1. STODDART, ET AL. v. RGH CONSTRUCTIONS, LLC, ET AL., 23CV0322

(A) Demurrer

(B) Motion to Strike Portions of the Complaint

(A) <u>Demurrer</u>

Defendants RGH Construction, LLC and Robert Hembree generally demur to the First, Second, Third, Fourth, Fifth, Sixth, and Tenth Causes of Action of the Complaint for failure to state a claim; and specially demur to the Fifth and Sixth Causes of Action for uncertainty.

1. Factual Background

Plaintiffs own real property located at 780 Little Bear Lane in South Lake Tahoe, California. (Compl., ¶ 1.) On March 30, 2019, the roof failed and caused significant damage to the property. (*Id*., ¶ 9.) The property was insured by defendant State Farm. (*Id*., ¶ 10.) After the original contractor's services were terminated, plaintiffs contacted defendant RGH to complete the work and repair some of the work done by the prior contractors. (*Id*., ¶ 11.) Plaintiffs and defendant RGH entered into a written proposal on September 19, 2020 (the "Agreement"). (*Id*., ¶ 12.) The work concluded in approximately April 2021. (*Id*., ¶ 15.)

When the work concluded, plaintiffs were presented with two invoices: one for the balance of the Agreement in the amount of $105,240, and a second invoice ("Invoice – Work Order") in the amount of $288,144.59. (*Ibid*.) Plaintiffs provided both invoices to defendant State Farm and requested payment. (*Id*., ¶ 17.) However, defendant State Farm refused to pay the second invoice by letter dated March 9, 2022. (*Ibid*.) In May 2021, plaintiffs had not paid the balance owed, and defendant RGH recorded a mechanic's lien on plaintiffs' property for the amount of both invoices. (*Id*., ¶ 18.) In July 2021, plaintiffs paid off the lien amount. (*Ibid*.)

2. Standard of Review

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Amarel v. Connell* (1998) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) All properly pleaded allegations of fact in the complaint are accepted as true, however improbable they may be, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank*, *supra*, 39 Cal.3d at p. 318.)

3. Discussion

3.1. Claims Against Robert Hembree

Defendants argue that plaintiffs have not, and cannot, plead any facts supporting individual liability against defendant Hembree. (Dem. at 11:9–11.) All causes of action against defendant Hembree (First, Second, Third, Fourth, Fifth, Sixth, and Tenth) arise out of the Agreement between plaintiffs and defendant RGH. Ordinarily, shareholders are not personally responsible for corporate liabilities. (See, e.g., Corp. Code, § 17703.04.) Plaintiffs, on the other hand, claim defendant "Hembree's personal liability can be established both on alter ego grounds and due to his own tortious conduct." (Opp. at 5:25–26.)

If a corporation has been operated as the "alter ego" of its shareholders, the corporation's creditors—including tort claimants—may be permitted to "pierce the corporate veil" and enforce their claim directly against the shareholders. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests. [Citation.] In certain circumstances

the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation: 'As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection of individuals, so that the corporation will be liable for acts of the stockholders or the stockholders liable for acts done in the name of the corporation.' [Citation.]" (*Ibid*.)

The allegations within the complaint, however, do not demonstrate that defendant Hembree extended such power and control over the limited liability company that the two were functionally the same entity, or that Hembree has abused the corporate form. Therefore, the court sustains the demurrer with leave to amend as to defendant Hembree.

3.2. First C/A for Negligence

Plaintiffs assert that "[t]he negligence claim is based on defendant RGH's alleged failure to complete the work in a workmanlike manner sufficiently free from defects." (Opp. at 6:13–14.) Defendants argue that the negligence claim arises from the contract they had with defendant RGH, and as such, falls within the ambit of the economic loss doctrine.

Economic loss consists of " ' " 'damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property….' " ' [Citation.]" (*Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 482.) "The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.)

In this case, plaintiffs do not claim damages to "other" property; rather, they claim damage to the property that defendants agreed to repair. Additionally, plaintiffs claim they suffered emotional distress. However, if the only injury caused by defendants'

negligence is emotional distress, damages are available only in limited circumstances. " ' "[N]egligent causing of emotional distress is not an independent tort but the tort of negligence." [Citation.]' " (*Holliday v. Jones* (1989) 215 Cal.App.3d 102, 107.) Where a plaintiff is physically injured, damages for resulting emotional distress are recoverable as "parasitic" damages. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 981.) Plaintiffs cite *Salka v. Dean Homes of Beverly Hills*, *Inc.* (1993) 23 Cal.App.4th 952, for the proposition that emotional distress damages are available in connection with the negligence claim for damages sustained to a plaintiffs' primary residence. The court notes, however, that *Salka* is not a published decision and, therefore, is not binding precedent. (See *Salka v. Dean Home of Beverly Hills*, *Inc.* (1993) 864 P.2d 1037 [review granted and opinion superseded]; *Salka v. Dean Home of Beverly Hills*, *Inc.* (1994) 877 P.2d 761 [review dismissed, cause remanded].)

The court agrees with defendants that the economic loss rule bars plaintiffs' negligence claim. The Agreement provides, "All work to be completed in a workmanlike manner according to standard practices." (Compl., Ex. 1.) Plaintiffs' claim here is not independent of the Agreement, not because their claim merely relates to the subject of that Agreement, but because it is based on an asserted duty that is contrary to the rights and obligations clearly expressed in the Agreement. Therefore, the court sustains the demurrer as to the First C/A without leave to amend as there does not appear to be a reasonable possibility that the Complaint can be amended to cure the defect. (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322.)

