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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

In re:
VERITY HEALTH SYSTEM OF CALIFORNIA, INC., et al.
Debtors and Debtors in Possession,

☒ Affects All Debtors
☐ Affects Verity Health System of California, Inc.
☐ Affects O'Connor Hospital
☐ Affects Saint Louise Regional Hospital
☐ Affects St. Francis Medical Center
☐ Affects St. Vincent Medical Center
☐ Affects Seton Medical Center
☐ Affects O'Connor Hospital Foundation
☐ Affects Saint Louise Regional Hospital Foundation
☐ Affects St. Francis Medical Center of Lynwood Foundation
☐ Affects St. Vincent Foundation

Case No. 2:20-CV-00613-DSF

Related to District Court Appeals: Case Nos.: 2:19-cv-10352-DSF; 2:19-cv-10354-DSF; and 2:19-cv-10356-DSF)

Lead Chapter 11 Bankr. Case 2:18-bk-20151-ER
Jointly Administered With:

CASE NO.: 2:18-bk-20162-ER
CASE NO.: 2:18-bk-20163-ER
CASE NO.: 2:18-bk-20164-ER
CASE NO.: 2:18-bk-20165-ER
CASE NO.: 2:18-bk-20167-ER
CASE NO.: 2:18-bk-20168-ER
CASE NO.: 2:18-bk-20169-ER
CASE NO.: 2:18-bk-20171-ER
CASE NO.: 2:18-bk-20172-ER
CASE NO.: 2:18-bk-20173-ER
CASE NO.: 2:18-bk-20175-ER
CASE NO.: 2:18-bk-20176-ER
CASE NO.: 2:18-bk-20178-ER
CASE NO.: 2:18-bk-20179-ER

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☐ Affects St. Vincent Dialysis Center, Inc. ☐ Affects Seton Medical Center Foundation ☐ Affects Verity Business Services ☒ Affects Verity Medical Foundation ☐ Affects Verity Holdings, LLC ☐ Affects De Paul Ventures, LLC ☐ Affects De Paul Ventures - San Jose Dialysis, LLC, Debtors and Debtors-in-Possession.	CASE NO.: 2:18-bk-20180-ER CASE NO.: 2:18-bk-20181-ER
VERITY HEALTH SYSTEM OF CALIFORNIA, INC., a California nonprofit public benefit corporation, ST. VINCENT MEDICAL CENTER, a California nonprofit public benefit corporation, ST. VINCENT DIALYSIS CENTER, INC., a California nonprofit public benefit corporation, and ST. FRANCIS MEDICAL CENTER, a California nonprofit public benefit corporation, SETON MEDICAL CENTER, a California nonprofit public benefit corporation, and VERITY HOLDINGS, LLC, a California limited liability company; and Plaintiffs, v. KALI P. CHAUDHURI, M.D., an individual, STRATEGIC GLOBAL MANAGEMENT, INC., a California corporation, KPC HEALTHCARE HOLDINGS, INC., a California corporation, KPC HEALTH PLAN HOLDINGS, INC., a California corporation, KPC HEALTHCARE, INC., a Nevada corporation, KPC GLOBAL MANAGEMENT, LLC, a California Limited Liability Company, and DOES 1 through 500, Defendants.	Adv. Case No. 2:20-ap-01001-ER **DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' SPECIAL MOTION TO STRIKE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16** Date: TBD Time: TBD Judge: Hon. Dale S. Fischer

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Defendants submit this reply memorandum in support of their special motion to strike pursuant to section 425.16 of the California Code of Civil Procedure.

I. INTRODUCTION

Confronted with an Anti-SLAPP motion, Plaintiffs try to characterize this controversy as a standard "commercial dispute." Their 37-page opposition barely makes mention of the litany of allegations based directly on Defendants' petitioning activity, which Plaintiffs used primarily to tortify this so-called standard "commercial dispute." A review of the Complaint demonstrates that each and every one of Plaintiffs' claims arise from protected activity. Plaintiffs' arguments that the Anti-SLAPP statute does not apply are non-starters. Plaintiffs thus must establish that their claims have merit, which, as explained below and in more detail in Defendants' Motion to Dismiss papers, they cannot do.

