RIC (Orcutt Rancho), LLC v. Anthony E. Wells, et al. (complaint) Case No. 23CV01855
Wells, et al. v. Greenberg, et al. (first amended cross complaint)
Hearing Date: February 6, 2024
Demurrer to First Amended Cross-Complaint

PROPOSED TENTATIVE

A) Factual Background

On May 1, 2023, plaintiff RIC (Orcutt Rancho), LLC, filed a complaint against defendants Anthony Wells (Wells) and HMW Group, LTD., LLC (HMW Group), for one cause of action – breach of the Guaranty Agreements. Briefly, in 2016, Romspen Mortgage Limited Partnership, the original lender, loaned $5.3 million (the first loan advance) to Orcutt Rancho, LLC[1] (borrower), as evidenced by the "Real Estate Loan Agreement" and Promissory Note, and secured by property in Santa Maria through an "Initial Deed of Trust." Defendants guaranteed the loans; each defendant also entered into "Security Agreements," continuing a first priority lien and security interest in and to certain collateral specified therein (both documents are attached to the operative pleading). In October 2018, the original lender and borrower amended the loan agreements (a First Amendment to Loan Agreement), with the lender providing $750,000 in additional financing to the borrower (the second loan advance), reflected in new promissory notes and an amended deed of trust, including updated guaranties. These documents are also attached to the operative pleading. Borrower Orcutt Rancho, LLC defaulted on the loan repayments upon the May 31, 2019 maturity date, and in June 2020, lender sent to borrower and guarantor defendants a notice of acceleration and demand for payment, which went unanswered. In April 2021, borrower, lender and guarantors executed a "Discounted Payoff Agreement" (acknowledging all debt and borrower's remedies). The loans remain unpaid, and as of January 2023, total $11,148,473.12. Borrower Orcutt Rancho, LLC has filed for Chapter 11 bankruptcy. In April 2023, lenders Romspen Mortgage Limited Partnership assigned its right, title, and beneficial interest in the loans and deeds of trust to RIC (Orcutt Rancho,), LLC, the current plaintiff, who is suing defendants on the guaranty agreements. Defendants answered on August 9, 2023.

Wells and HMW Group as cross-complainants on December 8, 2023, filed a cross-complaint against Romspen Mortgage Limited Partnership and Romspen Investment Corporation (hereafter either Romspen or Romspen cross-defendants), Apollo Rancho, LLC (Apollo), Gary Greenberg (Greenberg), Wesley Roitman (Roitman), RIC (Orcutt Rancho, LLC), and John Scardino (Scardino), as follows: 1) breach of contract against the Romspen cross-defendants only; 2) breach of fiduciary duty (against all cross-defendants but Roitman); and 3) financial elder abuse (against cross-defendants Romspen, Greenberg, Roitman and Scardino only). As relevant for our purposes, cross-complainants allege the following with regard to the cross-defendants: 1) Orcutt Rancho, LLC was owned by Wells and HMW Group, on one hand, and

[1] For clarity, RIC (Orcutt Rancho), LLC, plaintiff, is the assignee of lender/assignor Romspen. Orcutt Rancho, LLC (a different entity) was the borrower on the original loans given by lender/assignor Romspen. Orcutt Rancho, LLC, borrower, has filed for Chapter 11 bankruptcy.

Greenberg and Apollo, on the other hand, in a 24.4 percent and 75.6 percent split, respectively[2]; Orcutt Rancho, LLC was a mutual development entity, which consisted of two other entities (Apollo and HMW Group); Orcutt Rancho, LLC, with Wells as the project developer, was charged with developing the Neighborhoods of Willow Creek and Hidden Canyon development; 2) Roitman is the managing general partner of both Romspen cross-defendants; and 3) Scardino was the appointed plan developer paid by the Romspen cross-defendants "to develop and submit a plan for development" during bankruptcy.

B) Allegations in First Amended Cross-Complaint

Cross-complainants allege that Wells (through his company HMW Group) consummated a loan guaranty with the Romspen cross-defendants to develop a housing project called the Neighborhood of Willow Creek and Hidden Canyon (the Orcutt Rancho project). Wells arranged for additional financing "to take out the Romspen loan and successfully received County Planning Department recommendations for the entitlements and EIR approval to develop the project." Specifically, Wells arranged for additional financing of $9.4 million to pay off the Romspen loan, following Greenberg's land contribution to the original borrowing entity, Orcutt Rancho, LLC, permitting a 75.6 and 24.4 percent ownership split between Greenberg and Wells, during which Wells and Greenberg participated in and through their respective corporate organization, Apollo and HMW Group. Greenberg, however, without consulting Wells, placed Orcutt Rancho, LLC (the original borrower) into Chapter 11 bankruptcy "unnecessarily"; thereafter, Romspen convinced the bankruptcy court to appoint Scardino as "Chief Development Officer" of Orcutt Rancho, LLC, who was an acolyte of Romspen and who never formulated a true bankruptcy exit plan; Romspen and Greenberg then ordered Wells to "stand down" (i.e., be removed) from Orcutt Rancho, LLC as the project manager, while they took over operations. Eventually Roitman, through Romspen and Greenberg (in turn through Apollo), along with Scardino, conspired to remove Wells from the project entirely, and thereafter (i.e., after bankruptcy filing was made for Orcutt Rancho, LLC) forced Wells to pay for loan to the project through his guaranty, thus destroying whatever interest Wells had in the project and its future profit of over 7 million dollars.