3.3. Second C/A for Breach of Contract

The Complaint alleges that defendants breached the Agreement for several reasons, such as failing to complete the project for the contracted Agreement price and charging for work on an hourly basis that was included in the fixed Agreement price. (Compl., ¶ 45, subds. (a)–(i).)

Defendants contend that the Invoice – Work Order became the parties' new contract, and plaintiffs have not pleaded any facts supporting a cause of action for breach of the new contract. (Dem. at 3:26–4:1, 15:13.) The court disagrees. A novation is the substitution of a new obligation for an existing one. (Civ. Code, § 1530.) Generally, a novation requires an express release by the party entitled to enforce the promise. (*Vallely Investments*, *L.P. v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 832.) Without making a determination as to the validity of the Invoice – Work Order, the court finds the requirements for novation are not met.

Plaintiffs have sufficiently alleged that defendant RGH breached the original Agreement. Thus, the court overrules the demurrer as to the Second C/A.

3.4. Third C/A for Violation of Bus. & Prof. Code, §§ 7159 and 7159.5

Where there are several grounds for demurrer, each must be stated in a separate paragraph. (Cal. Rules of Ct., rule 3.1320, subd. (a).) Here, defendants separately demurred to the First, Second, Fourth, Fifth, Sixth, and Tenth C/A. However, they did not separately demur to the Third C/A. Therefore, the court overrules the demurrer as to the Third C/A.

3.5. Fourth C/A for Breach of Implied Covenant of Good Faith and Fair Dealing

Defendants contend that the Fourth C/A for breach of the implied covenant of good faith and fair dealing should be dismissed because it is superfluous, as it rests on the same facts as the underlying breach of contract claim, and there is no factual basis pleaded for a cause of action sounding in tort. (Dem. at 16:23–26.) Further, defendants point out that the applicable " 'general rule preclud[es] tort recovery for noninsurance contract breach, at least in the absence of violation of "an independent duty arising from principles of tort law ...." ' " (Dem. at 17:18–22, quoting *Freeman & Mills*, *Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 102 [alteration and ellipses in original].) Defendants argue that no special relationship has been or can be alleged here. (Dem. at 17:26.)

The court agrees with defendants and sustains the demur as to the Fourth C/A without leave to amend as there does not appear to be a reasonable possibility that the Complaint can be amended to cure the defect. (*Roman*, *supra*, 85 Cal.App.4th at p. 322.)

3.6. Fifth C/A for Violation of Bus. & Prof. Code § 17200

Defendants demur to the Fifth C/A based on uncertainty. (Code Civ. Proc., § 430.10, subd. (f).) Plaintiffs seek leave to file an amended complaint to plead this C/A with more certainty. (Opp. at 13:17–18.) Therefore, the demurrer is sustained with leave to amend.

3.7. Sixth C/A for Unjust Enrichment

The elements of a claim for unjust enrichment are " 'receipt of a benefit and unjust retention of the benefit at the expense of another.' [Citation.]" (*Prof. Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 238–242.) 'The term "benefit" "denotes any form of advantage." ' [Citation.]" (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51.) Plaintiffs seek restitution "in the form of return of the money that was paid above and beyond the fixed bid Agreement …." (Opp. at 13:25–27.)

Defendants argue that the unjust enrichment claim is covered under plaintiffs' breach of contract claim. The court is not persuaded. Plaintiffs have sufficiently alleged that defendants received the benefit of an additional $288,144.59 (the charge reflected in the Invoice – Work Order) for work that was already covered by the Agreement. Therefore, the court overrules the demurrer as to the Sixth C/A.

3.8. Tenth C/A for Declaratory Relief

Plaintiffs seek a declaration regarding how much money plaintiffs were obligated to pay defendants RGH and Hembree for the work that was done at the property. (Compl., ¶ 97, subds. (a)–(b).)

Defendants argue that the Tenth C/A is unnecessary and superfluous because it is duplicitous of the causes of action for breach of contract and violations of Business and Professions Code sections 7159 and 7159.5. (Dem. at 20:21–23.) "[A]n action in declaratory relief will not lie to determine an issue which can be determined in the

underlying … action. 'The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues.' " (*Cal. Ins. Guaranty Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617, 1624 [citation omitted].)

The court agrees with defendants. The issue posed by plaintiffs can be determined in the underlying causes of action for breach of contract and violations of Business and Professions Code section 7159 and 7159.5. Therefore, the court sustains the demur as to the Tenth C/A without leave to amend as there does not appear to be a reasonable possibility that the Complaint can be amended to cure the defect. (*Roman*, *supra*, 85 Cal.App.4th at p. 322.)

4. Conclusion

As it relates to defendant Hembree, the court sustains the demurrer with leave to amend as to causes of action One, Two, Three, Four, Five, Six, and Ten. As it relates to defendant RGH, the court sustains the demurrer without leave to amend as to causes of action One, Four, and Ten; sustains the demurrer with leave to amend as to the Fifth C/A; and overrules the demurrer as to Counts Two, Three, and Six.

(B) <u>Motion to Strike</u>

1. Standard of Review

A motion to strike is generally used to address defects appearing on the face of a pleading that are not subject to demurrer. (*Pierson v. Sharp Memorial Hospital* (1989) 216 Cal.App.3d 340, 342.) Further, "[t]he court may, upon a motion [to strike] …, or at any time in its discretion … [¶] … [s]trike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc. § 463, subd. (a).) Like a demurrer, the grounds for a motion to strike must appear on the face of the pleading or from any matter which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) On a motion to strike, the trial court must read the complaint as a whole, considering all parts in their

context, and must assume the truth of all well-pleaded allegations. (*Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519.)