II. THE ANTI-SLAPP STATUTE APPLIES IN THIS ACTION.

A. The Anti-SLAPP Statute Applies In Adversary Proceedings.

Plaintiffs first argue that the anti-SLAPP statute does not apply to adversary proceedings, because they are federal in nature. (Opp. 10-12.) Nonsense. Plaintiffs' cited cases all stand for the limited proposition that the Anti-SLAPP statute does not apply to federal *claims*. (Opp. 11, citing, *inter alia, In re Bah*, 321 B.R. 41, 46 (9th Cir. B.A.P. 2005).) But this case concerns *state law claims*.

One of Plaintiffs' own cases, *In re Bah*, goes on to *reject* "the bankruptcy court's statement to the effect that anti-SLAPP remedies are not available" in bankruptcy court. *Id.* To the contrary, the *Bah* court ruled, the Anti-SLAPP statute unequivocally applies to state law claims in an adversary proceeding. *See id., citing Globetrotter Software, Inc. v. Elan Computer Group, Inc.,* 63 F.Supp.2d 1127, 1129 (N.D.Cal. 1999). "Important substantive state interests – the protection of citizens' constitutional rights of freedom of speech and petition for the redress of grievances – are furthered by the anti-SLAPP statute and application of the statute to state law claims would not undermine federal interests." *Id.* "No reason exists to deny

Appellants a state law remedy which they could have asserted . . . in state court." *Id.; accord In re Cont'l Coin Corp.,* 2013 WL 3301005, at *4 (Bkrtcy. C.D.Cal. 2013) (applying Anti-SLAPP statute to state law claims in an adversary proceeding); *In re Mesala Silva*, 2009 WL 6699687, at *4 (Bkrtcy. S.D.Cal. 2009) (same); *see also Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009) (applying the statute to state law claims).

This Court should thus reject Plaintiffs' legally erroneous argument.

B. The "Commercial Speech" Exception Does Not Apply.

The commercial speech exception applies on its face to claims for false or deceptive advertising. *See Mendoza v. ADP Screening & Selection Servs., Inc.,*182 Cal.App.4th 1644, 1652 (2010); *see also* Cal. Civ. Proc. § 425.17(c); *Demetriades v. Yelp, Inc.,* 228 Cal.App.4th 294, 309 (2014) ("The legislative history indicates this legislation is aimed squarely at false advertising claims…."). Plaintiffs' effort to expand the exemption to cover the claims here are without support.

To prevail, Plaintiffs must establish that each element of this "narrowly construed" exception applies to each of their claims. *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal.4th 12, 26 (2010). Claims are exempt only when the plaintiff establishes all of the following elements: the cause of action is (1) "against a person primarily engaged in the business of selling or leasing goods or services; (2) … arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) … made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) [to an]… intended audience … [meeting] the definition set forth in section 425.17(c)(2)." *Id.* at 30. Here, Plaintiffs have not established and cannot establish that their claims satisfy these elements. For purposes of this motion, Defendants

concede that they are in the business of providing healthcare services to patients,[1] but Plaintiffs have not and cannot establish the other three elements, which require the transaction to be "in the person's goods or services." Cal. Civ. Pro. §425.17(c)—a requirement Plaintiffs ignore.

Plaintiffs cannot satisfy the second element because their claims do not arise from Defendants' representations regarding healthcare services. *See, e.g., Tuck Beckstoffer Wines LLC v. Ultimate Distribs., Inc.,* 682 F.Supp.2d 1003, 1011–12 (N.D. Cal. 2010) ("the commercial speech exception … applies only to statements that TB Wines may have made about its own products or the products of a competitor"; plaintiff's argument failed because it did "not refer to a single statement that TB Wines made about its own products or a competitor's products."); *Stewart v. Rolling Stone LLC*, 181 Cal.App.4th 664, 676 (2010) (commercial speech exemption did not apply to a claim that a magazine wrongfully used plaintiffs' names in a Camels ad because "the goods they sell are copies of Rolling Stone magazine, not Camel cigarettes.").

