

1 the sale of bell peppers to Vantaggio, and the alleged wrongful taking of said proceeds by
2 Produce Pay.

3 **A. Statement of Facts**¹

4 Plaintiff is an Arizona based “distributor of agricultural products, including but not
5 limited to bell peppers.” ECF No. 19 (“FAC”) at 2,² ¶ 3. Defendants are “distributors,
6 buyers and sellers of fresh fruits and vegetables” and are licensed “Dealers,” “Commission
7 Merchants,” and “Brokers” as those terms are defined by the Perishable Agricultural
8 Commodities Act, 7 U.S.C. § 499a, *et seq.* (“PACA”). *Id.* at 2, ¶ 6. “Vantaggio is generally
9 known . . . to be substantially engaged in selling the produce of others,” including Plaintiff,
10 and Produce Pay was aware of this. *Id.* at 3, ¶ 8.

11 Around December 2019, Plaintiff and Vantaggio entered into a verbal consignment
12 sales agreement for Vantaggio to market Plaintiff’s bell peppers in exchange for a
13 commission and warehousing fee. *Id.* at 3, ¶ 9; 6, ¶ 20. The verbal agreement was
14 subsequently confirmed in writing via invoices—pursuant to the terms, “Vantaggio agreed
15 to sell the bell peppers to third party buyers at the price agreed, collect the proceeds of sale,
16 deduct its commission [10%] and warehousing fee [\$350.00 per shipment], [and] remit[]
17 the net proceeds of sale to Plaintiff.” *Id.* at 3–4, ¶ 10. Thus, Plaintiff’s obligation under
18 the agreement was to deliver the bell peppers to Vantaggio, which, in turn, would sell the
19 goods for Plaintiff to third-party purchasers and “inform Plaintiff of the market price it was
20 able to obtain.” *Id.* at 3, ¶ 9. “As part of the parties’ agreements, as stated on Plaintiff’s
21 invoices . . . [,] Vantaggio agreed to pay Plaintiff’s attorney’s fees and costs incurred in
22 collection efforts or litigation to obtain the sums owed” *Id.* at 4, ¶ 14.

23 Between December 2019 and March 2020, Vantaggio received several shipments of
24

25 ¹ The majority of the facts set forth are taken from the operative complaint, and for
26 purposes of ruling on the instant Motion to Dismiss, the Court assumes the truth of the
27 allegations pled and liberally construes them in favor of the non-moving party. *Manzarek*
v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008).

28 ² Unless otherwise indicated, all page number references are to the ECF-generated
page number contained in the header of each ECF-filed document.

1 bell peppers from Plaintiff, took delivery of the produce ordered from Plaintiff, and “paid
2 [Plaintiff] the agreed upon amounts for a number of the initial shipments” *Id.* at 4, ¶
3 11. With respect to later shipments, however, Vantaggio sold Plaintiff’s bell peppers on
4 Plaintiff’s behalf and “failed to remit the net proceeds to Plaintiff,” which amounted to no
5 less than \$295,864.67. *Id.* at 4, ¶¶ 12, 13. Plaintiff further alleges that the bell peppers it
6 delivered to Vantaggio were red, yellow, and orange, and that this specific type of produce
7 was “supplied by (and only by) Plaintiff during the time in question.” *Id.* at 5, ¶ 18.
8 Plaintiff attaches invoices—and email correspondence identifying two of the alleged
9 invoices—that involve payment for red, yellow, and/or orange bell peppers. Ex. 1 to FAC
10 at 1, 3, 10, 12.

11 Payment for the peppers was made by third-party buyers in “checks payable to
12 Vantaggio,” but the checks were ultimately delivered to Produce Pay at its Los Angeles
13 office. FAC at 4, ¶¶ 13, 16. The money was subsequently “deposited into a bank account
14 controlled by and in . . . Produce Pay’s name.” *Id.* at 4, ¶ 16. Plaintiff further alleges that
15 “Vantaggio personnel have . . . confirmed that these funds were delivered to Produce Pay
16 upon its demand, and were retained by Produce Pay, despite request to release the funds
17 for payment to Plaintiff (because Produce Pay had no right to retain Plaintiff’s funds.)” *Id.*
18 at 5, ¶ 18. Produce Pay was aware that the bell peppers and payment were Plaintiff’s
19 property—and not that of other third-party suppliers—and “exercised dominion and
20 control over, directed, managed and ratified Vantaggio’s actions at issue” *Id.* at 4, ¶
21 15; 5, ¶ 17. Produce pay did all of this without Plaintiff’s knowledge or consent and
22 continues to wrongfully retain the sums rather than remit the payment to Plaintiff. *Id.* at
23 4–5, ¶ 16.

24 **B. Procedural History**

25 On November 6, 2020, Produce Pay filed suit against Vantaggio, in the Chancery
26 Court of Delaware alleging nine causes of action for: (1) breach of contract; (2) breach of
27 fiduciary duty and principals; (3) conversion; (4) unjust enrichment; (5) intentional
28 interference with contractual relations; (6) alter ego or single enterprise liability; (7)

1 conspiracy to defraud; (8) aiding and abetting; and (9) breach of malfeasance agreement.
2 *Produce Pay, Inc. v. Vantaggio Farming Corporation*, Case No. 2020-09-54, 2020 WL
3 66371554 (Del. Ch. Nov. 6, 2020) (Verified Complaint).³

4 On January 22, 2021, Plaintiff filed this action against Defendants Vantaggio and
5 Produce Pay, alleging twelve causes of action for: (1) breach of contract; (2) breach of
6 PACA; (3) breach of fiduciary duty; (4) goods had and received; (5) open book account;
7 (6) conversion; (7) civil theft, California Penal Code sections 496(a) and (c); (8)
8 accounting; (9) violation of the Uniform Fraud Transfer Act, California Civil Code sections
9 3439, *et seq.*; (10) violation of California’s Business & Professions Code section 17200
10 (the “UCL”); (11) violation of Chapter 7 of the California Food & Agricultural Code (the
11 “Produce Dealer Act”); and (12) unjust enrichment and constructive trust. ECF No. 1
12 (“Compl.”). On January 26, 2021, Vantaggio executed a waiver of service of the summons
13 pursuant to Rule 4(d) of the Federal Rules of Civil Procedure. ECF No. 16 at 2.

14 On February 16, 2021, Produce Pay filed a Motion to Dismiss Plaintiff’s claims for:
15 (1) breach of contract; (2) breach of fiduciary duty; (3) goods had and received; (4) open
16 book account; (5) civil theft; (6) accounting; and (7) the UCL. *See* ECF No. 4 at 1. Produce
17 Pay answered the remaining claims for: (1) breach of PACA; (2) conversion; (3) violation
18 of the Uniform Fraudulent Transfer Act; (4) violation of the Produce Dealer Act; and (12)
19 unjust enrichment and constructive trust. *See generally* ECF No. 5. On March 29, 2021,
20 the deadline for Vantaggio’s to respond to the Complaint expired, with no response from
21 Vantaggio. *See* ECF No. 16 at 2; *see also* FED. R. CIV. P. 4(d)(3). On July 22, 2021,
22 Plaintiff filed an Application for Entry of Default against Vantaggio, which was entered by
23 the Clerk of Court on July 23, 2021. ECF Nos. 16, 17.