As for the first cause of action for breach of contract (against the Romspen cross-defendants only), cross-complainants allege that Romspen had a "contractual duty" to maintain the 24.4% interest in the project and not to frustrate Wells' expectation interest therein. "Romspen completely eliminated the contractual purpose of the guaranty by changing the nature and scope of the project and ensuring its failure." As a proximate cause of the conduct and

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[2] Cross-complainants seem to have misstated in paragraph 4 of the cross-complaint that the split involves RIC (Orcutt Rancho, LLC), not Orcutt Rancho, LLC.

In opposition, cross-defendants claim they are unfamiliar with the entity named RIC (Orcutt Rancho, LLC), although RIC (Orcutt Rancho, LLC) is the named plaintiff in the complaint and who is represented by the same counsel as here. The entity RIC (Orcutt Rancho, LLC), was the assignee on the recorded "Assignment of Beneficial Interest Under Deed of Trust" attached as Exhibit M (i.e. the assignment from Romspen assignor to (RIC) Orcutt Rancho, LLC assignee). Given this factual predicate, the court will assume without deciding that RIC (Orcutt Rancho) LLC is a relevant and identifiable entity for our immediate purposes – and certainly there is enough information at the pleading stage to move forward despite protestation.

breach of the duties under the loan guaranty, Wells had been damaged to the tune of over $7 million.

As for the second cause of action for breach of fiduciary duty (against cross-defendants Romspen, Greenberg, Apollo, Orcutt Rancho, LLC, and Scardino), cross-complainants claim that Romspen, Roitman, and RIC (Orcutt Rancho), LLC (along with other cross-defendants not moving parties Greenfield, Apollo, and Scardino) breached their fiduciary duty to cross-complainants. Specifically, cross-complainants allege that Greenberg had a fiduciary duty to Wells as "co-managing members in their respective limited liability companies and each held an equity interest in Orcutt Rancho, LLC"; Greenberg disregarded his fiduciary obligation when he conspired with Roitman and Romspen to reject the replacement funding obtained by Wells to pay off the original borrower and send Orcutt Rancho, LLC to bankruptcy (without Wells consent); Greenberg took advantage of Wells' illness and fired Wells as the developer without cause or justification; and effectively sought a "cram down of the accrued interest" on the loans to Orcutt Rancho, LLC by enforcing the guaranty. Further, "Roitman and Romspen conspired to have Scardino appointed in the bankruptcy to develop a bankruptcy exit plan at a cost of $25,000 per month with no intention of developing an exit plan but rather allowing Romspen to foreclose on the Orcutt Rancho property with the intent of subsequent development free of the burden of Wells and HMW's 24.4 [percent] equity interest." "Such greed[y] behavior is beyond all decent expectation for a commercial transaction . . . ."

As for the third cause of action for financial elder abuse within the meaning of Welfare & Institutions Code, section 15600, et seq. (against cross-defendants Greenberg, Romspen, Roitman, and Scardino), cross-complainants contend that Greenberg, who had a 75.6 percent interest in Orcutt Rancho, LLC, colluded and conspired with Roitman "to arrange funding of a Chapter 11 bankruptcy proceeding funded by Romspen designed to 'cram' down the accrued interest under the mortgage loan with Romspen and effectuate a forced sale of the foreclosed property and eliminate the 24.4 [percent] equity interest Wells" held in the project through Orcutt Rancho, LLC. "Upon information and belief and thereupon alleged, Greenburg conspired to take Orcutt Rancho, LLC into bankruptcy so that Greenberg could acquire the [property] associated with the [project] at a fire sale price. Greenberg and Roitman convinced Romspen to fund the cost of the bankruptcy and appoint Scardino, a customer/borrower of Romspen to serve as developer to put together a[] bankruptcy exit plan that would benefit Greenberg and Romspen/Roitman and freeze out Wells." According to cross-complainants, this conduct amounts to financial elder abuse within the meaning of Welfare and Institution Code sections 15620.30, 15610.70, and 15657.5. Further, cross-complainants ask for heightened remedies under Welfare and Institutions Code section 15657, including punitive damages, attorney's fees (§ 15657.1),and treble damages (Civ. Code, § 3345). (See, e.g., *Royals v. Lu* (2022) 81 Cal.App.5th 328, 347.)