As set forth in the Complaint, Plaintiffs' claims arise from SGM's contractual promises, its allegedly fraudulent representation that it intended to pay the $610 million purchase price, and substantial other petitioning activity that occurred when SGM disputed its obligation to close the transaction before Plaintiffs met the conditions required of them. SGM's alleged improper activity included, *e.g.*: "making unfounded and untimely assertions of alleged Material Adverse Effects," "asserting entitlement to an 'Evaluation Period' following entry of the Enforcement Order," "filing meritless and frivolous appeals," and "failing to cooperate with Plaintiffs and move with alacrity towards closing the SGM Sale." (Comp. at ¶100,107.) None of these relates to healthcare services.

[1] Not all of the defendants are actually healthcare providers.

Plaintiffs cannot satisfy the third element, either. SGM's alleged speech was not made to convince patients to use SGM's services. According to the Complaint, it was meant to defraud Plaintiffs, not patients.

Finally, Plaintiffs cannot satisfy the fourth element because the intended audience of the speech at issue was Plaintiffs and/or the courts, not patients.

In brief, Plaintiffs' claims are not exempt under 425.17(c).

C. Plaintiffs' Claims Each Arise From Protected Activity.

As Defendants' explained in their motion, claims arising from statements made in connection with a bankruptcy proceeding may be covered by the Anti-SLAPP statute. *Crossroads Inv'rs, L.P.* v. *Fed. Nat'l Mortg. Assn.,* 13 Cal.App.5th 757, 781 (2017). Here, the Anti-SLAPP statute applies because Plaintiffs' claims all derive from Defendants' participation in the bankruptcy proceeding.

1. Plaintiffs' Breach Claim Arises From Protected Activity.

In their Motion, Defendants explained that Plaintiffs' allegations of breach arose from protected activity because the contract at issue was negotiated during the bankruptcy proceeding, involved the sale of Plaintiffs' hospitals, and was subject to conditions that expressly required the approval of both the Bankruptcy Court and the California Attorney General ("AG"). Furthermore, the majority of Plaintiffs' breach allegations specifically seek to hold Defendants' liable for their advocacy in connect with that proceeding, including: "making unfounded and untimely assertions of alleged Material Adverse Effects," "asserting entitlement to an 'Evaluation Period," "filing meritless and frivolous Notices of Appeal," "attempting to coerce Plaintiffs to engage in a retrade," and "failing to respond to Plaintiffs' inquiries…." (Compl. ¶ 100 & 107.) In their Opposition, Plaintiffs revealingly disregard these allegations targeting Defendants' advocacy.

Plaintiffs argue instead that the gravamen of their claims for breach of contract is a "course of conduct that resulted in the failure to close a hospital transaction." (Opp. at 18:21-22.) However, the course of conduct to which Plaintiffs

refer is SGM's petitioning activity, namely its arguments that it was not obligated to close the transaction. Because the contractual representations at issue were made in connection with a bankruptcy proceeding and required AG approval, and the majority of the breach allegations specifically target Defendants' advocacy in the proceeding, this claim satisfies the broad first prong of the Anti-SLAPP statute.

2. The "Tortious Breach" Claim Arises From Protected Activity.

Plaintiffs downplay the "tortious" part of their claim for "tortious breach" to argue that it is simply the same as their breach of contract claim "pled under an alternative theory." (Opp. at 20.) But if this were just a simple claim for breach of contract, then Plaintiffs would not have this manufactured claim for tortious breach. What makes the breach allegedly tortious is SGM's separate petitioning conduct denying it was obligated to close the transaction. (Compl. at ¶107.) This petitioning activity occurred in connection with the bankruptcy proceeding and is thus covered by the Anti-SLAPP statute.