24 On September 20, 2021, the Court issued an Order, *see* ECF No. 18 (the “Dismissal
25 Order”), granting Produce Pay’s Motion to Dismiss. The Court dismissed *with prejudice*,
26 Plaintiff’s claims against Produce Pay for: (1) breach of contract; (2) open book account;

27 ³ The Court will refer to the complaint filed in this separate litigation as the “Delaware
28 Complaint.”

1 and (3) violation of California’s UCL under the fraudulent prong. *Id.* The Court also
2 dismissed *with prejudice*, Plaintiff’s allegations that Vantaggio and Produce Pay have an
3 agency/principal, master/servant, employer/employee, or joint venture relationship. *Id.*
4 The Court dismissed *with leave to amend* Plaintiff’s claims for: (1) breach of fiduciary
5 duty; (2) goods had and received; (3) civil theft; (4) accounting; and (5) violations of the
6 UCL under the unfair and unlawful prongs. *See generally id.* The Court also took judicial
7 notice of the Delaware Complaint, because it is a document of public record, but did not
8 take judicial notice of the factual allegations therein. *Id.* at 4 n.4.

9 On October 4, 2021, Plaintiff filed the First Amended Complaint (the “FAC”)
10 alleging the same twelve causes of action but amended the goods had and received claim
11 to goods *and money* had and received, and did not name Produce Pay in its claims for (1)
12 breach of contract; (2) breach of fiduciary duty; (3) open book account; and (4) accounting.
13 *See generally* FAC. Produce Pay responded by filing the instant Motion to Dismiss,
14 seeking to dismiss *with prejudice* Plaintiff’s remaining claims. ECF No. 23-1 (“Motion”).
15 Plaintiff filed an Opposition and Produce Pay replied. ECF Nos. 24, 25.

16 **III. LEGAL STANDARD**

17 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be
18 dismissed when a plaintiff’s allegations fail to set forth a set of facts which, if true, would
19 entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007);
20 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible
21 to survive a motion to dismiss). The pleadings must raise the right to relief beyond the
22 speculative level; a plaintiff must provide “more than labels and conclusions, and a
23 formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S.
24 at 555. On a motion to dismiss, a court accepts as true a plaintiff’s well-pleaded factual
25 allegations and construes all factual inferences in the light most favorable to the plaintiff.
26 *Manzarek*, 519 F.3d at 1031. However, a court is not required to accept as true legal
27 conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

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1 **IV. DISCUSSION**

2 Produce Pay seeks to dismiss all remaining claims lodged against it and set forth in
3 the FAC. Produce Pay also seeks to dismiss all allegations that it and Vantaggio had an
4 alter ego type relationship and argues that without these allegations, Plaintiff cannot
5 maintain any claims against it.

6 **A. Claims Previously Dismissed with Prejudice**

7 On September 20, 2021, the Court dismissed *with prejudice* Plaintiff's claims for:
8 (1) breach of contract; (2) open book account; and (3) UCL violations based on the
9 fraudulent prong. See ECF No. 18 at 8–9, 19–20, 25. The Court also dismissed with
10 prejudice Plaintiff's allegations that Produce Pay and Vantaggio "have any sort of
11 agency/principal, employer/employee, master/servant, or joint venture relationship." *Id.* at
12 29. Despite this Court's prior order, Plaintiff's FAC re-alleges an agency/principal,
13 master/servant, and employee/employer relationship between Produce Pay and Vantaggio.
14 FAC at 3, ¶ 7; 12, ¶ 59; 13, ¶ 66. Because these allegations were dismissed *with prejudice*,
15 they will be disregarded. See *Virgen v. Mae*, No. CIV S-06-0341-FCD-DAD-PS, 2007
16 WL 1521553, at *8 (E.D. Cal. May 23, 2007), *R. & R. adopted sub nom. Virgen v. Sallie*
17 *Mae*, No. CVS 06-0341-FCD-DAD-PS, 2007 WL 1821414 (E.D. Cal. June 25, 2007)
18 (holding that a claim dismissed *with prejudice* and re-alleged "was irrelevant and w[ould]
19 be disregarded."). As to Plaintiff's claims for breach of contract and open book account,
20 these claims are re-alleged as to Vantaggio only. FAC at 6, 9. Any arguments by Produce
21 Pay that Plaintiff improperly alleged these claims will also be disregarded, because Plaintiff
22 clearly alleges them against only Vantaggio. Plaintiff's UCL claim is addressed below.

23 **B. UCL Claim**

24 In the Court's Dismissal Order, Plaintiff's claim for violation of the UCL based on
25 the fraudulent prong was dismissed *with prejudice*. ECF No. 18 at 25. Violations based
26 on the unlawful and unfair prongs were also dismissed, but not *with prejudice*. *Id.* at 28.
27 However, Plaintiff seeks to dismiss its UCL claim stating "[i]n light of the Court's ruling
28 regarding the remedies available under the UCL, restitution and injunctive relief, [Plaintiff]

1 is willing to dismiss this claim without prejudice.” ECF No. 24 (“Oppo.”) at 24. Plaintiff
2 further “requests leave of the Court to dismiss this claim without prejudice pursuant to Rule
3 15(a)(2).” Oppo. at 24. Federal Rule of Civil Procedure 15(a)(2) states that “a party may
4 amend its pleading only with the opposing party’s written consent or the court’s leave. The
5 court should freely give leave when justice so requires.” Produce Pay makes no objections
6 to Plaintiff’s proposed and voluntary dismissal and therefore, the Court **GRANTS**
7 Plaintiff’s request and **DISMISSES** the UCL claim under the unlawful and unfair prongs
8 *without prejudice* as to Produce Pay.

9 **C. Breach of Fiduciary Duty**

10 Plaintiff’s prior claim for breach of fiduciary duty was dismissed *without prejudice*
11 in the Court’s prior Dismissal Order. ECF No. 18 at 10–17. Plaintiff’s FAC indicates that
12 Plaintiff brings its claim for breach of fiduciary duty against Vantaggio and not Produce
13 Pay. *See* FAC at 8; *Cf.* Compl. at 6. Although Plaintiff indicates that Produce Pay is
14 involved in the claim—based on Plaintiff’s use of the term Defendants—Plaintiff’s
15 Opposition does not address Produce Pay’s arguments regarding the breach of fiduciary
16 duty. *See* generally Oppo. Accordingly, although it is clear the FAC does not allege breach
17 of fiduciary duty against Produce Pay, to the extent it does, that claim is **DISMISSED** *with*
18 *prejudice*.