C) Demurrer to First Amended Cross-Complaint

Cross-defendants RIC (Orcutt Rancho), LLC, the Romspen cross-defendants, and Roitman (***but not the other cross-defendants***) have filed a joint demurrer to all three causes of action. They claim the court should sustain the demurrer for the following reasons:

- As to first cause of action for breach of contract, cross-complainants (according to cross-defendants) have failed to attach – or otherwise plead – the guaranty contract at issue, and have failed to identify the specific provision that was breached. Further, cross-defendants' claim the damages alleged as a result of the breach (over $7 million) are entirely speculative, based on future profits from the successful completion of the real estate development project.
- As to the second cause of action for breach of fiduciary duty, cross-complainants (according to cross-defendants) have not and cannot establish that the moving parties each had a fiduciary relationship with them, a necessary predicate (as alleged) for such a breach. Additionally, according cross-defendants, cross-complainants have failed to allege any causal connection between any alleged fiduciary duty breached by Romspen and any harm sustained.
- As to the third cause of action for financial elder abuse, cross-defendants contend 1) that there is no separate cause of action for financial elder abuse; rather, the statute scheme only allows for enhanced remedies when plaintiff succeeds on an otherwise viable claim and also proves that the otherwise actionable wrong constituted elder abuse; and 2) assuming arguendo that there is standalone cause of action for financial elder abuse, cross-complainants have failed to allege Wells is elderly as defined under the statute; and have failed to allege sufficient facts showing that Romspen personally committed elder abuse (as the facts focus exclusively on Greenberg's actions).

On January 24, 2022, plaintiff filed opposition. A reply was filed on January 30, 2024. All briefing has been reviewed and considered.

D) Cross-Defendants' Request for Judicial Notice

Moving parties ask the court to take judicial notice of Exhibits A to K, consisting of court documents from Orcutt Rancho, LLC's Chapter 11 bankruptcy petition in *In re Orcutt Rancho, LLC*, Case No. 9:21-bk-10412-MB, filed with the United States Bankruptcy Court for the Central District of California (with documents in that case filed between the dates of April 26, 2021, and March 21, 2023, as follows): Exhibit A (Romspens' preliminary objection regarding interim and final orders); Exhibit B (an order signed by Judge Martin Barash, dated April 29, 2021, denying without prejudice debtor's request to for an interim financing order pending a final hearing); Exhibit C (Romspens' supplemental brief in support of objection to motions for interim and final orders); Exhibit D (notice of proposed consensual post-petition financing order with Romspen); Exhibit E (a lengthy final order authorizing debtor to obtain post-petition financing, granting liens and superpriority claims, granting adequate protection to prepetition secured creditors, modifying the automatic stay, and granting related relief, signed by Judge Martin Barash on June 1, 2021); Exhibit F (debtor's *ex parte* application to employ Chief Development Officer John Scardino); Exhibit G (order authorizing debtor to employ Chief Development Officer John Scardino, signed by Judge Martin Barash on August 18, 2021); Exhibit H (cross-defendant Romspens' response (memorandum of points and authorities) in opposition to motion for entry of final order authorizing debtor obtain post-petition refinancing; granting liens and

supermajority claims; granting adequate protection to prepetition secured creditors; modifying the automatic stay; and granting related relief); Exhibit I (Romspens' memorandum of points and authorities in support of motion for relief from the automatic stay); Exhibit J (order denying motion for entry of final order authorizing debtor to obtain post-petition refinancing, granting lies and supermajority claims, granting adequate protection to prepetition secured creditors, as applicable, modifying the automatic stay, and granting related relief, signed by Judge Martin Barash on March 21, 2023; and Exhibit K (order granting in part and denying in part a motion for relief from the automatic stay, signed by Judge Martin Barash on March 21, 2023).

The court grants the request for judicial notice. A court may take judicial notice of court records, including unpublished orders and decisions in a related federal proceeding, as the moving parties have demonstrated that the matters as to which judicial notice is sought are both relevant to and helpful toward resolving the matters before this court. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418.) There are limitations, however. The court cannot take judicial notice of the truth of the factual matters asserted in the documents. (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1090.) It can take judicial notice of both the existence of the documents and the truth of the results reached in those records. (*In re Vicks* (2013) 56 Cal.4th 274, 314; see *Hart v. Darwish* (2017) 12 Cal.App.5th 218, 224-225 ["a court's ruling and the basis for that ruling constitute official records excepted from the hearsay rule"].)