3. Plaintiffs' Claim for Promissory Fraud Arises From a Promise Made in Connection With the Bankruptcy.

In their Motion, Defendants explained in detail that Plaintiffs' allegation that Defendants falsely promised that SGM would pay $610 million was covered by the Anti-SLAPP statute because this representation was made in connection with a bankruptcy proceeding. Plaintiffs half-heartedly argue that this claim does not fall within the purview of § 425.16 because "the false promise was made outside the bankruptcy proceeding, in private commercial interactions with Plaintiffs." (Opp. at 19.) Revealingly, Plaintiffs do not cite any Anti-SLAPP authority in support of their argument. As Defendants explained in the motion, the Anti-SLAPP statute applies to alleged false promises made in agreements *related to* the judicial proceedings. *See, e.g., Navarro v. IHOP Properties, Inc.,* 134 Cal.App.4th 834, 841-42 (2005).

It is also irrelevant that SGM was not the actual debtor in the bankruptcy. Just like the litigation privilege (discussed more below), the Anti-SLAPP statute

extends to non-parties who have some connection with the proceedings like judges, jurors, and witnesses. *See Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal.App.4th 1532, 1540 (2006). The statute also protects those who make statements in anticipation of becoming parties to an official proceeding. *Digerati Holdings, LLC v. Young Money Ent., LLC,* 194 Cal.App.4th 873, 887 (2011) (finding Anti-SLAPP applied to "statements made in anticipation of a court action or other official proceeding"); *Bluestem Advisors LLC v. Eventure Interactive, Inc.*, 2017 WL 3047895, at *5 (C.D. Cal. Apr. 17, 2017) (finding statements made in advance of a potential administrative proceeding were covered by Anti-SLAPP statute). Here, at a minimum, SGM's alleged fraudulent representation was made in anticipation of becoming a participant in the bankruptcy and AG approval process.

III. PLAINTIFFS CANNOT ESTABLISH THEIR CLAIMS HAVE MERIT.

A. Plaintiffs' Claims All Fail Because Plaintiffs Cannot Establish They Satisfied Section 8.7 of the APA.

In their Motion, Defendants explained in detail multiple reasons why Plaintiffs' alleged theory that they satisfied section 8.7 by securing certain Orders from the Bankruptcy Court that allegedly "afforded equal or greater protection to SGM than any settlement could have" was unavailing. Most importantly, according to its terms, only a settlement agreement would satisfy section 8.7. Even if Plaintiffs were allowed to satisfy 8.7 in some alternative fashion, their argument that the Court order "afforded equal or greater protection" than a settlement agreement is absurd. [2]

As explained in more detail in Defendants' concurrently filed Reply in

[2] Plaintiffs continue to rely on the bankruptcy court's November 18 and 27 orders, which are pending appeal in this Court. The bankruptcy court itself told Plaintiffs these orders should be given no effect in this litigation, which was acknowledged by Plaintiffs' counsel. (See Suppl. RJN, Ex. V at 29-31.) While defending the Bankruptcy Court's ruling, Plaintiffs' counsel even stated that he did not see how the orders "could be used for virtually any purpose." (*Id.* at 32.) Yet Plaintiffs refer to these orders throughout their Opposition. This Court should disregard all such references.

support of their Motion to Dismiss (See Pages 2-4), in their Opposition, Plaintiffs fail to reckon with Defendants' specific arguments. Indeed, they fail to respond Defendants' point that their alleged "equally" good Court orders would have left DHCS with the potential ability to recoup more than $80 million from SGM after a close. (*See* Motion at 17-19 and Reply Brief re Motion to Dismiss at 2-3)

They then argue that their later alleged oral agreement "in principle" they reached after they sent a notice to close satisfied section 8.7. Plaintiffs' argument that this alleged oral agreement "in principle" relating to an $80 million issue materially satisfied section 8.7 defies credulity. Indeed, an "agreement in principle" is well known legal speak for something that is not yet a binding agreement. "In principle" just means that the attorney believes an agreement is close. As Defendants' explained in their motion, at best, this alleged oral agreement would have left Defendants with just a bad argument to later fight with DHCS after close.