19 **D. Alter Ego Allegations**

20 To plead an alter ego relationship between two entities, the plaintiff must allege facts
21 sufficient to plausibly show: (1) “there is such unity of interest and ownership that the
22 separate personalities of the two entities no longer exist,” and (2) “failure to disregard their
23 separate identities would result in fraud or injustice.” *Ranza v. Nike, Inc.*, 793 F.3d 1059,
24 1073 (9th Cir. 2015); *see also Leek v. Cooper*, 194 Cal. App. 4th 399, 417 (2011). “[A]
25 plaintiff must allege specific facts supporting both of the necessary elements.” *Gerritsen*
26 *v. Warner Bros. Ent. Inc.*, 116 F. Supp. 3d 1104, 1136 (C.D. Cal. 2015); *see also In re*
27 *Packaged Seafood Prod. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1062 (S.D. Cal. 2017)
28 (Sammartino, J.); *Cork v. CC-Palo Alto, Inc.*, 534 F. Supp. 3d 1156, 1191 (N.D. Cal. 2021)

1 (striking “Plaintiff’s alter ego allegations[, which] consists of two sentences” without leave
2 to amend as “[t]hese are the type of conclusory allegations that will not suffice.”). Courts
3 may consider several factors in determining whether two entities have a unity of interest
4 and ownership, including:

5
6 (1) inadequate capitalization, (2) commingling of funds and other assets, (3)
7 disregard of corporate formalities and failure to maintain an arm’s length
8 relationship, (4) holding out by one entity that is liable to the debts of the
9 other, (5) identical equitable ownership, (6) use of the same offices and
10 employees, (7) lack of segregation of corporate records, (8) manipulating
11 assets between entities so as to concentrate the assets in one and the liabilities
12 in another, and (9) identical directors and officers.

13 *City & Cty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 635 (N.D. Cal.
14 2020) (citing *Daewoo Elecs. Am. Inc. v. Opta Corp.*, 875 F. 3d 1241, 1250 (9th Cir. 2017)).

15 This Court’s prior Dismissal Order dismissed *with prejudice* any allegations of an
16 “agency/principal, employer/employee, master/servant, or joint venture relationship”
17 between Produce Pay and Vantaggio as abandoned by Plaintiff. ECF No. 18 at 29.
18 However, the Court went on to analyze Plaintiff’s allegations of an alter ego and/or a single
19 enterprise relationship between the Defendants and those allegations were dismissed, but
20 not *with prejudice*. *Id.* at 35.

21 Produce Pay argues that Plaintiff “generically pleads that Produce Pay was the alter
22 ego of [Vantaggio],” but fails “to plead any facts to support or develop this allegation.”
23 Motion at 27. Produce Pay contends that Plaintiff abandoned its alter ego allegations based
24 on its failure to re-plead them following this Court’s Dismissal Order and therefore, these
25 allegations should be dismissed *with prejudice*. *Id.* Plaintiff argues that the FAC’s
26 allegations regarding Vantaggio’s insolvency and Produce Pay’s control over operations
27 and finances are sufficient to allege an alter ego or single enterprise liability claim at the
28 pleadings stage. *Oppo.* at 21–22. Specifically, Plaintiff points to Vantaggio’s alleged
undercapitalization and insolvency, Produce Pay and Vantaggio’s commingling/improper

1 transfer of funds, and that Produce Pay used Vantaggio as a mere shell/conduit for a single
2 vertically integrated venture. *Id.* Produce Pay replies that the FAC’s allegations are
3 unsubstantiated and “still conflict with other factual averments in the [FAC].” ECF No. 25
4 (“Reply”) at 6. Produce Pay also contends that Plaintiff fails to allege how Produce Pay
5 diverted the funds from Plaintiff. *Id.* Produce Pay points out that ownership is mentioned
6 only minimally in the FAC and not with respect to Produce Pay and Vantaggio. *Id.* at 6–
7 7. Finally Produce Pay reiterates its argument that all claims against Produce Pay rest on
8 the theory that it controlled Vantaggio and without this theory, the Court should dismiss
9 all claims against Produce Pay. *Id.* at 7.

10 The Court finds that Plaintiff sufficiently substantiated its allegations that an alter
11 ego relationship existed between Produce Pay and Vantaggio. Although the original
12 Complaint made conclusory statements regarding Produce Pay’s dominion and control
13 over Vantaggio, the FAC now supports those contentions with additional factual
14 allegations, allowing the Court to draw plausible inferences. First, the FAC alleges that:
15 (1) Vantaggio was undercapitalized and is now insolvent, lacking the funds to pay Plaintiff;
16 (2) Produce Pay used Vantaggio as an instrumentality or conduit for a single venture to
17 divert Plaintiff’s proceeds from Vantaggio to Produce Pay, and (3) Produce Pay
18 manipulated or controlled the finances of Vantaggio to obtain the assets for itself, leaving
19 Vantaggio with the debt. FAC at 5, ¶ 17. The FAC then, more specifically, alleges how
20 attached invoices, checks, and emails show that: (1) Produce Pay was intimately involved
21 in the internal operations of Vantaggio and controlled how payments were directed; (2) the
22 proceeds payments were for the type of produce supplied only by Plaintiff during the time
23 in question; and (3) checks were made out to Vantaggio but delivered to a Produce Pay
24 office address and deposited into a Produce Pay bank account. *Id.* at 4, ¶ 15–16; 5, ¶ 18;
25 *see also* Ex. 1 to FAC. Finally, the FAC alleges that: (1) Vantaggio personnel confirmed
26 the funds at issue were delivered to Produce Pay upon demand; (2) the funds were retained
27 by Produce Pay, despite a request to release them to Plaintiff; and (3) Produce Pay asserted
28 dominion and control over all of Vantaggio’s proceeds of sale from Plaintiff’s produce.

1 *See id.*

2 The Court finds the substantiated allegations in the FAC invoke several factors set
3 forth above and used to determine the unity of interest and common ownership element of
4 an alter ego claim. *See Purdue Pharma*, 491 F. Supp. at 635. First, Plaintiff alleges that
5 Vantaggio’s inadequate capitalization and insolvency resulted from Produce Pay’s
6 interference with the funds Vantaggio received. FAC at 5, ¶ 17. From this, the Court can
7 plausibly infer that Produce Pay’s alleged control over and diversion of Vantaggio’s funds
8 led to the insolvency. Second, the invoices, emails, and checks (made out to Vantaggio
9 but allegedly addressed to Produce Pay) allow the Court to plausibly infer that Produce Pay
10 was intimately involved in Vantaggio’s finances, and that some unity of interest existed
11 with respect to the purported invoices and proceeds. For example, the subject line of two
12 payment related emails detailing certain purported invoices read “Vantaggio Farming
13 (Produce Pay) – Huron Produce payment details attached” *See* Ex. 1 to FAC at 1, 3.
14 These emails show payment details including invoice numbers, and above the invoice
15 numbers, the documents read “Vantaggio (“Produce Pay Inc.)” *Id.* Plaintiff also alleges
16 that the invoices involve the type of bell peppers that, during the relevant time, only
17 Plaintiff delivered to Vantaggio. *See id.* at 1, 3, 10, 12 (showing two invoices involving
18 yellow, red, and/or orange bell peppers that match certain invoice details in the attached
19 emails). The Vantaggio name followed by the Produce Pay name (in parentheses), in
20 emails regarding invoices that detailed the type of bell peppers delivered to Vantaggio
21 (only by Plaintiff), allow for the plausible inference that the companies have a common
22 interest in Vantaggio’s proceeds resulting from Plaintiff’s delivery of bell peppers. *See id.*
23 Third, allegations that the checks were made out to Vantaggio but addressed to a Produce
24 Pay location in Los Angeles create a plausible inference that Defendants share at least one
25 office, where funds are delivered. *See id.* at 4–6. Plaintiff also alleges that Vantaggio
26 personnel confirmed Produce Pay’s receipt of Plaintiff’s funds upon demand and its refusal
27 to release the funds to Plaintiff when requested. FAC at 5, ¶ 18. These allegations, coupled
28 with the emails and alleged invoices described above, create a plausible inference that