E) Merits

A demurrer tests the legal sufficiency of the challenged pleading. (*Milligan v. Golden Gate Bridge Highway & Transportation Dist.* (2004) 120 Cal.App.4th 1, 5.) Generally, a demurrer is limited to the facial sufficiency of the allegations in the challenged pleading. (*Donabedian v. Mercury Ins. Co*. (2004) 116 Cal.App.4th 968, 994 [grounds for demurrer must appear on the face of the complaint].) In reviewing a complaint for purposes of demurrer, the court assumes the truth of the allegations in the operative pleading. (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 209; accord, *Lee, supra*, 61 Cal.4th at p. 1230; see *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96, 104-105 [" '[W]e accept as true even improbable alleged facts, and we do not concern ourselves with the plaintiff's ability to prove [the] factual allegations.' "].) Additionally, in determining whether the well-pleaded allegations in a complaint state a valid cause of action, courts may "consider matters which may be judicially noticed,." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; see also *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 [" ' "[A] complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective." ' "].)

The court will apply these rules to each cause of section. The court will then address the separate arguments advanced by Romspen and Roitman.

i) Breach of Contract (First Cause of Action)

Establishing a breach of contract requires plaintiff to show (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) the

resulting damages to the plaintiff. (*D'Arrigo Bros. of California v. United Farmworkers of America* (2014) 224 Cal.App.4th 790, 800.) In order to plead a breach of contract when the contract is in writing, plaintiff must set the written contract out verbatim in the body of the complaint or attach a copy, incorporated by reference. (4 Witkin, California Procedure (6th ed. (2023 Supp.), § 527.) The other method of pleading a written contract is according to its legal effect, by alleging the making, and then proceeding to allege the substance of its relevant terms. (*Id*. at § 527; see *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 270, fn. 1, citing *Twaite v. Allstate Ins. Co*. (1989) 216 Cal.App.3d 239, 252 [to state a cause of action for breach of contract, it is absolutely essential to plead the terms of the contract ether in *haec verba* or according to legal effect].) And while plaintiff need not allege every promise of the defendant, plaintiff must plead those that the plaintiff claims were breached. (4 Witkin, *supra*, at § 528.) Additionally, plaintiff cannot enforce a contractual obligation without first performing the conditions precedent imposed on plaintiff. (*Id.* at § 538.) Accordingly, the allegation of performance is an essential part of the plaintiff's cause of action, and must be pleaded. (*Ibid.*) Finally, plaintiff must adequately allege that the damages suffered were proximately caused by the breach (a substantial factor in causing the harm when there are multiple proximate causes). (See, e.g., *Vu v. California Commerce Club, Inc*. (1997) 58 Cal.App.4th 229, 233.) General damages, such as loss of normally expected profits from an established business, need only be plead with bare statement of damages in a particular sum. (4 Witkin, *supra*, § 941.) Special damages are recoverable in breach of contract action only a showing of certain circumstances. (*Id.* at § 942.)

The court overrules the demurrer based on claims that that damages alleged by cross-complainants – over $7 million (essentially general damages) – are too speculative. Cross-complainants are clear that they were entitled to receive $7,225,422,000 in a fee and percentage of the net operating profits from Orcutt Rancho, LLC. No doubt, as defendants contend, Orcutt Rancho, LLC, was in bankruptcy, and under the raiment of bankruptcy there was no guarantee that cross-complainants would be able to secure this amount from the development at issue as a result. But the court is required at this stage to assume the truth of the allegations as made – and cross-complainants contend that during the post-bankruptcy petition Wells was able to secure additional financing of $9.4 million that would have satisfied the Romspens' loans and therefore "be able to proceed with" finishing the development project (i.e., despite bankruptcy). While this may be a heavy burden to prove at trial (and one may be suspicious it is possible, leaving the matter open to challenge via summary judgment/adjudication), it is deemed true for pleading purposes; accordingly, the claim is not speculative and survives demurrer.

The court nevertheless sustains the demurrer to the first cause of action for other reasons. First, cross-complainants have not attached the relevant contract to the first amended pleading; nor have they pleaded language or otherwise pleaded allege the material terms that Romspen cross defendants alleged breach. This alone is fatal. Further, cross-complainants have not alleged that they performed all duties required under the contract as a condition precedent to alleging Romspens' breach of contract. This is also fatal. The court will sustain the demurrer with leave to amend as a result.

ii) Breach of Fiduciary Duty (Second Cause of Action)

"The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach." (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405; see *O'Neal v. Stanislaus County Employees' Retirement Assn.* (2017) 8 Cal.App.5th 1184, 1215.) Whether a fiduciary duty exists is generally a question of law; whether the defendant breached that duty towards plaintiff is generally a question of fact. (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915; *Harvey v. The Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809, 822, 76 Cal.Rptr.3d 41.)