2. Discussion

Defendants claim that the following portions of the Complaint should be stricken because they are "demonstrably false:" (1) "The Proposal is the only written agreement between the Plaintiffs and RGH/Hembree regarding the work to be done at the Property" (Compl., ¶ 12 at 3:15–17); (2) "Plaintiffs had never agreed to those rates or the additional time or the change in work from the Agreement" (Compl., ¶ 19 at 5:2–3); (3) "…[n]ever being provided with a single change order" (Compl., ¶ 26 at 8:2); (4) "Plaintiffs were never provided with any written change orders changing the terms of the original Agreement" (Compl., ¶ 14 at 3:24–25); and (5) "Plaintiffs never agreed to these charges." (Compl., ¶ 25 at 7:26–27.)

A judge may, on a motion to strike made under Code of Civil Procedure section 435 or at any time at the judge's discretion, strike out any irrelevant, false, or improper matter in a pleading, on terms the judge deems proper. (Code Civ. Proc., § 436, subd. (a).)

Attached to the Complaint and incorporated by reference is an "Invoice – Work Order." (Compl., Ex. 3.) Defendants argue the Invoice – Work Order is another agreement because it includes the signatures of plaintiff Bruce Stoddart and defendant Hembree, on behalf of defendant RGH; and because it also includes a list of materials, labor, and services charged. (Mtn. at 7:16–18.)

Plaintiffs argue that the Invoice-Work Order is not a valid agreement, but rather, a signed acknowledgement from Plaintiff Bruce Stoddart that he received the document. (Opp. at 3:17–25.) Plaintiffs point out that "There is nothing about approving the work, agreeing to the work, authorizing the work or anything to that effect." (Opp. at 3:19–20.)

The court finds that a motion to strike is not the appropriate procedure for determining the truth of the disputed allegations listed above. Therefore, the motion to strike the above allegations is denied.

Defendants also move to strike as irrelevant and improper the following references to punitive and treble damages (Mtn. at 2:13–25):

1. "…therefore be required to pay punitive damages to Plaintiffs to punish them for their conduct and deter them from engaging in such conduct in the future" (Compl., ¶ 59 at 17:16–18);
2. "For punitive damages in an amount to be determined by the trier of fact" (Compl. at 22:19); and
3. "For treble damages as provided by Business and Professions Code 17200." (Compl. at 22:20.)

Plaintiffs seek punitive damages under the Fourth C/A for breach of the implied covenant of good faith and fair dealing. The court sustained the demurrer to the Fourth C/A without leave to amend. As such, the court will also grant the motion to strike without leave to amend as it relates the Fourth C/A and punitive damages.

Next, plaintiffs seek treble damages under the Fifth C/A for violation of Business and Professions Code section 17200. However, that section does not provide for treble damages. Therefore, the motion to strike the reference to treble damages is granted without leave to amend.

3. Conclusion

The court grants defendants' motion to strike with respect to punitive and treble damages without leave to amend; and denies the motion with respect to the allegations regarding the Invoice – Work Order and additional charges.

TENTATIVE RULING # 1: DEFENDANTS HEMBREE'S AND RGH'S DEMURRER TO THE COMPLAINT IS OVERRULED IN PART AND SUSTAINED IN PART, WITH AND WITHOUT LEAVE TO AMEND. DEFENDANTS' MOTION TO STRIKE PORTIONS OF THE COMPLAINT IS DENIED IN PART AND GRANTED IN PART WITHOUT LEAVE TO AMEND. NO HEARING ON THESE MATTERS WILL BE HELD (*LEWIS V. SUPERIOR COURT* (1999) 19 CAL.4TH 1232,

1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

2. ARANA v. ALONZO, 23CV0602

Motion to Compel Arbitration and Stay Action

Defendant has withdrawn his motion and proposes a deadline of October 6, 2023, to file a new responsive pleading in this matter. Defendant's request is granted.

TENTATIVE RULING # 2: MOTION WITHDRAWN BY DEFENDANT. DEFENDANT IS ORDERED TO FILE AND SERVE A RESPONSIVE PLEADING ON OR BEFORE OCTOBER 6, 2023.

3. PIMOR, ET AL. v. VANHEE WOODWORKS, 23CV0578

Motion to Set Aside Default and Default Judgment and to Quash Service of Summons

Default was entered on June 9, 2023, and default judgment was entered on June 12, 2023. Pending is defendant's motion to set aside default and default judgment pursuant to Code of Civil Procedure section 473, subdivision (b).

Code of Civil Procedure section 473 provides, in part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. … Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. …" (*Id*., subd. (b).)

The purpose of the attorney affidavit provision is " ' "to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits." [Citation.] In the words of the author[,] " 'Clients who have done nothing wrong are often denied the opportunity to defend themselves, simply because of the mistake or inadvertence of their attorneys in meeting filing deadlines.' " [Citation.]' [Citation.]" (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248, quoting *Huens v. Tatum* (1997) 52 Cal.App.4th 259, 263.)

Here, defendant submitted declarations indicating that defense counsel mistakenly believed that plaintiff had granted a one-day extension to file an Answer to Complaint. Defense counsel attests that, but for this mistaken belief, defendant would have submitted a timely Answer to Complaint on June 8, 2023. Under Code of Civil Procedure

section 473, subdivision (b), the court must vacate entry of default and default judgment when there is a timely application for relief and the application is accompanied by an attorney's sworn affidavit attesting to his mistake, which requirements are met here. Accordingly, defendant's motion to set aside default and default judgment is granted.

Defendant's motion to quash service of Summons is based on the allegation that plaintiff served incomplete documents upon defendant. However, defendant acknowledges ultimately receiving a complete copy of the Complaint on June 9, 2023. (Rusin Decl., ¶ 9.) Therefore, the motion to quash is moot. Defendant is ordered to file and serve a responsive pleading on or before October 9, 2023.