1 funds were commingled or at the very least, the companies were not maintaining an arm's
2 length relationship. Ex. 1 to FAC at 2 (indicating that Produce Pay employees worked with
3 Vantaggio to obtain invoices and close balances respecting Plaintiff's bell peppers). In
4 light of all the allegations described above, the Court can plausibly infer that Produce Pay's
5 alleged manipulation of assets between it and Vantaggio, and Vantaggio's subsequent
6 insolvency, caused the assets at issue to be concentrated in Produce Pay and the debts left
7 to Vantaggio. *See Sundance Image Tech., Inc. v. Inkjetmall.com, Ltd.*, No. 02-cv-02258-
8 B-AJB, 2005 WL 8173279, at *3 (S.D. Cal. Oct. 4, 2005) (listing as factors "the diversion
9 of assets from a corporation by or to a stockholder or other person or entity, to the detriment
10 of creditors, or the manipulation of assets and liabilities between entities so as to
11 concentrate the assets in one and the liabilities in another;" and . . . "the formation and use
12 of a corporation to transfer to it the existing liability of another person or entity.").

13 The FAC's satisfaction of these factors through specific factual allegations—in
14 addition to the general allegations that Produce Pay asserted control over Vantaggio's
15 finances and used Vantaggio as an instrumentality or conduit to intercept the funds—
16 plausibly allege the unity of interest and common ownership element required for
17 Plaintiff's alter ego allegations. Produce Pay does not specifically challenge⁴ the second
18 element required for alter ego allegations and as such, it will not be addressed.

19 As noted in the prior Dismissal Order, Plaintiff failed to allege facts sufficient to
20 plausibly infer an alter ego type relationship. As explained above, however, the FAC
21

22 ⁴ The Court further notes that Produce Pay makes limited arguments regarding the
23 alter ego allegations in its Motion to Dismiss. Any new arguments made in Produce Pay's
24 Reply that are unresponsive to Plaintiff's Opposition, are deemed waived. The Court also
25 notes Produce Pay lodged at least one argument in a footnote. *See* Motion at 24–25 n.6.
26 The Court will not consider new arguments made only in footnotes and the Reply. *See*
27 *also Khoja v. Orexigen Therapeutics, Inc.*, 498 F. Supp. 3d 1296, 1309 (S.D. Cal. Nov. 2,
28 2020) (quoting *Cheever v. Huawei Device USA, Inc.*, No. 18-cv-06715-JST, 2019 WL
8883942, at *3 (N.D. Cal. Dec. 4, 2019)) (explaining that generally, parties waive
"arguments raised only in footnotes, or only on reply . . ."). Regardless, Plaintiff
sufficiently pleads its alter ego allegations.

1 alleges additional facts that support these allegations. Produce Pay points to the verified
2 Delaware Complaint, alleging it shows that Produce Pay purchased bell peppers that were
3 placed with Vantaggio. Motion at 13. As such, Produce Pay disputes Plaintiff's allegation
4 that it was the only entity providing bell peppers to Vantaggio. *Id.* Although the Court
5 took judicial notice of the Delaware Complaint, the Court did not judicially notice "any of
6 the factual allegations contained in the complaint." ECF No. 18 at 4 n.4. The allegations
7 and attachments set forth in the FAC therefore, create factual disputes between the parties
8 regarding Produce's Pay's relationship and dealings with Vantaggio. These factual
9 disputes are inappropriate for resolution on a motion to dismiss. And while the Delaware
10 Complaint "plausibly shows that Produce Pay neither controls nor has any relationship
11 with Vantaggio," Plaintiff's instant FAC plausibly shows otherwise. *See* ECF No. 18 at
12 35; *see generally* FAC. The Complaints at issue set forth conflicting factual allegations,
13 but the Court cannot disregard the FAC here and accept as true all factual allegations
14 lodged by Produce Pay in the Delaware Complaint. Accordingly, the Court **DENIES**
15 Produce Pay's Motion to Dismiss Plaintiff's allegations of alter ego set forth in the FAC.

16 **E. Goods and Money Had and Received**

17 "The count for money had and received states in substance that the defendant is
18 indebted to the plaintiff in a certain sum for money had and received by the defendant for
19 the use of the plaintiff." *Scheibe v. Freeman*, No. 10-cv-01496-H-WMC, 2010 WL
20 11684791, at *4 (S.D. Cal. Sept. 27, 2010) (internal quotation marks and citations omitted).
21 "The essential elements of an action for money and/or goods had and received are '(1) a
22 statement of indebtedness of a certain sum, (2) the consideration made by the plaintiff, and
23 (3) nonpayment of the debt.'" *Id.* (quoting *First Interstate Bank v. State of Cal.*, 197 Cal.
24 App. 3d 627, 635 (1987)). Plaintiff's claim for goods had and received was previously
25 dismissed *without prejudice* in this Court's Dismissal Order. ECF No. 18 at 19; *see also*
26 Compl. at 6. In the FAC, Plaintiff re-alleges the claim against both Produce Pay and
27 Vantaggio, clarifying that the claim is for goods *and* money had and received against both
28 Defendants. FAC at 9.