The court rejects defendants' arguments (as it did above) that the alleged damages are speculative. Again, if a basis for a breach of fiduciary duty can be established, the damages claim survives for the same reasons discussed above with regard to the breach of contract cause of action.

The court nevertheless sustains the demurrer because the California Supreme Court has concluded that a breach of fiduciary duty based on a conspiracy theory, to be viable, requires that *each of the conspirators* must have a fiduciary duty to the plaintiff. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511 ["tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty"].) Thus, a party cannot be held liable for conspiracy to breach a fiduciary duty if that party does not personally owe a fiduciary duty to the plaintiff. (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 590; *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4th 1102, 1106-1108; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336, fn. 3.) "[T]o be liable for conspiracy to breach a [fiduciary] duty, the defendant must be bound by that duty and capable of breaching it." (*1-800 Contacts, Inc. v. Steinberg, supra*, 107 Cal.App.4th at p. 592.) Put another way, nonfiduciaries cannot be liable for breach of fiduciary duty on a conspiracy theory because they are legally incapable of committing the underlying tort unless they are deemed fiduciaries with plaintiff themselves. (*Ibid;* contrast this with *American Master Lease, LLC v. Idanta Partners, Ltd*. (2014) 225 Cal.App.4th 1451, 1476-1478 [unlike conspiracy to breach a fiduciary duty, abetting a breach of fiduciary duty did *not* require that a defendant owe a fiduciary duty to plaintiff, distinguishing Applied Equipment].) The first amended complaint is steeped *exclusively* in terms of a civil conspiracy to breach the fiduciary duty owed to cross-complainants. At the same time, the only fiduciary duty actually alleged exists between Greenberg and Wells/HMA Group (see §§ 21-23 of the first amended cross-complaint).

Cross-complainants in opposition contend that this "is not a case where the parties are in a traditional banking relationship," and Wells is not "a simple depositor off the street, dealing with a bank teller." Romspen and Wells (according to cross-complainants) were "major participants" in a "complicated real estate transaction," which amounted to a "complex and entangled transaction," and there was a "special relationship that was the foundation of the project." It is claimed that this created a fiduciary relationship.

As a general rule, the relationship between the borrower and lender in an ordinary commercial loan transaction is at arms-length and adverse—each party has its separate economic self-interests. (See, e.g., *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 476.) "It has long been regarded as 'axiomatic that the relationship between a bank and its depositor arising out of a general deposit is that of a debtor and creditor.' [Citation.] 'A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such.' [Citation.] *The same principle should apply with even greater clarity to the relationship between a bank and its loan customers*." (*Ibid, emphasis added*.) Thus, " 'a lender does not assume any obligations regarding the viability of the project or investment which is financed by the loan funds as long as the conduct of the lender is limited to the activities which customarily are associated with the lending function. (*Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 119 (*Peterson*) (quoting 4 Miller & Starr, Cal. Real Estate (2d ed.1989) § 9.61, p. 176.) Instead, a commercial lender is entitled to pursue its own economic interests in a loan transaction (see *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 67), and this right is inconsistent with the obligations of a fiduciary (see *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 221 ["[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law"]; see also *Ragland v. U.S. Bank Nat. Assn*. (2021) 209 Cal.App.4th 182, 206 ["No fiduciary duty exists between a borrower and lender in an arm's length transaction"]; *Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 740 [a commercial lender is not to be regarded as the guarantor of a borrower's success and is not liable for the hardships which may befall a borrower].) A mere contract or debt does not constitute a trust or create a fiduciary relationship. (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30-31, 33-34.) Only under limited circumstances will a lender owe fiduciary duties to a borrower. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979–981 [a lender owes a borrower no fiduciary duty unless the borrower can demonstrate a special relationship or circumstances that would give the lender/borrower relationship a fiduciary character].)

Nothing of substance in the operative pleading suggests that there was anything more than a straightforward (albeit complicated) commercial loan transaction between cross-complainants (the borrowers) and Romspen (the lender). (See, e.g., *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096–1097 ["Normal supervision of the enterprise by the lender for the protection of its security interest in loan collateral is not 'active participation' [in

the financed enterprise beyond that of the ordinary role of a lender in a loan transaction]"]; *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35 [A lender's normal supervision of the enterprise for the protection of its own security interest is not "active participation" in the project].) There is no indication, for example, that there was a merger of identities, or the lender was the alter ego of the debtor; nor is there any indication that the lender had any extraordinary say in the operation of the construction project at issue. There are no allegations or evidence of overwhelming or complete control equivalent to the control alleged or exercised in either *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1365-1366 [lender had fiduciary duty to borrower given the very detailed advice about how to manage the loan] or *Credit Managers Assn. v. Superior Court* (1975) 51 Cal.App.3d 352, 359-360 [same]. Nor are there any allegations or evidence that the moving parties provided advice or sharing of any confidential information. (*Kim*, *supra*, 17 Cal.App.4th at p. 980.) Finally, there is nothing to suggest that the relationship at issue comes close to the types of fiduciary relationships traditionally recognized as a matter of law. (See, e.g., *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 631-632 [a fiduciary duty arises in relationships such as those between partners, trustees and beneficiaries, principals and agents, attorneys and clients, joint venturers, corporate officers and directors and corporation and shareholders, husband and wife – essentially, a fiduciary must give priority to the best interest of the beneficiary].)