TENTATIVE RULING # 3: MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT IS GRANTED. MOTION TO QUASH SERVICE OF SUMMONS IS MOOT. DEFENDANT IS ORDERED TO FILE AND SERVE A RESPONSIVE PLEADING ON OR BEFORE OCTOBER 9, 2023. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS V. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

4. CURTIS JOHNSON, ET AL. v. KENT JOHNSON, SC20180141

Motion for Contempt Sanctions

The Referee seeks contempt sanctions against defendant, as well as an order that defendant cooperate in the close of escrow for the Premises, including executing all documents reasonably requested by the escrow company. Good cause appearing, the court hereby sets a hearing on October 20, 2023, and orders Kent Johnson to appear in person to show cause why contempt sanctions should not be issued against him for failure to comply with court orders. (*Arthur v. Superior Court* (1965) 62 Cal.2d 404, 407–408.)

TENTATIVE RULING # 4: DEFENDANT KENT JOHNSON IS ORDERED TO APPEAR IN PERSON AT 1:30 P.M., FRIDAY, OCTOBER 20, 2023, IN DEPARTMENT FOUR TO SHOW CAUSE WHY CONTEMPT SANCTIONS SHOULD NOT BE ISSUED AGAINST HIM FOR FAILURE TO COMPLY WITH COURT ORDERS.

5. DE LOIA, ET AL. v. JARS LINEN, INC., 23CV0839

Petition for Writ of Mandate to Compel Inspection and Copying of Corporate Books and Records

Petitioners indicate that after filing the petition they were able to gain access to the company office to inspect the company records. (Reply at 5:2–8.) Therefore, the petition is moot. The issue of attorney fees is not properly before the court.

TENTATIVE RULING # 5: PETITION IS DROPPED FROM THE CALENDAR AS MOOT. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS V. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

6. ALOM v. SNYDER, 22CV1349

OSC Re: Failure to Prosecute and Appear for Court Proceedings

TENTATIVE RULING # 6: PLAINTIFF'S APPEARANCE IS REQUIRED AT 1:30 P.M., FRIDAY, SEPTEMBER 29, 2023, IN DEPARTMENT FOUR TO SHOW CAUSE WHY HIS COMPLAINT SHOULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE AND FOR FAILURE TO APPEAR FOR COURT PROCEEDINGS.

7. JOHNSON v. McCALL, 21CV0173

Motion to Set Aside Default and Default Judgment

Defendant's original moving papers indicate that this is a motion to set aside default and default judgment (even though the court did not enter default or default judgment). According to her amended motion, defendant now moves to modify the court's January 27, 2023, order granting plaintiff's motion for summary judgment under Code of Civil Procedure section 473, subdivision (b). (Am. Mtn. at 2:17–20.)

A motion for relief under Code of Civil Procedure section 473, subdivision (b) "shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (*Id*.) Here, the court entered the order granting summary judgment on January 27, 2023. Plaintiff's proof of service indicates that the summary judgment order was served upon defendant by mail on February 7, 2023. (McCall Decl., Ex. F.) Therefore, the deadline to seek relief under Code of Civil Procedure section 473, subdivision (b) was August 12, 2023. Defendant's amended motion, however, was not filed until August 23, 2023. Therefore, defendant's motion is denied as untimely.

TENTATIVE RULING # 7: DEFENDANT'S MOTION IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS V. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

8. URBAN SUNRISE, ET AL. v. VOGT, ET AL., 22CV0024

(A) DEFENDANTS SMITH AND VOGT'S MOTION FOR SUMMARY JUDGMENT

(B) PLAINTIFF URBAN SUNRISE'S MOTION FOR SUMMARY ADJUDICATION

(A) Defendants Smith and Vogt's Motion for Summary Judgment

1. FACTUAL BACKGROUND

This is an action concerning the purchase of five commercial properties in South Lake Tahoe, California (collectively, "Tahoe Properties"). Plaintiff Susan Kerr is the managing member of plaintiff Urban Sunrise, an Arizona limited liability company that was the buyer in these transactions. (Mtn., UMF ¶ 1, Ex. C.) Each of the Tahoe Properties was owned by a separate limited liability company in which defendant Charles German is the managing member. (Mtn., UMF ¶ 6.) Plaintiffs have sued David Vogt dba Tahoe Investment Properties and Ryan Smith, both real estate licensees,[1] for (1) breach of fiduciary duty, (2) professional negligence, (3) constructive fraud, and (4) rescission of the buyer's representation agreement. Pending before the court is defendants Smith's and Vogt's motion for summary judgment.

1.1. The Buyer's Representation Agreement

On January 10, 2021, plaintiffs Susan Kerr and Urban Sunrise entered into the "Buyer's Representation Agreement – Exclusive" with Tahoe Investment Properties. (Mtn., UMF ¶ 5, Ex. G.) Thereafter, defendant Smith informed plaintiffs that defendant Vogt had a "client," defendant German, who owned numerous commercial properties in South Lake Tahoe that were not on the market, but that Mr. German was potentially willing to sell. (Mtn., UMF ¶ 12.)

[1] Mr. Vogt is also a licensed attorney. However, there is no allegation that Mr. Vogt had an attorney-client relationship with any of the parties in this matter.