1 Produce Pay argues that Plaintiff’s FAC fails to allege any additional facts to cure
2 the defects in its original Complaint. Motion at 16. Produce Pay argues Plaintiff merely
3 reasserts the previously dismissed allegations “of receipt, acceptance, resale, collection,
4 and remittance” by Vantaggio. *Id.* at 16. Produce Pay further contends Plaintiff’s
5 contradictory argument that the goods were “delivered to and accepted by Defendants,”
6 does not save the claim, as established in this Court’s prior Dismissal Order. *Id.* at 17.
7 Produce Pay argues that because it never received goods or money from Plaintiff and no
8 contract or agreement ever existed between Plaintiff and Produce Pay, a money had and
9 received claim cannot be sustained. *Id.* at 17–18. Produce Pay points to Exhibit 1 attached
10 to the FAC and notes they are unverified records involving “payments to Vantaggio in Los
11 Angeles for invoices related to bell pepper.” *Id.* at 18. Produce Pay argues “the Delaware
12 Complaint already established that Produce Pay also provided Vantaggio with bell
13 pepper[s],” because those peppers originated from Mexico and the FAC fails to allege the
14 peppers originated from Mexico. *Id.*

15 Plaintiff counters that it sufficiently pleads a claim for money had and received,
16 because the FAC alleges that “Produce Pay received *the money* belonging to [Plaintiff].”
17 *Oppo.* at 18. Plaintiff contends that Produce Pay argues, with no factual support, that it did
18 not receive money for Plaintiff’s produce. *Id.* Plaintiff asserts a claim for money had and
19 received “does not require that the money be given to Produce Pay *by* Plaintiff, only that
20 Produce Pay be in possession of money which, by rights, belongs to Plaintiff.” *Id.* Plaintiff
21 says it sufficiently pleads that Produce Pay intercepted the money for a money had and
22 received claim by alleging that “[s]aid money did not belong to Produce Pay and was not
23 for [Produce Pay’s] benefit . . . and refused to remit the proceeds of sale of Plaintiff’s
24 produce which belong to Plaintiff and in which Produce Pay has no right or interest.” *Id.*
25 Produce Pay replies that the money had and received claim should still be dismissed,
26 because there is “no colorable allegation that Produce Pay received anything from Plaintiff,
27 and sums owed to Produce Pay by Vantaggio are not proper grounds.” Reply at 8.

28 In its original Complaint, Plaintiff alleged that Defendants received, accepted, and

1 sold Plaintiff's goods (*i.e.*, the bell peppers) and refused to remit the proceeds to Plaintiff.
2 Compl. at 6, ¶ 35. However, the FAC alleges that only Vantaggio accepted and resold
3 Plaintiff's goods. FAC at 4–5, ¶¶ 11–17; 9, ¶ 41. The FAC further pleads that both
4 “Produce Pay and Vantaggio caused the proceeds from the sale of Plaintiff's produce,
5 which were at all times property of Plaintiff, to be delivered to Produce Pay in Los Angeles,
6 rather than Vantaggio, for remittance to Plaintiff and then deposited into a bank account
7 controlled by and in Defendant Produce Pay's name.” *Id.* at 4, ¶ 16; 9, ¶ 41. Finally,
8 Plaintiff alleges that “Vantaggio personnel have . . . confirmed that [said] funds were
9 delivered to Produce Pay upon its demand, and were retained by Produce Pay, despite
10 request to release the funds for payment to Plaintiff (because Produce Pay had no right to
11 retain Plaintiff's funds.)” *Id.* at 5, ¶ 18. The Court finds these allegations—coupled with
12 the alter ego allegations that Produce Pay controlled and directed Plaintiff's profits from
13 Vantaggio to itself—sufficient to state a claim for money had and received.

14 The conclusory and contradictory allegations in the original Complaint that
15 “Defendants transferred the produce or proceeds from of sale to Produce Pay,” are cured
16 in the FAC because there, the allegations assert that Produce Pay interjected itself in
17 Vantaggio's finances to divert and retain funds belonging to Plaintiff to Produce Pay's
18 bank account. *Id.* at 4, ¶ 16; 9, ¶ 41. To the extent Plaintiff alleges a goods had and received
19 claim, that claim is dismissed *with prejudice* as to Produce Pay, because there are no
20 allegations that Produce Pay received the bell peppers (*i.e.*, the goods) at issue. However,
21 a money had and received claim and a goods had and received claim are different causes
22 of action. *Compare* CACI 371 *with* CACI 370. The fact that Plaintiff pleads itself out of
23 a goods had and received claim against Produce Pay, based on the implausibility that
24 Produce Pay received Plaintiff's *goods*, does not make it implausible that Produce Pay
25 received Plaintiff's *money*. *Id.*

26 “A cause of action for money had and received is stated if it is alleged [that] the
27 defendant is indebted to the plaintiff in a certain sum for money had and received by the
28 defendant for the use of the plaintiff.” *Avidor v. Sutter's Place, Inc.*, 212 Cal. App. 4th

1 1439, 1454 (2013) (internal quotation marks and citations omitted). Plaintiff’s money had
2 and received claim does not require that the money at issue be given to Produce Pay by
3 Plaintiff directly. *Mains v. City Title Ins. Co.*, 34 Cal.2d 580, 586 (1949) (“[A money had
4 and received claim] may be brought ‘... wherever one person has received money which
5 belongs to another, and which “in equity and good conscience,” or in other words, in justice
6 and right, should be returned.”); *Gutierrez v. Girardi*, 194 Cal. App. 4th 925, 937 (2011)
7 (quoting *Weiss v. Marcus*, 51 Cal.App.3d 590, 599 (1975)) (explaining that a money had
8 and received claim “lies wherever one person has received money which belongs to
9 another, and which in equity and good conscience should be paid over to the latter.”);
10 *Utility Audit Co., Inc. v. City of Los Angeles*, 112 Cal. App. 4th 950, 958 (2003) (“A claim
11 for money had and received can be based upon money paid by mistake, money paid
12 pursuant to a void contract, or a performance by one party of an express contract.”).

13 Read in the light most favorable to Plaintiff, Produce Pay allegedly retained
14 Plaintiff’s money through control of Vantaggio, by diverting checks that were seemingly
15 made out to Vantaggio but addressed to a Produce Pay location, and those checks were
16 subsequently deposited into Produce Pay’s bank account. FAC 4–5, ¶¶ 16–18. Plaintiff
17 pleads additional supporting facts that Vantaggio’s employees confirmed Produce Pay’s
18 receipt of Plaintiff’s funds and did not release the funds to Plaintiff upon request. *Id.* at 5,
19 ¶ 18. These facts are sufficient to state a claim for money had and received against Produce
20 Pay, because the allegations plausibly indicate that: (1) Plaintiff provided bell peppers to
21 Vantaggio; (2) Plaintiff did not receive the proceeds it was entitled to (totaling at least
22 \$295,864.67); and (3) Produce Pay obtained possession of the subject proceeds, which
23 belong to Plaintiff. In addition, Produce Pay’s contentions regarding the Delaware
24 Complaint—that both Produce Pay and Plaintiff sold bell peppers to Vantaggio—and that
25 the FAC’s attached Exhibits are “unverified,” would require the Court to evaluate and
26 weigh evidence to resolve a material factual dispute—that would be improper at this stage
27 in the proceedings. *Cf. Colby v. Newman*, No. CV 11-07413-JGB-RZx, 2013 WL
28 12124390, at *28 (C.D. Cal. June 11, 2013) (denying a motion for summary judgment

1 based on conflicting factual contentions and evidence regarding a money had and received
2 claim). Accordingly, the Court **DENIES** Produce Pay’s Motion to Dismiss Plaintiff’s
3 money had and received claim.