Because Plaintiffs have not, and cannot, establish they satisfied all conditions, their claims should be stricken.

B. Plaintiffs' Promissory Fraud Claim Fails for Additional Reasons.

1. The Litigation Privilege Bars Plaintiffs' Fraud Claim.

Plaintiffs never dispute that the litigation privilege applies to statements made in connection with a bankruptcy proceeding. *E.g., In re Cedar Funding, Inc.,* 419 B.R. 807, 825 (B.A.P. 9th Cir. 2009) (a "bankruptcy proceeding is a judicial proceeding within the scope of California's litigation privilege."). Plaintiffs also do not dispute the substantial breadth of this privilege and the rule that any doubts regarding its application should be resolved in favor of applying it. *Ramalingam v. Thompson*, 151 Cal.App.4th 491, 500 (2007); *Olsen v. Harbison,* 191 Cal.App.4th 325, 333 (2010) ("The breadth of the litigation privilege cannot be understated.") [3]

[3] Plaintiffs wrongfully claim that Defendants "fail to cite a single case applying the litigation privilege to a claim for promissory fraud context." (Opp. at 26.) Despite Plaintiffs' claim, Defendants discussed at length *Navarro v. IHOP Properties, Inc.,* 134 Cal.App.4th 834, 841-42

Instead, Plaintiffs argue that Defendants are not protected by the litigation privilege because they were not parties to the bankruptcy. The litigation privilege does not apply only to parties; it applies broadly to anyone connected with the proceedings. *See Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal.App.4th 1532, 1540 (2006); *see also Olsen*, 191 Cal.App.4th at 334.

Indeed, the Court of Appeal specifically rejected Plaintiffs' argument. In *Olsen*, a plaintiff alleged that an attorney made various fraudulent representations to induce the plaintiff to associate the attorney in as co-counsel in ongoing litigation. Just as Plaintiffs do here, the plaintiff relied on cases like *LiMandri v. Jenkins* to argue that the defendant attorney's representations were not privileged because the attorney was "was not a participant in the Klawitter litigation when he made the alleged representations." The Court of Appeal rejected this argument, explaining: "Although defendant was not actually involved in the Klawitter litigation when his alleged statements were made, these communications were linked to ongoing litigation and his participation was imminent. They therefore fell within the ambit of the litigation privilege." *Id.* at 335 (emphasis added). As in *Olsen*, SGM's alleged fraudulent representation is privileged because it was made in relation to an ongoing bankruptcy in which its participation in the bankruptcy was, at minimum, imminent. Indeed, SGM's representation was also made in preparation for proceedings with the AG and is privileged for that reason as well.

Finally, Plaintiffs argue the litigation privilege does not apply because they alleged a tortious course of conduct. Not so. Plaintiffs' fraud claim is based on SGM's allegedly fraudulent representation that it would pay $610 million to close the transaction – that is all. (Compl. at ¶102.) As explained above, this representation is privileged.

(2005), which is a claim for promissory fraud resulting from statements made in connection with a bankruptcy proceeding. (Motion at pp. 14-15, 21.) Ironically, after making this point, Plaintiffs themselves did not cite any case relating to a promissory fraud claim.