1.2. The Purchase Agreements

On April 12, 2021, plaintiff Urban Sunrise executed the "Commercial Property Purchase Agreement and Joint Escrow Instructions" for each of the Tahoe Properties. (Mtn., UMF ¶ 7, Ex. H.) The purchase agreements called for the close of escrow on or before June 13, 2021. (Mtn., Ex. H, ¶ 1, subd. (D).) Additionally, each of the purchase agreements contained a liquidated damage provision initialed by the buyer and seller. (Mtn., Ex. H, ¶ 25, subd. (B).) The end of the liquidated damages provision in each purchase agreement reads in bold print: "AT TIME OF ANY INCREASED DEPOSIT BUYER AND SELLER SHALL SIGN A SEPARATE LIQUIDATED DAMAGES PROVISION INCORPORATING THE INCREASED DEPOSIT AS LIQUIDATED DAMAGES (C.A.R. FORM RID)." (*Ibid*.)

Plaintiff Urban Sunrise understood that it would have to obtain property and/or fire insurance on each of the Tahoe Properties.[2] (Mtn., UMF ¶ 38.) On April 26, 2021, defendant German sent plaintiff Urban Sunrise the following disclosure: "Fire insurance rates are variable from year to year on new policies. It has been our experience that fire insurance slowly increases every year for existing policies but for new policies it has depended on our previous fire season(s). Policies at the moment are much higher than last year due to the most recent fire season so we shop our policies every year." (Mtn., UMF ¶ 41, Ex. E at 8:1–13, Ex. Z.)

On May 5, 2021, plaintiff Urban Sunrise released all contingencies for the Tahoe Properties. (Mtn., UMF ¶ 47, Ex. N.)

[2] Plaintiffs dispute that plaintiff Urban Sunrise was required to obtain property insurance as a condition to close escrow. The explicit terms of the purchase agreements do not include any such requirement. However, plaintiffs admit in their own motion for summary adjudication that "[d]ue to recent wildfires in the area, [plaintiff Urban Sunrise] could not obtain first [sic] insurance and could not close escrow on the transactions." (Pls.' Mtn. for Summary Adjudication at 2:8–9.)

1.3. The Third Addenda

By May 11, 2021, plaintiff Urban Sunrise still did not have any lender commitment letters. (Mtn., UMF ¶ 17.) Defendant Smith sent plaintiff Kerr's mortgage broker an email, and copied plaintiff Kerr, stating that an extension was "inevitable." (Mtn., UMF ¶ 17, Ex. JJ.) Defendant Smith recommended plaintiff Urban Sunrise request an extension of time to close escrow and, in May 2021, plaintiff Urban Sunrise did. (Pls.' Resp. to Defs.' UMF ¶¶ 18.)

The terms of the extension were memorialized in the Third Addenda to the purchase agreements, dated May 14, 2021. (Mtn., UMF ¶ 23.) In exchange for extending the close of escrow to June 30, 2021, plaintiff Urban Sunrise agreed to: (1) remove all contingencies (despite having previously done so); (2) release the existing earnest money deposits from escrow to the sellers, non-refundable; (3) deposit an additional $200,000 per property in escrow by May 27, 2021; and (4) release the additional deposits from escrow to the sellers on May 27, 2021. (Mtn., Ex. M.)

The parties dispute who authored the Third Addenda. Defendants claim defendant German drafted the agreement (Mtn. at 10:11–12), while plaintiffs claim defendant Vogt did. (Pls.' Opp. at 1:19–21.) According to plaintiffs, defendant Vogt provided the language of the Third Addenda to defendant Smith "who thereafter incorporated the language into the final third addenda, which were then presented to the Buyers for signature." (Pls.' Opp. at 15:2–5.)

Despite the extension, plaintiff Urban Sunrise could not close on the transactions because it was unable to obtain the required property fire insurance. (Pls.' Mtn. for Summary Adjudication at 2:8–9.) The sellers declared a default and retained all of the monies deposited and released to the sellers totaling $1,184,000.00.

2. REQUESTS FOR JUDICIAL NOTICE

Pursuant to Evidence Code section 452, subdivision (d) the court grants defendants Vogt's and Smith's unopposed request for judicial notice of (1) plaintiffs' First Amended

Complaint; (2) Cross-Complaint of defendants 737 San Jose LLC, 772 Tallac Avenue LLC, 1032 Fourth Street LLC, 1040 Marjorie Street LLC, SFR Etcetera LLC, and Charles German; (3) "Articles of Restatement for Urban Sunrise, LLC;" (4) "Articles of Amendment to the Articles of Organization;" and (5) "Articles of Restatement Lease Lightning, LLC."

Plaintiffs' unopposed requests for judicial notice are also granted.

3. EVIDENTIARY OBJECTIONS

Plaintiff's objections to defendants' UMF, Numbers 28, 37, 48, 49, and 50 are granted; and Numbers 15, 16, and 38, are denied.

4. STANDARD OF REVIEW

A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action at issue cannot be established, or that there is a complete defense to the cause of action. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact. (*Ibid*.)

A summary judgment motion must show that the "material facts" are undisputed. (Code Civ. Proc., § 437c, subd. (b)(1).) The pleadings serve as the "outer measure of materiality" in a summary judgment motion; the motion may not be granted or denied on issues not raised by the pleadings. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Cal. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the

evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Stationers Corp. v. Dun & Bradstreet*, *Inc.* (1965) 62 Cal.2d 412, 417.)