4 **F. Civil Theft**

5 “A claim for civil theft in California ultimately rests on whether a plaintiff
6 establishes that a defendant committed theft as defined by California Penal Code section
7 484.” *GEC US 1 LLC v. Frontier Renewables, LLC*, No. 3:16-cv-01276-YGR, 2016 WL
8 4677585, at *9 (N.D. Cal. Sept. 7, 2016) (citing *Bell v. Feibush*, 212 Cal. App. 4th 1041,
9 1049 (2013)). A person is guilty of theft where he or she, *inter alia*, (1) feloniously steals,
10 takes, carries, or drives “away the personal property of another;” (2) “fraudulently
11 appropriate[s] property which has been entrusted to him or her,” or (3) “knowingly and
12 designedly, by any false or fraudulent representation or pretense, defraud[s] any other
13 person of money . . . or personal property.” CAL. PENAL CODE § 484. “To establish theft
14 under Section 484, a defendant must have the specific ‘felonious’ intent to deprive the
15 owner of his or her property.” *GEC*, No. 3:16-cv-01276-YGR, 2016 WL 4677585, at *9
16 (dismissing the plaintiffs’ civil theft claim without prejudice because “[a]bsent adequate
17 allegations of the requisite specific intent, the FAC [did] not state a plausible claim for civil
18 theft”) (citing *People v. Avery*, 27 Cal.4th 49, 58 (2002)). “The requisite intent is a specific
19 intent to steal and cannot be established if a defendant has a ‘good faith claim of right’ to
20 possession.” *Id.* (citing *People v. Davis*, 19 Cal. 4th 301, 305 (1998)). Plaintiff’s claim
21 for civil theft was previously dismissed *without prejudice* in this Court’s Dismissal Order.
22 ECF No. 18 at 22; *see also* Compl. at 7. In the FAC, Plaintiff re-alleges the claim against
23 both Defendants. FAC at 10.

24 Produce Pay argues that Plaintiff’s claim for Civil Theft against it does not state a
25 claim because the FAC: (1) fails “to allege that Produce Pay ‘feloniously’ stole, took,
26 carried, or drove ‘away the person property’” of Plaintiff; and (2) fails to plead “that
27 Produce Pay possessed the requisite intent to steal.” Motion at 22–23. Produce Pay argues
28 the documents attached to the FAC and purported to be invoices are unverified, and that

1 the allegations cannot state a claim for legal theft, because Plaintiff’s contention that only
2 it delivered bell peppers to Vantaggio is false. *Id.* at 22. Produce Pay further contends that
3 Plaintiff cannot establish Produce Pay’s receipt of bell peppers, because the peppers were
4 delivered to Vantaggio. *Id.* at 22–23. Produce Pay argues that because it “also provided
5 Vantaggio with bell pepper[s], Plaintiff’s allegations regarding Produce Pay’s dealings in
6 bell pepper[s] cannot establish a plausible claim that Produce Pay possessed the requisite
7 intent to steal.” *Id.* at 23. Produce Pay further explains that it “had every right to conduct
8 business with Vantaggio involving bell pepper[s] and Plaintiff is wholly unable to
9 articulate why or how those dealings involve Plaintiff or injured Plaintiff.” *Id.*

10 Plaintiff counters that the FAC sufficiently pleads a claim for civil theft, citing
11 various allegations in the FAC. *Oppo.* at 19–20. Plaintiff also argues that the Produce Pay
12 relies on improper extrinsic fact in its Motion to Dismiss, and that even if the Court were
13 to consider the evidence, Produce Pay’s argument would fail. *Id.* at 19. Plaintiff explains
14 that the evidence attached to Produce Pay’s Motion shows that it delivered green bell
15 peppers (not red, yellow, or orange as delivered by Plaintiff) during August 2020 and not
16 in late 2019 and the first quarter of 2020 (the relevant time period in this case). *Id.* The
17 Court will not resolve this factual dispute.

18 The Court previously dismissed the claim for civil theft because the original
19 Complaint failed to state sufficient facts to plausibly show that: (1) Produce Pay obtained
20 Plaintiff’s property, and (2) Produce Pay possessed the requisite specific intent required
21 for civil theft. ECF No. 18 at 22. The Court finds that Plaintiff’s FAC substantiates its
22 claim for civil theft. First, although Produce Pay argues that Plaintiff again fails “to provide
23 facts which demonstrate that [Plaintiff] was the sole provider of bell pepper[s] to
24 Vantaggio,” the FAC clearly states that during the requisite time period, Plaintiff was the
25 only provider of yellow, red, and orange bell peppers. FAC at 5, ¶ 18. In addition, the
26 invoices attached to the FAC are for bell peppers, two of which are cited in email
27 discussions involving Produce Pay and Vantaggio employees. *See id.*; Ex. 1 to FAC at 1,
28 3, 10, 12. It is plausible that if Plaintiff was the sole provider of bell peppers to Vantaggio

1 during the time in question, Produce Pay was aware the proceeds identified in the purported
2 emails/invoices involved bell peppers and therefore, did not belong to Produce Pay. The
3 FAC also alleges that the checks for Plaintiff’s produce were made out to Vantaggio but
4 delivered to a Produce Pay office in Los Angeles and deposited into a bank account
5 controlled by and in Produce Pay’s name. FAC at 4, ¶ 16. This indicates the funds were
6 allegedly obtained in a felonious manner through representations that Vantaggio received
7 them, when in reality, Produce Pay received them. This inference is further supported by
8 Plaintiff’s allegation that “Vantaggio personnel . . . confirmed . . . the[] funds were
9 delivered to Produce Pay upon its demand, and were retained by Produce Pay, despite
10 request to release the funds for payment to Plaintiff (because Produce Pay had no right to
11 retain Plaintiff’s funds).” *Id.* at 5, ¶ 18.

12 Produce Pay’s arguments disregard the fact that in resolving its Motion to Dismiss,
13 this Court must liberally construe and accept as true the allegations set forth in Plaintiff’s
14 FAC. *See Beaver v. Omni Hotels Mgmt. Corp.*, No. 20-cv-00191-AJB-KSC, 2021 WL
15 5042116, at *2 (S.D. Cal. Oct. 29, 2021) (assuming the truth of the allegations and the
16 reasonable inferences drawn therefrom in denying a motion to dismiss an alter ego theory
17 of liability). Produce Pay improperly relies on the contention that it also provided
18 Vantaggio with bell peppers, which directly conflicts with allegations in the FAC. As
19 discussed *supra*, at this stage in the proceedings, the Court will not engage in resolving
20 factual disputes as to whether and/or when Produce Pay provided bell peppers (including
21 of what type) to Vantaggio. Accordingly, the Court rejects Produce Pay’s arguments and
22 **DENIES** its Motion to Dismiss Plaintiff’s claim for civil theft.