The court sustains the demurrer with leave to amend as to the second cause of action, as it is possible for plaintiff to articulate either a special relationship and/or an aiding and abetting theory, which is treated differently than a conspiracy theory for purposes of fiduciary duty.

iii) Financial Elder Abuse (Third Cause of Action)

The substantive law of elder abuse provides that financial abuse of an elder (defined as any person residing within this state, 65 years or age or older) occurs when any person or entity takes, secretes, appropriates, or retains real or personal property of an elder adult to a wrongful use or with an intent to defraud, or both. A wrongful use is defined as taking, secreting, appropriating, or retaining property in bad faith. Bad faith occurs where the person or entity knew or should have known that the elder had the right to have the property transferred or made readily available to the elder or to his or her representative. (Welf. & Inst. Code, § 15610.30; see *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 174.) A person or entity is "deemed to have taken . . . property for a wrongful use if, among other things, the person or entity takes ... the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (b).) Property is taken when the elder adult "is deprived of any property right, including by means of an agreement . . . regardless of whether the property is held directly or by a representative of an elder or dependent adult." (Welf. & Insts. Code, § 15610.30, subd. (c).) An essential element of elder abuse is either an intent to defraud or a wrongful use of the property. (See *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1315–1316 [lot line adjustment made without valid

power of attorney supports a skeletal claim for elder abuse]; *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 527–528 [no valid cause of action without allegation that foreclosing lender took property for a "wrongful use"]; *Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 658 [insurer liable for breach of contract for denying coverage to elderly homeowners is not liable for elder abuse because there was a genuine dispute about scope of coverage; "wrongful conduct occurs only when the party who violates the contract actually knows that it is engaging in a harmful breach, or reasonably should be aware of the harmful breach."].)

The Elder Abuse Act provides for heightened remedies to encourage private enforcement of laws against abuse and neglect. "It sets forth a scheme of heightened remedies – punitive damages [Welf. & Inst. Code], § 15657, subd. (c)), attorney's fees and costs (*id.* subd. (a)), and exemption from certain limitations on recoverable damages in survivorship actions (*id*. subd. (b)) – designed to provide incentives for 'interested person to engage attorneys to take up the cause of abused elderly persons . . . . ([Welf. & Insts. Code], § 15600, subd. (j).) These remedies are available only where the plaintiff proves by clear and convincing evidence that the 'defendant has been guilty of recklessness, oppression, fraud or malice in the commission of the abuse.' ([Welf. & Inst. Code], § 15657.)" Courts "are divided over whether this section and related provisions create an independent causes of action or merely enhance the remedies available under preexisting causes of action. (See *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664–666 ... [discussing division of authority concerning § 15657, which addresses physical abuse of an elder]; Balisok, Elder Abuse Litigation, [(The Rutter Group 2008)] ¶ 8:9, p. 8-5 (rev. #1, 2009) ['Whether "financial abuse" amounts to a new cause of action or whether it is remedial is an important question.'].)' (*Das v. Bank of America, N.A., supra*, 186 Cal.App.4th at p. 743–744.)" (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 858, and fn. 11; see also *Strawn v. Morris, Polich & Purdy , LLP* (2019) 30 Cal.App.5th 1087, 1103, fn. 6 [courts are divided over whether provisions of the Elder Abuse Act " 'create independent causes of action or merely enhance the remedies available under preexisting causes of action.' "].)

Moving parties ask this court to weigh in and determine whether the financial elder abuse, and the heightened remedies, create a separate cause of action or apply only when other torts are pleaded (i.e., other causes of action must act as a predicate).