5. DISCUSSION

As to defendants Vogt and Smith, the issues framed by plaintiffs' FAC are whether defendants met the informed consent requirement for dual agency (FAC, ¶ 37, subd. (a)) and whether defendants breached their fiduciary duty for any of the following reasons: (1) defendants allegedly recommended plaintiffs enter into the Third Addenda, which called for the waiver of all contingencies and an increase in deposits that would be released to the sellers as non-refundable (FAC, ¶ 37, subd. (b)); (2) defendant Vogt allegedly acted as an attorney in the preparation of the Third Addenda despite having an alleged conflict of interest (FAC, ¶ 37, subd. (c)); (3) defendant Smith allegedly engaged in the unauthorized practice of law in preparing the Third Addenda (FAC, ¶¶ 26, 37, subd. (d)); (4) defendants allegedly failed to investigate all material facts concerning the availability and cost of fire insurance on the Tahoe Properties (FAC, ¶ 37, subd. (e)); and (5) defendants allegedly provided to plaintiffs historical financial information for each of the Tahoe Properties without advising that certain information contained therein would likely change and should not be utilized to estimate costs and expenses for the Tahoe Properties in the future. (FAC, ¶ 37, subd. (f).)

Plaintiffs' causes of action for professional negligence, constructive fraud, and rescission of the Buyer's Representation Agreement are each based on the same allegations as the breach of fiduciary duty claim.

5.1. Informed Consent Requirement for Dual Representation

Under California law, a real estate broker may act as a "dual agent" for both the seller and the buyer in a real estate property transaction, provided both parties consent to the arrangement after full disclosure. (Civ. Code, §§ 2079.14, 2079.16.) To that end, the law requires brokers to disclose whether they are acting as dual agents and to inform the

parties that a broker acting as a dual agent owes fiduciary duties to both buyer and seller. (Civ. Code, § 2079.16.) However, "it is not enough to disclose only the fact of dual representation. The agent must also disclose all facts which would reasonably affect the judgment of each party in permitting the dual representation. [Citation.]" (*Huijers v. DeMarrais* (1992) 11 Cal.App.4th 676, 686 [decided under similar former law].)

Plaintiffs claim that outside of the purchase agreements, "there was no discussion, explanation or consultation by David Vogt and/or Ryan Smith regarding the brokers acting as a dual agent." (Pls.' Opp. at 5:4–7.) Based on the undisputed material facts, that claim is incorrect.

The undisputed facts show that plaintiff Urban Sunrise signed the exclusive buyer's representation agreement on January 10, 2021. Thereafter, defendant Smith informed plaintiffs that defendant Vogt had a "client," defendant German, who owned numerous commercial properties in South Lake Tahoe that were not on the market, but that Mr. German was potentially willing to sell. (Mtn., UMF ¶ 12.) On April 12, 2021, plaintiff Urban Sunrise signed the agency disclosure statement (Civ. Code, § 2079.16) and the purchase agreements. The agency disclosure statement lists the duties of the seller's agent and the buyer's agent, and advises that a real estate agent may represent both seller and buyer in a transaction. (Mtn., Ex. I.) It also contains the warning that "[t]he above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect their own interests." (*Ibid*.) Each of the purchase agreements included a statement that Tahoe Investment Properties was acting as a dual agent for both buyer and seller. (Mtn., Ex. H.)

Plaintiffs further claim that defendants Smith and Vogt were required to disclose the full extent of their prior business relationship with defendant German, that is, that defendants Smith and Vogt had represented Mr. German in a number of previous transactions. (Opp. at 11:16–19.)

Defendants argue that, at most, all that was required was the disclosure of the basic fact that defendant Vogt had represented defendant German in other transactions. (Mtn. at 8:10–20.) In support of this argument, defendants cite *Pagano v. Krohn* (1997) 60 Cal.App.4th 1. In *Pagano*, the buyers purchased a condominium and then sued the seller and the seller's broker for failing to disclose that the property had a water intrusion problem. The undisputed facts showed that prior to closing, the seller and/or the broker disclosed that several units in the condominium complex had water intrusion problems, but the unit for sale had never exhibited such issues. (*Id*. at p. 5.) Likewise, prior to closing, the buyers were given a copy of a letter from the complex's homeowners association ("HOA"), informing homeowners of a lawsuit filed by the HOA against the complex's developer relating to water intrusion problems. The buyers then submitted a second offer, which was $5,000 less than their initial offer, stating, '[b]uyer is aware of the ongoing [HOA] lawsuit and the offer reflects that knowledge.' " (*Id*. at p. 6.) A home inspection of the unit was performed for the buyers prior to closing, but it failed to uncover evidence of water intrusion. After moving in, the buyers discovered evidence of water damage and filed suit. (*Ibid*.) The trial court granted summary judgment in favor of the seller and the broker.

On appeal, the buyers asserted the seller and the broker failed to make several disclosures. First, they asserted the broker should have disclosed (1) newsletters and minutes from HOA meetings discussing the water problems, (2) that she was aware of severe water intrusion problems at three units in the complex, and (3) that she had read the HOA's complaint against the developer. (*Pagano*, *supra*, 60 Cal.App.4th at pp. 8–9.) The appellate court disagreed, explaining "these additional facts would have served only as elaboration on the basic disclosed fact that there was a water intrusion problem in the development affecting some of the units and resulting in a lawsuit against the developer." (*Ibid*.) "[T]he essential facts about the water intrusion problem were disclosed to [the buyers] before they made [their] second offer to buy the subject property. [The broker]

was not duty bound to elaborate on those facts by providing further details regarding the various manifestations of water intrusion throughout the development or the precise allegations in the [HOA's] complaint against the developer." (*Id*. at p. 10.)

Second, the buyers claimed the seller was required to disclose that her unit "had exhibited evidence of moisture intrusion problems in the past in the form of efflorescence on the concrete in her garage and algae or moss on the exterior wall of the garage." (*Ibid.*) The appellate court also rejected this argument. It explained, "the past occurrence of algae or efflorescence at [the seller's] unit was not a material fact [the seller] was required to disclose because there is no evidence the algae or efflorescence was related to the general water intrusion problem at the [condominium complex.] In a declaration in support of her summary judgment motion, [the seller] stated the algae and efflorescence disappeared after certain sprinklers were adjusted so as not to spray on the affected areas, and the problem had been remedied long before she sold the property to the [buyers.] [One of the buyers] testified in his deposition that he inspected the garage and noticed no sign of efflorescence at the time he purchased the property." (*Id*. at p. 11.)