23 **G. Timeliness of Arguments Not Raised in Prior Motion to Dismiss**

24 Generally, a defense asserted in a Rule 12(b)(6) motion to dismiss must be made
25 before filing an answer. *See Fed. R. Civ. P. 12(b)(6). Pascal v. Concentra, Inc.*, No. 19-
26 cv-02559-JCS, 2020 WL 4923974, at *2 (N.D. Cal. Aug. 21, 2020)). “[A]lthough an
27 amended complaint ordinarily supercedes [sic] the original pleading, it does not
28 automatically revive defenses and objections a defendant has waived in response to the

1 original complaint.” *Brooks v. Caswell*, No. 3:14-cv-01232-AC, 2016 WL 866303, at *2
2 (D. Or. Mar. 2, 2016) (citations omitted). “[A] defendant may attack only new allegations
3 or claims not contained in the original complaint.” *Id.* (citations omitted). If an amended
4 complaint merely substantiates claims previously alleged, “[a]llowing a post-answer
5 motion to dismiss” the complaint “would render the Rule 12(b) restriction on post-answer
6 motions meaningless.” *Id.* at *3. Essentially, post-answer motions to dismiss can only be
7 heard to the extent the arguments set forth were not previously available to the moving
8 party. *See Pascal v. Concentra, Inc.*, No. 19-cv-02559-JCS, 2020 WL 4923974, at *2
9 (N.D. Cal. Aug. 21, 2020) (explaining that the defendant’s “challenges under Rule 12(b)(6)
10 are not aimed at any new material in the SAC and therefore its objections have already
11 been waived.”).

12 The only Ninth Circuit case on the matter is an unpublished opinion, where the Court
13 affirmed a district court’s decision to consider a post-answer motion but provided no
14 discussion or analysis on the matter. *Adesanya v. I.N.S.*, 996 F.2d 1223 (9th Cir. 1993).
15 Lower courts have found this opinion unpersuasive. *See Brooks*, No. 3:14-cv-01232-AC,
16 2016 WL 866303, at *3 (citing *Fed. Agr. Mortg. Corp. v. It’s A Jungle Out There, Inc.*,
17 No. C 03-3721-VRW, 2005 WL 3325051, at *5 (N.D. Cal. Dec. 7, 2005)). Even so, certain
18 district courts have entertained post-answer motions to dismiss amended complaints for the
19 purpose of judicial economy or based on distinguishing factors. *See Fed. Agr. Mortg.*
20 *Corp. v. It’s A Jungle Out There, Inc.*, No. C 03-3721 VRW, 2005 WL 3325051, at *5
21 (N.D. Cal. Dec. 7, 2005); *Parra, Tr. of Laura E. Parra Revocable Tr. Dated Sept. 9, 1994*
22 *v. Parra*, No. 20-cv-00839-DMS-JLB, 2021 WL 2038323, at *3 (S.D. Cal. May 20, 2021).
23 Here, however, entertaining Produce Pay’s motion to dismiss claims asserted in the original
24 complaint weighs against judicial economy, because Produce Pay waived those arguments
25 previously available to it. If the Court were to dismiss these claims based on previously
26 waived arguments, it would likely do so *without prejudice*, leaving the potential for a
27 second amended complaint and a subsequent motion to dismiss.

28 Produce Pay cites *Parra* to argue that its Motion, arguing to dismiss previously

1 answered claims, should be considered based on Plaintiff’s new factual allegations. Reply
2 at 4 (citing *Parra*, No. 20-cv-00839-DMS-JLB, 2021 WL 2038323, at *2). In *Parra*, the
3 court heard an untimely motion to dismiss and converted it into a motion for judgment on
4 the pleadings in a land inheritance dispute, because a material fact changed while litigation
5 was pending. *Parra*, No. 20-cv-00839-DMS-JLB, 2021 WL 2038323, at *3. That is not
6 the case here, where Plaintiff substantiated its existing claims with certain factual
7 allegations. Although Produce Pay argues the Court may convert the instant Motion to
8 Dismiss into a motion for judgment on the pleadings, *see* Reply at 4, that would be
9 inappropriate given the factual disputes at issue.

10 The Court follows the general rule that only new allegations—and arguments
11 previously unavailable—can be considered in resolving the remainder of Produce Pay’s
12 Motion to Dismiss. *See Rowley v. McMillan*, 502 F.2d 1326, 1333 (4th Cir. 1974) (“[W]e
13 agree, that an amendment to the pleadings permits the responding pleader to assert only
14 such of those defenses which may be presented in a motion under Rule 12 as were not
15 available at the time of his response to the initial pleading. An unasserted defense available
16 at the time of response to an initial pleading may not be asserted when the initial pleading
17 is amended.”). Although the FAC largely substantiates the claims asserted in the original
18 complaint, to the extent Produce Pay bases its arguments on new factual allegations, the
19 Court will consider only those arguments. The Court otherwise rejects arguments
20 previously available to Produce Pay as waived and untimely.

21 i. PACA Violation

22 Plaintiff’s PACA claim was originally filed against both Produce Pay and
23 Vantaggio. Compl. at 5. Produce Pay did not challenge the PACA claim in its original
24 Motion to Dismiss, and the FAC re-alleges the PACA claim against both Defendants. FAC
25 at 6. Produce Pay argues that Plaintiff’s PACA claim fails, because the Court already held
26 there was no contract between Produce Pay and Plaintiff, and PACA requires some form
27 of contract or agreement. The Court will not address this argument, because Produce Pay
28 cites to a portion of the FAC that was also included in the original Complaint. Motion at

1 10 (citing FAC at 7, ¶ 29); *see also* Compl. at 5, ¶ 26. This defense was available to
2 Produce Pay when it filed its original motion to dismiss, evidenced by Produce Pay’s
3 challenge to Plaintiff’s breach of contract claim and argument that no contract existed
4 between Produce Pay and Plaintiff.

5 Produce Pay also argues that Plaintiff included allegations of agency/principal,
6 employer/employee, master/servant, and join venture relationship, which this Court
7 already dismissed *with prejudice*. Motion at 11, 14. However, Produce Pay ignores the
8 fact that the Court did not dismiss *with prejudice* allegations of alter ego, which the Court
9 now finds are stated with sufficiency in Plaintiff’s FAC. *See supra* at Part IV.D.

10 Finally, Produce Pay argues that Plaintiff’s mischaracterization that Vantaggio
11 received bell peppers from only Plaintiff is false. Motion at 12–14. Produce Pay contends
12 that the Court already took judicial notice of the Delaware Complaint, which shows (among
13 other things) that Vantaggio dealt with bell peppers in relation to Produce Pay as well. *Id.*
14 at 13. As discussed *supra*, the Court finds this allegation creates a factual dispute between
15 the parties inappropriate for resolution on a motion to dismiss. Accordingly, the Court
16 **DENIES** Produce Pay’s Motion to Dismiss Plaintiff’s PACA claim.