2. Plaintiffs' Allegations Do Not Support a Fraud Claim.

Plaintiffs fail to respond to Defendants' argument that their allegations contradict their fraud theory. Instead, Plaintiffs obfuscate and attempt to summarily dismiss Defendants' argument as just a "semantic ploy." There is no ploy. Rather, as Defendants' explained in the motion, Plaintiffs allege that Defendants *never* believed they would have an obligation to pay $610 million – not that they had an intention of breaching an expected obligation to pay the $610 million. This distinction is critical. According to Plaintiffs' allegations, Defendants did not commit fraud; they just misjudged Plaintiffs' ability to satisfy their conditions. *Richard P. v. Vista Del Mar Child Care Serv*., 106 Cal.App.3d 860, 865 (1980) ("predictions of future events are ordinarily considered nonactionable expressions of opinion."). Plaintiffs allege SGM never thought it would be contractually obligated to pay the $610 million, not that Defendants did not intend to comply with this obligation. There is nothing fraudulent about Defendants believing that Plaintiffs would not be able to satisfy conditions set forth in the contract.

Indeed, Plaintiffs tacitly concede Defendants' point by attempting to modify their theory. They now argue: "the bottom line is that [Defendants] induced Plaintiffs to enter the agreement through the false promise that they [sic] would pay $610 million *if and when* the conditions were satisfied." (Opp. at 28 (emphasis added).) Despite Plaintiffs' attempt to change their story, the factual theory they pleaded was that Defendants wrongly believed that they would "never" have to pay the $610 million, which is, at best, a non-fraudulent opinion. It is not actionable.

C. Plaintiffs' Claim for Tortious Breach Fails as a Matter of Law.

Defendants cited binding Ninth Circuit authority holding that there is no such claim for "tortious breach of the implied covenant of good faith and fair dealing" in an arms-length transaction such as that at issue here. (Mtn. at 4) citing *Pension Tr. Fund for Operating Eng'rs v. Fed. Ins. Co*., 307 F.3d 944, 955 (9th Cir. 2002) ("Generally, no cause of action for the tortious breach of the implied covenant of

good faith and fair dealing can arise unless the parties are in a special relationship with fiduciary characteristics. Thus, *the implied covenant tort is not available to parties of an ordinary commercial transaction where the parties deal at arms' length.*") (emphasis added). Plaintiffs have no response to this black-letter law.[4]

Instead, Plaintiffs wrongly state that "numerous courts" have "recognized" a claim for "tortious breach of the implied covenant of good faith and fair dealing" in arms-length transactions. This is false. *Plaintiffs have not cited a single reported case allowing a claim for "tortious breach of the implied covenant of good faith and fair dealing" to survive a motion to dismiss*. There is no such claim.

Plaintiffs' numerous string-cited cases stand only for the unremarkable principle that a plaintiff may allege various *tort* claims (*e.g.,* negligence, conversion, etc.) when a contracting defendant has also breached a duty arising *independent* of the contract. *See e.g. Century of Progress Prods. v. Vivendi S.A.*, 2018 WL 4191340, at *9 (C.D. Cal. Aug. 28, 2018) ("Plaintiffs have alleged Defendants' breach of a duty *not arising from contract*, and resulting harm *distinct from breach*") (emphasis added) (Opp. at fn. 6); *Vestis, LLC v. Caramel Sales, Ltd*. 2019 WL 3312212, at *9 (C.D. Cal. Apr. 30, 2019) (holding that the plaintiff could seek tort damages for *conversion* despite the existence of a contract) (Opp. at fn. 6); *Robinson Helicopter Co. v. Dana Corp*., 34 Cal.4th 979, 991 (2004) ("We hold the economic loss rule does not bar Robinson's *fraud and intentional misrepresentation claims* because they were independent of Dana's breach of contract.") (emphasis added). Indeed, one of Plaintiffs' cases is the seminal California Supreme Court case *rejecting* a plaintiff's attempt to tortify a breach of contract. In *Erlich v. Menezes*, the California Supreme Court rejected a plaintiff's attempt to bring a claim for "negligent breach of contract," stating: "conduct amounting to a breach of

[4] Instead, they seek to "distinguish" the cases by noting they discuss special/fiduciary relationships. That is precisely the point. The claim, if it exists at all, exists ***only*** in such cases. This is not one of those cases.

contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. . . An omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty." 21 Cal.4th 543, 551 (1999) (citation omitted). Plaintiffs' cases do not support their made up cause of action.[5]

Defendants' motion also demonstrated that Plaintiffs' "tortious breach" claim must be dismissed because it is duplicative of their failed breach of contract and fraud claims. (Mtn. at 10.) Plaintiffs contend this argument is "demonstrably false" without saying why. (Opp. at 28 n.7.) Plaintiffs likely do not attempt a defense of this argument because they concede it elsewhere in their Opposition. Plaintiffs state: "Plaintiffs' third claim for relief alleges Tortious Breach of Contract (Breach of the Implied Covenant of Good Faith and Fair Dealing) based on the same allegations supporting the first claim, for breach of contract." (Opp. at 29:10-12); *id.* ("The third claim for relief is based on the same conduct at issue in the breach of contract claim . . . .").[6]

Finally, Plaintiffs try to misdirect the Court by reciting the well-known principle that every contract contains an implied covenant of good faith and fair dealing. (Opp. at 27:11-28). True, but that is not the claim Plaintiffs made. Plaintiffs did not plead breach of the implied covenant; they pled *tortious* breach of contract and sought punitive damages for that alleged breach.

D. Plaintiffs' Cannot Establish Alter-Ego Liability.

Defendants cited multiple cases explaining that a plaintiff cannot invoke the alter-ego doctrine when it knew the alleged alter-egos existed but nevertheless decided to contract solely with the defendants instead of or in addition to the principal. *E.g., Lynch v. McDonald*, 155 Cal. 704 (1909). Plaintiffs have not cited

[5] Defendants distinguish each case in their reply in support of motion to dismiss. (See Concurrently filed Reply in Support of Motion to Dismiss at 9.)

[6] As stated in Defendants' moving papers, to the extent that it is different from the breach of contract claim, it would be barred by the litigation privilege also. (Motion at 25-26.)

any authority that supports their alter-ego theory.

Plaintiffs first rely on *G. E. J. Corp. v. Uranium Aire, Inc.* But that case involved a principal that assured the plaintiff that while it would not sign a contract, it "*would be responsible for* [its subsidiary corporation's] *obligations contained in the* [contract] *and would stand behind* [its subsidiary corporation] *in the performance of the option agreement*." 311 F.2d 749, n.6 (9th Cir. 1962) (emphasis added). The court held that injustice would result if the subsidiary's separate corporate existence were maintained under these circumstances. *Id*. at 757.

Hiehle v. Torrance Millworks also fails to support Plaintiffs' argument. There, the principals of a corporation made multiple misrepresentations regarding the corporation's financial condition to entice an employee to lend money to the corporation. *See id.*, 126 Cal. App. 2d 624, 625-26 (1954). The principal also represented that he would pay the interest on the loan. *Id*. at 630. After the corporation filed for bankruptcy, the plaintiff filed a complaint in intervention arguing that the corporation was the principals' alter ego. *Id*. at 627. The court concluded that the principals were estopped from denying their representations regarding the status of the corporation's finances. *Id*. at 630.

Unlike the cases they rely on, Plaintiffs have not and cannot allege that any of the Non-SGM Defendants represented they would be responsible for SGM's contractual obligations. Indeed, the parties specifically negotiated the terms of *SGM*'s potential liability. The parties negotiated a contractual limitation on damages and Plaintiffs received the added security of a $30 million deposit that would be lost if SGM breached an obligation to close the transaction. Plaintiffs' attempts to circumvent their negotiated relationship by alleging manufactured torts and alter-ego claims are unavailing. These claims should be stricken.

IV. CONCLUSION

For the reasons discussed in its Moving papers and above, Defendants request that the Court strike each claim asserted by Plaintiffs.

Dated: March 11, 2020

BARNES & THORNBURG LLP

By:/s/Kevin D. Rising
Kevin D. Rising

Counsel for Defendants