The court agrees with defendants. Additional facts concerning the details of the prior business relationship with defendant German would have served only as elaboration on the basic disclosed fact that he was an existing client of defendants Vogt and Smith.

Furthermore, the exact number of prior transactions is not a material fact that the brokers were required to disclose for purposes of the informed consent requirement regarding dual agency. By contrast, "where the seller's real estate agent is obligated to disclose to his principal the identity of the buyer, and where the buyer is not the agent but occupies with him such blood, marital or other relationship which would suggest a reasonable possibility that the agent could be indirectly acquiring an interest in the property himself, such relationship is a 'material fact' which the agent must disclose to his principal." (*Loughlin*, *supra*, 259 Cal.App.2d at p. 631.) The court finds as a matter of law that neither defendants Vogt or Smith occupied a blood, marital or other relationship

with the sellers that would suggest a reasonable possibility that the agents could be indirectly acquiring an interest in the property itself. Technically, defendant German was not even the seller in any of the transactions.

Based on the above, the undisputed material facts demonstrate that plaintiff Urban Sunrise consented to the dual agency arrangement after full disclosure.

5.2. Alleged Breach of Fiduciary Duty

As indicated on the agency disclosure statement, defendants Smith and Vogt owed plaintiff Urban Sunrise a fiduciary duty of utmost care, integrity, honesty and loyalty in dealings with Urban Sunrise. This included (1) the diligent exercise of reasonable skill and care in performance of the agents' duties; (2) a duty of honest and fair dealing and good faith; and (3) a duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

Defendants Smith and Vogt assert that as a matter of law, they did not breach any fiduciary duties toward plaintiff Urban Sunrise.

5.2.1. Recommendation that plaintiff Urban Sunrise enter into the Third Addenda

Plaintiffs' FAC alleges that defendants Smith and Vogt breached their fiduciary duty to plaintiff Urban Sunrise by "recommend[ing] and encourag[ing] that Plaintiffs enter into the [Third] Addenda which called for the waiver of all contingencies and an increase in deposits which would be released to the Seller as non-refundable deposits." (FAC, ¶ 37, subd. (b).) Plaintiffs, however, do not explain how defendants' actions would have breached a fiduciary duty of care. Defendants do not address the issue in their moving papers.

The court first notes that plaintiff Urban Sunrise released all contingencies prior to signing the Third Addenda. (Mtn., UMF ¶ 47, Ex. N.) Next, the court finds that the alleged conduct does not constitute a breach of the fiduciary duty of loyalty because it was not

adverse to plaintiff Urban Sunrise's position. The undisputed material facts show that plaintiff Urban Sunrise requested the extension. (Mtn., UMF ¶ 18.) Even if defendants Smith and Vogt's conduct did constitute a breach of the duty of loyalty, plaintiff Urban Sunrise consented to defendants' conduct when it agreed to the dual agency arrangement. Therefore, the court finds, as a matter of law, that neither defendant Smith nor defendant Vogt breached their fiduciary duty by recommending and encouraging that plaintiffs enter into the Third Addenda.

5.2.2. Preparation of the Third Addenda

Plaintiffs assert that as an attorney, defendant Vogt acted improperly by drafting the Third Addenda because he had a conflict of interest. (FAC, ¶ 37, subd. (c).) As previously discussed, plaintiff Urban Sunrise consented to the dual agency arrangement after full disclosure. Thus, plaintiff Urban Sunrise waived any alleged conflict of interest. Moreover, there is no allegation that defendant Vogt had an attorney-client relationship with any of the parties involved in this matter. Therefore, plaintiffs' argument is without merit.

Plaintiffs' FAC also alleges that defendant Smith engaged in the unauthorized practice of law by preparing the Third Addenda. (FAC, ¶¶ 26, 37, subd. (d).) A person cannot "practice law" unless he or she is an active member of the state bar. (Bus. & Prof. Code, § 6125.) The practice of law " 'includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in court.' [Citations.]" (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542.) However, a person who merely performs a clerical service of filling in the blanks on a particular form in accordance with information furnished by the parties, or who merely acts as a scrivener to record the stated agreement of the parties to the transaction, is not practicing law. (*People v. Sipper* (1943) 61 Cal.App.2d Supp. 844, 846–847 [disapproved on other grounds].)

Plaintiffs' opposition brief claims defendant Vogt provided the language of the Third Addenda to defendant Smith "who thereafter incorporated the language into the final

third addenda, which were then presented to the Buyers for signature." (Pls.' Opp. at 15:2–5.) In other words, defendant Smith merely acted as a scrivener to record the agreement defendant Vogt provided. Therefore, the court finds as a matter of law that defendant Smith did not engage in the unauthorized practice of law.

5.2.3. Investigation and disclosure of material facts regarding the availability and cost of property and/or fire insurance

"As a fiduciary, a real estate broker must disclose to the broker's client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction." (CACI 4107.) "The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of the sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision." (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25.)

On April 26, 2021, defendant German made the following disclosure to plaintiff Urban Sunrise: "Fire insurance rates are variable from year to year on new policies. It has been our experience that fire insurance slowly increases every year for existing policies but for new policies it has depended on our previous fire season(s). Policies at the moment are much higher than last year due to the most recent fire season so we shop our policies every year." (Mtn., UMF ¶ 41, Ex. E at 8:1–13, Ex. Z.) Plaintiffs argue this was a "general" disclosure that was not specific to each property and thus, it did not satisfy the broker's duty of disclosure. (Pls.' Resp. to Defs.' UMF, ¶ 41.)