The court need not weigh in on this issue at this time, because other grounds apparent from the face of pleading exist to sustain the demurrer. First, the complaint fails to state a claim for financial elder abuse because it does not indicate Wells' age at the time of the events. Plaintiff claims in opposition that Wells is 84 – but that fact must be *pleaded.*

Second, and more substantively, cross-complainants (and Wells in particular) do not allege that damages (or at least the vast majority most of the damages) was *directly* taken, secreted,

appropriated from Wells as a person over 65. The complaint alleges that 1) Greenberg wrongfully sent Orcutt Rancho, LLC into Chapter 11 bankruptcy; 2) during the bankruptcy proceeding, Greenberg wrongfully terminated Wells position as the project developer and co-manager of Orcutt Rancho, LLP; 3) cross-defendants improperly hired John Scardino as project manager at $25,000 a month; 4) wrongfully deprived Orcutt Rancho LLP from developing the property, which in turn deprived cross-complainants of his/their 24.4 equitable interest in Orcutt Rancho, LLP; and 5) Greenberg and Wells "participated in the Orcutt Rancho, LLC ***by and through their respective organizations***, Apollo [Greenberg] and HMW Group [Wells]" (§ 9 of the Operative Pleading). "It is fundamental that a corporation is a legal entity that is distinct from its shareholders." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108; accord, *Presta v. Tepper* (2009) 179 Cal.App.4th 909, 914; see *Hilliard v. Harbour* (2017) 12 Cal.App.5th 1006, 1015 [plaintiff did not have standing to sue for financial elder abuse because his claim did not "originate in circumstances independent of his status as a shareholder in the [c]ompanies, and his claim therefore cannot be deemed personal"].) The first amended complaint seems to indicate that Wells was *at best* indirectly impacted by the alleged financial abuse as contemplated by the Elder Abuse Act (for the entities directly impacted were Orcutt Rancho, LLP and HMW Group). Accordingly, the claims do not originate in circumstances independent of Wells' officer/ownership of either Orcutt Rancho, LLP or NMW Group, Ltd, which were clearly separate corporate entities.[3] Put differently, but for his interest in Orcutt Rancho, LLC, and NHW Group, Ltd, as pleaded, Wells would not have been injured; his claim thus cannot be deemed personal (based on the allegations made) so as to create standing for purposes of the financial elder abuse cause of action. (*Hillard, supra*, at p. 1015.)

The point is underscored (or at least conflated and confused) by the fact both Wells and HMW Group are cross-complainants to the financial elder abuse cause of action (with both treated interchangeably), and HMW Group is clearly not an elder within the meaning of the Elder Abuse Act. The statutory language cannot be read to include property owned by a corporation such as HHM Group, as it exists as a legal entity separate and apart from Wells. Plaintiff at a minimum has to give a much clearer explanation between the two in order to flesh out the parameters of the financial elder abuse cause of action, and describe who actually owned the equitable interest in Orcutt Rancho, LLC, and, additionally, when Wells was acting individually and not as a corporate officer. As pleaded, the relationship between Wells and HW Groups is too uncertain and ill-defined to survive challenge, and standing for financial elder abuse has not been established.

For these reasons, the court sustains the demurrer with leave to amend.

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[3] Any other conclusion would lead to a conflict with the settled principle that it is not tortious conduct for a commercial lender (such as Romspen) to lend money, take collateral, or to foreclose on collateral when the debt is not paid because a commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights. (*Stebley, supra*, 202 Cal.App.4th at p. 528.)

iv) Arguments Advanced Exclusively by Romspen and Roitman

The Romspen cross-defendants claim that all three causes of action fail against them because each is predicated or premised on statements and actions that occurred during, or were taken in furtherance of, a valid bankruptcy proceeding, and thus are privileged pursuant to Civil Code section 47, subdivision (b).

No doubt Civil Code section 47, subdivision (b) "establishes a privilege that bars liability in tort for the making of certain statements" and "bars a civil action for damages for communications made[, inter alia,] '. . . in the initiation or course of any other proceeding authorized by law and reviewable pursuant to [statutes governing writs of mandate],' with certain statutory exceptions." (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360, quoting § 47, subd. (b).) And it is settled that a demurrer can challenge a cause of action when, on the face of the operative pleading, the litigation privilege applies. (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 815.)

The court, however, is not persuaded at this time that the litigation privilege applies -- and thus bars the three causes of action as alleged -- because the gravamen of these three causes of action, based on a facial reading of the operative pleading, involves predominately the noncommunicative acts of denying plaintiff his rightful claim to the property at issue. (*Chen, supra*, 33 Cal.App.4th at p. 819-820 [litigation privilege protects only acts that are communicative, and thus the threshold question is whether defendants' alleged conduct is communicative or noncommunicative].) While pleadings and process of bankruptcy are considered privileged, the court must look to whether the gravamen of the claims at issue are communicative (protected) or noncommunicative conduct (not protected), which in turn hinges on the gravamen of the action. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1058; see *Chen, supra*, at p. 821-822.) Essentially, cross-complainants allege that bankruptcy was unnecessary (a sham), used for the pretense of removing Wells and squashing his ownership interest (by allowing plaintiff above to pursue the guaranty) through a conspiracy by the cross-defendants. Here, the noncommunicative conduct of purposefully and intentionally hindering/damaging cross-complainants' claimed interest, through a sham proceeding and effectuated by an alleged conspiracy of purpose, is sufficiently independent and noncommunicative – even given the backdrop of bankruptcy -- that plaintiff's primary right claims should not be precluded by the litigation privilege (at least at this time). (*Chen, supra,* 33 Cal.App.5th at p. 821 [permitting a creditor, such as Chen, to allege a sham lawsuit and conspiracy despite the litigation privilege].) There are no allegations in the operative pleading that would suggest that communicative acts made or advanced in the bankruptcy proceeding rest at the heart (or are the gravamen of, rather than tangentially related to) this lawsuit, and thus subject to the litigation privilege. The court is not barring the moving parties from revisiting this issue, and they may at summary judgment/adjudication, when the factual record is more developed, refined, and informed, to convincingly argue that the litigation privilege applies. In fact, the court acknowledges the litigation privilege remains a potential or possible Damocles' sword over the lawsuit should the

