reply at 12 n. 8. In light of the allegations of the complaint, quoted above, I need not rely on the additional facts alleged in the declaration to make my ruling, and so it is unnecessary to resolve whether the Court can consider the declaration under Rule 12(b)(6).

14 Indeed, the Trustee would appear to have a basis for an accounting claim due to K Bank's role as servicer of K Capital's loans and the FDIC's alleged refusal, as receiver, to provide the Trustee with documentation regarding those loans, independent of the Trustee's claims that K Capital's loans should be treated as joint loans with K Bank's loans on a *pari passu* basis.

15 In *Golub, supra,* 138 Md.App. at 519–24, 772 A.2d at 887–90, the intermediate Maryland appellate court recognized that, because "discovery is the remedy given to plaintiffs who prove they are entitled to an accounting," some bifurcation of discovery may be appropriate in a suit seeking accounting: " 'the first stage concerns whether there is any right to an accounting, and only if it is determined that there is such a right does the proceeding move on to the second stage, which comprises the actual accounting.' " *Id.* at 520, 772 A.2d at 887 (citation omitted). It reasoned: " '[W]ithout the rule, any person could inspect the private records of another by the simple device of filing a complaint against the latter asking for an accounting.' " *Id.* (citation omitted).

16 *In re Bogdan* is distinguishable from this case because in that case the trustee brought suit pursuant to an express assignment from the mortgage lenders. Nevertheless, *In re Bogdan* counsels against an uncritical application of the *in pari delicto* doctrine to a bankruptcy trustee.

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# EXHIBIT "13"

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