The court disagrees and finds, as a matter of law, that defendants Vogt and Smith satisfied the duty of disclosure in this case. The fluctuation in fire insurance premiums is common knowledge. Additionally, plaintiff Kerr was an experienced investor and would often refer to her "team." (Mtn., UMF, ¶ 3.) The disclosure was made well before the

original escrow deadline and clearly identified the fact that fire insurance rates were variable and much higher than the year before due to the most recent fire season. Further, plaintiff Urban Sunrise was aware that if it purchased each of the Tahoe Properties, its costs and expenses for the Tahoe Properties would not be identical to what the sellers' costs and expenses had been for each of the Tahoe Properties. (Mtn., UMF ¶ 51, Ex. E at ¶ 30.)

6. CONCLUSION

Defendants' motion for summary judgment is granted. The court finds, as a matter of law, that defendants Vogt and Smith did not breach their fiduciary duties. As such, plaintiffs' causes of action for professional negligence, constructive fraud, and rescission—which are based on the same allegations as the breach of fiduciary claim—also cannot be established.

(B) <u>Plaintiff Urban Sunrise's Motion for Summary Adjudication</u>

Plaintiff/cross-defendant Urban Sunrise requests an order summarily adjudicating that defendant/cross-complainant Charles German's second cause of action for breach of contract against Urban Sunrise has no merit. Plaintiff Urban Sunrise's motion is based on the grounds that defendant German, as a member of the selling limited liability companies, does not have standing to assert an individual breach of contract claim with respect to contracts to which he was not a party and in which he had no direct interest. (Mtn. at 2:12–15.) Defendant German, on the other hand, claims that he is entitled to recover for breach of contract as a third-party beneficiary. (Opp. at 2:24–25.)

The court adopts the above statement of facts from defendants' motion for summary judgment.

1. REQUEST FOR JUDICIAL NOTICE

Plaintiff's unopposed requests for judicial notice are granted.

2. STANDARD OF REVIEW

Because plaintiff Urban Sunrise is a cross-defendant moving for summary adjudication, it bears the initial burden of showing either that: (1) one or more elements of the second cause of action cannot be established; or (2) there is a complete defense to the second cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) If plaintiff Urban Sunrise makes such a showing, the burden shifts to defendant German to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (See *Brizuela v. CalFarm Ins. Co.* (2004) 116 Cal.App.4th 578, 586.)

Third-party beneficiary status may be determined as a question of law if there is no conflicting extrinsic evidence. (See, e.g., *Kalmanovitz v. Bitting* (1996) 43 Cal.App.4th 311, 315.)

3. DISCUSSION

Plaintiff Urban Sunrise claims that defendant German, as a member of the selling limited liability companies, does not have standing to assert an individual breach of contract claim with respect to contracts to which he was not a party and in which he had no direct interest. (Mtn. at 2:12–15.) It is undisputed that the Purchase Agreements were formed by and between plaintiff Urban Sunrise and the limited liability companies–not defendant German. (Mtn., UMF ¶ 12.) Plaintiff Urban Sunrise's answer to the cross-complaint alleges that defendant German is not in privity of contract with the sellers and has no standing to assert claims for breach of contract as alleged in this action. (Mtn., UMF ¶ 15.)

In order to recover as a third-party beneficiary of the Purchase Agreements, defendant German must ultimately show that the agreements were made expressly for his benefit. (Civ. Code, § 1559.) While it is not necessary that a third party be specifically named, the contracting parties must clearly manifest their intent to benefit the third party. (*City & County of San Francisco v. Western Air Lines, Inc.* (1962) 204 Cal.App.2d 105, 120–121.) "The fact that [a third party] is incidentally named in the contract, or that the

contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of *the parties* to secure to him personally the benefit of its provisions." (*Walters v. Calderon* (1972) 25 Cal.App.3d 863, 871 [italics in original].)

The question is whether defendant German was an intended, and not merely incidental, beneficiary of the contracts he seeks to enforce. In answering, the court reads the Purchase Agreements as a whole in light of the circumstances under which they were created. The test is whether an intent to benefit defendant German appears from the terms of the agreement. (*Walters*, *supra*, 25 Cal.App.3d at p. 870.)

Defendant German claims that before the Purchase Agreements were executed, he had plans to refinance the Tahoe Properties and use the funds to complete the purchase of a hotel that he was personally under contract to buy. (Opp. at 8:21–23.) Defendant German further claims that this plan was conveyed to plaintiff Urban Sunrise multiple times before the Purchase Agreements were signed. (Opp. at 8:23–24.)

The court finds, however, that none of the Purchase Agreements reflect defendant German's plans to refinance the Tahoe Properties and use the funds to complete the purchase of a hotel. Defendant German's plans simply do not appear from the terms of the agreements. At most, defendant German was merely an incidental beneficiary. Accordingly, defendant German is not entitled to recover as a third-party beneficiary as a matter of law.

4. CONCLUSION

Because defendant German is not entitled to recover as a third-party beneficiary as a matter of law, plaintiff Urban Sunrise's motion for summary adjudication is granted.

TENTATIVE RULING # 8: DEFENDANTS SMITH'S AND VOGT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. PLAINTIFF URBAN SUNRISE'S MOTION FOR SUMMARY ADJUDICATION IS ALSO GRANTED. NO HEARING ON THESE MATTERS WILL BE HELD

(*LEWIS V. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.