communicative acts made during the bankruptcy proceeding become more central or robust to the lawsuit. But the court is not at this time (at the pleading stage) prepared to cut the thread and the let the sword fall, causing death prematurely.[4]

Roitman claims that the court should sustain the demurrer as to him, because cross-complainants seek to hold him personally liable "for his role as an agent" as an officer/director of Romspen. True, "corporate directors cannot be held vicariously liable for the corporation's torts in which they do not participate . . . . '[A]n officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented. ... While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct.' [Citation.]" (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503–504, italics omitted & added.) But "[c]orporate directors or officer status [does not] immunize[ ] a person from personal liability for tortious conduct . . . . [¶] A corporate director or officer's participation in tortious conduct may be shown not solely by direct action but also by knowing consent to or approval of unlawful acts. [Citations.] ... [¶] The legal fiction of the corporation as an independent entity was never intended to insulate officers and directors from liability for their own tortious conduct." (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 966.)

The first amended complaint does not predicate Roitman's liability on his status as an officer or director, but on his own *personal* misconduct (or more accurately, personal liability for his own tortious conduct). According to cross-complainants, Roitman conspired with Greenberg to remove Wells from his position as project developer and co-manager, and personally acted tortiously in an intentional "cram" down so that all cross-defendants could benefit as cross-complainants' expense. Not one of the causes of actions as to Roitman is predicated on vicarious liability – only Roitman's personal liability. The court rejects this argument as a basis to sustain the demurrer.

Defendants in reply cite to *Michalis v. Benavides* (1998) 61 Cal,App.4th 681. Reliance on *Michalis* is misplaced. Procedurally, the case involved an appeal after the trial court granted a motion for nonsuit; it did not involve the adequacy of any pleading allegations. (*Id.* at p. 683.) More substantively, the appellate court in *Michalis* observed that the "allegations here show that respondent did not merely make a corporate policy decision which was carried out by someone else. He personally participated in and directed the construction of appellant's patio and

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[4] For example, in *Rusheen*, the California Supreme Court concluded that the communicative conduct of procuring a judgment based on the use of allegedly fraudulent declarations of service, and not the noncommunicative act of executing the judgment, was the gravamen of the abuse of process cause of action, and thus barred by the litigation privilege. (*Rusheen, supra*, 37 Cal.4th at p. 1062.) Here, it remains possible as pleaded that the execution of the bankruptcy judgment itself – a noncommunicative act – rather than statements made in the bankruptcy proceeding – is the gravamen of this lawsuit. That is, while the acts of filing the petition and making statements during the bankruptcy proceeding are communicative, and thus protected, those acts do not appear the gravamen of the lawsuit *as alleged.* (*Chen, supra*, 33 Cal.App.5th at p. 821.)

driveway. He personally bid for appellants' job and he personally negotiated with appellants for completion of the job. . . [¶]. . . [¶] . . . The instant circumstances involve a corporate officer's *personal* tortious conduct . . . ." (*Id.* at pp. 686-697, italics in original.) The allegations here are also predicated on Roitman's personal tortious conduct – and are sufficient to withstand demurrer.

F) Summary

The court grants cross-defendants' unopposed request for judicial notice, although it does take judicial notice of the truth of the facts in the court documents. The court overrules the demurrer based on claims that damages are speculative. The court also overrules the demurrer (at least at this time, at the pleading stage) based on the claim that the litigation privilege bars all three causes of action, for the gravamen of the lawsuit as pleaded seems predicated predominantly on noncommunicative conduct (the court can revisit this issue at summary judgment/adjudication after a more robust record is developed). Finally, the court rejects Mr. Roitman's claim that he cannot be personally liable for his own tortious acts as alleged. The liability pleaded in the operative pleading is not vicarious, but personal.

That being said, the court sustains the demurrer to the first, second and third causes of action, with leave to amend, for the reasons discussed in greater detail above. Cross-complainants have 30 days from today's hearing to file an amended pleading.