17 ii. Conversion

18 Plaintiff’s conversion claim was originally filed against both Produce Pay and
19 Vantaggio. Compl. at 7. Produce Pay did not challenge the conversion claim in its original
20 Motion to Dismiss and the FAC re-alleges the claim against both Defendants. FAC at 10.
21 Produce Pay now argues that the FAC fails to allege Plaintiff is an intended beneficiary for
22 purposes of PACA’s trust provisions. Motion at 20. This argument was available to
23 Produce Pay when Plaintiff filed its original Complaint, which alleged “Plaintiff is an
24 intended beneficiary under PACA.” Compl. at 6, ¶ 28. The Court, therefore, rejects this
25 argument as waived and untimely.

26 Produce Pay also reiterates its argument that it too provided Vantaggio with bell
27 peppers, making false Plaintiff’s claim that the proceeds from the bell peppers in question
28 belonged to Plaintiff. As stated *supra*, the Court will not resolve the factual dispute

1 regarding whether and/or when Produce Pay provided bell peppers to Vantaggio.
2 Accordingly, the Court **DENIES** Produce Pay’s Motion to Dismiss Plaintiff’s conversion
3 claim.

4 iii. Uniform Fraudulent Transfer Act

5 Plaintiff’s claim under the Uniform Fraudulent Transfer Act was originally filed
6 against both Produce Pay and Vantaggio. Compl. at 9. Produce Pay did not challenge the
7 claim in its original Motion to Dismiss, and the FAC re-alleges the claim against both
8 Defendants. FAC at 13. Produce Pay again argues that Plaintiff was not the only one to
9 provide Vantaggio with bell peppers. Motion at 24. Produce Pay further argues that “no
10 special relationship exists between Produce Pay and Vantaggio.” *Id.* As stated *supra*, the
11 Court: (1) holds that Plaintiff sufficiently states allegations of an alter ego relationship
12 between Produce Pay and Vantaggio; and (2) will not resolve factual disputes involving
13 whether and/or when Produce Pay provided Vantaggio with bell peppers. Accordingly,
14 the Court **DENIES** Produce Pay’s Motion to Dismiss Plaintiff’s claim under the Uniform
15 Fraudulent Transfer Act.

16 iv. Produce Dealer Act

17 Plaintiff’s claim under the Produce Dealer Act was originally filed against both
18 Produce Pay and Vantaggio. Compl. at 11. Produce Pay did not challenge the claim in its
19 original Motion to Dismiss, and the FAC re-alleges the claim against both Defendants.
20 FAC at 15. Produce Pay argues that “allegations regarding any failure by Produce Pay to
21 account to Plaintiff cannot form the basis for Plaintiff’s” claim, because there are no “facts
22 sufficient to show that Produce Pay undertook unfair or unlawful business practices.”
23 Motion at 25–26. Produce Pay points to the Delaware Complaint and argues it “identifies
24 Produce Pay as an unpaid creditor of Vantaggio, a supplier of bell peppers and other
25 Produce to Vantaggio, and a party to a written contract with Vantaggio providing Produce
26 Pay the right to receive payment from Vantaggio in connection with the parties Produce
27 dealings.” *Id.* at 26. Produce Pay contends the business relationship between it and
28 Vantaggio “cannot possibly be injurious to Plaintiff.” *Id.*

1 The Court declines Produce Pay's argument. First, the argument respecting
2 accounting and the Delaware Complaint was available when Plaintiff filed its original
3 Complaint and is therefore waived and untimely. Second, for the reasons described *supra*,
4 the Court will not address any factual disputes between the instant FAC and the Delaware
5 Complaint. To resolve the issue, the Court would need to evaluate whether and when any
6 bell peppers were delivered by Produce Pay to Vantaggio because here, the FAC alleges
7 that during the time in question, Plaintiff was the only supplier of bell peppers to
8 Vantaggio. Accordingly, the Court **DENIES** Produce Pay's Motion to Dismiss Plaintiff's
9 claim under the Produce Dealer Act.

10 v. Unjust Enrichment and Constructive Trust

11 Plaintiff's claim for Unjust Enrichment/Constructive Trust was originally filed
12 against both Produce Pay and Vantaggio. Compl. at 12. Produce Pay did not challenge
13 the claim in its original Motion to Dismiss, and the FAC re-alleges the claim against both
14 Defendants. FAC at 16. Produce Pay once again argues that it too provided Vantaggio
15 with bell peppers, making Plaintiff's allegations "demonstrably wrong." Motion at 27.
16 Produce Pay further argues that the FAC fails to allege "that Produce Pay took anything
17 from Plaintiff or received any property belonging to Plaintiff." *Id.* As established *supra*,
18 the Court has determined that: (1) it will not resolve factual disputes regarding whether and
19 when Produce Pay delivered bell peppers to Vantaggio; and (2) Plaintiff plausibly alleges
20 that Produce Pay wrongfully obtained the bell pepper funds belonging to Plaintiff.
21 Accordingly, the Court **DENIES** Produce Pay's Motion to Dismiss Plaintiff's claim for
22 unjust enrichment and constructive trust.

23 **V. CONCLUSION**

24 For the reasons set forth above, the Court **ORDERS** the following:

25 1. Plaintiff's claims for breach of contract, open book account, and breach of
26 fiduciary duty were re-alleged as to Vantaggio only and are disregarded for purposes of
27 Produce Pay's Motion to Dismiss.

28 2. Plaintiff's re-alleged allegations of an agency/principal, master/servant, and

1 employer/employee relationship between Produce Pay and Vantaggio were previously
2 **DISMISSED** *with prejudice* and remain **DISMISSED** *with prejudice*.

3 3. Plaintiff's UCL claim under the unlawful and unfair prongs is **DISMISSED**
4 *without prejudice* as to Produce Pay. Any claim under the fraud prong of the UCL remains
5 **DISMISSED** *with prejudice*.

6 4. The Motion to Dismiss Plaintiff's allegations of an alter ego relationship
7 between Produce Pay and Vantaggio is **DENIED**.

8 5. The Motion to Dismiss Plaintiff's money had and received claim is **DENIED**.
9 To the extent Plaintiff alleges a *goods* had and received claim against Produce Pay, that
10 claim is **DISMISSED** *with prejudice*.

11 6. The Motion to Dismiss Plaintiff's claim for civil theft is **DENIED**.

12 7. The Motion to Dismiss Plaintiff's PACA claim is **DENIED**.

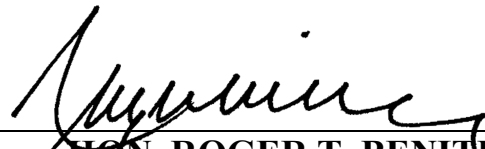
13 8. The Motion to Dismiss Plaintiff's conversion claim is **DENIED**.

14 9. The Motion to Dismiss Plaintiff's Produce Dealer Act claim is **DENIED**.

15 10. The Motion to Dismiss Plaintiff's unjust enrichment and constructive trust
16 claim is **DENIED**.

17 **IT IS SO ORDERED.**

18 DATED: September 7, 2022



HON. ROGER T. BENITEZ
United States District Judge