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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Ken Gazian, et al.,

10 Plaintiffs,

11 v.

12 Wells Fargo Bank NA, et al.,

13 Defendants.

No. CV-13-01312-PHX-DGC

**ORDER**

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15 Plaintiffs Ken Gazian, Pierre Investments, Inc., and Aragadz Foods, Inc. d/b/a  
16 Devanche Jewelers have filed a motion for leave to file a second amended complaint.  
17 Doc. 59. Defendants Hubert Kelly and Kelly and Kelly, P.C. (collectively the “Kelly  
18 Defendants”) have filed a motion to dismiss Defendant Wells Fargo Bank NA’s cross-  
19 claim against them or, in the alternative, to bifurcate. Doc. 60. The motions are fully  
20 briefed. For the reasons that follow, the Court will deny the motion for leave to amend  
21 and deny the motion to dismiss or bifurcate.<sup>1</sup>

22 **I. Background.**

23 Plaintiffs filed this action in Texas state court in October 2012, and it was  
24 removed to the United States District Court for the Northern District of Texas on  
25 October 26, 2012. Doc. 1. On June 28, 2013, Judge O’Connor ordered that the case be  
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28 <sup>1</sup> The request for oral argument is denied because the issues have been fully  
briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b);  
*Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 transferred to this Court. Doc. 39. Plaintiffs filed their First Amended Complaint  
2 (“FAC”) on October 28, 2013, asserting a number of claims against the Kelly Defendants  
3 and Wells Fargo arising out of an allegedly “fraudulent scheme orchestrated by the Kelly  
4 Defendants.” Doc. 51, ¶ 9. Plaintiffs allege that they paid \$80,000 to the Kelly  
5 Defendants for a transaction that the Kelly Defendants asserted was worth more than  
6 \$45,000,000 and “would yield a return of \$280,000” for Plaintiffs. *Id.*, ¶ 10. Plaintiffs  
7 allege that Wells Fargo “assured Plaintiffs on multiple occasions” that the transaction was  
8 valid,” and confirmed that the Kelly Defendants had an account at Wells Fargo with  
9 “funds in excess of \$280,000.” *Id.*, ¶¶ 11, 14. Plaintiffs claim that they entered into an  
10 “Irrevocable Commitment” with the Kelly Defendants and Wells Fargo that set forth the  
11 terms discussed above. *Id.*, ¶ 12.

12 Plaintiffs assert that they were convinced by the Kelly Defendants in October 2011  
13 to reinvest the \$280,000 promised by the Irrevocable Commitment – rather than  
14 withdrawing it as scheduled – to “fund a \$5,000,000 loan to purchase and renovate” an  
15 office tower in Dallas. *Id.*, ¶ 16. Plaintiffs also agreed to pay an additional \$50,000 to  
16 fund the transaction. *Id.* Plaintiffs assert that on November 29, 2011, when they  
17 attempted to transfer the funds guaranteed by the Irrevocable Commitment to the Kelly  
18 Defendants, they “were informed by Wells Fargo that the accounts had been emptied and  
19 that Wells Fargo would not pay any amount to Plaintiffs pursuant to the Irrevocable  
20 Commitment.” *Id.*, ¶ 21.

21 The day after Plaintiffs’ FAC was filed, the Kelly Defendants filed a notice of  
22 settlement. Doc. 53. Wells Fargo answered Plaintiffs’ FAC on November 15, 2013, and  
23 asserted a cross-claim for indemnity against the Kelly Defendants. Doc. 56. The Court  
24 dismissed Plaintiffs’ complaint as to the Kelly Defendants on November 26, 2013.  
25 Doc. 58. Plaintiffs’ motion for leave to amend and the Kelly Defendants’ motion to  
26 dismiss or bifurcate followed on December 6, 2013. Docs. 59, 60.

## 27 **II. Leave to Amend.**

28 The Court’s case management order entered on August 29, 2013, established a

1 deadline for amending pleadings of October 28, 2013. Doc. 50 at 1. Plaintiffs’ motion  
2 was filed on December 6, 2013, well after the deadline. *See* Doc. 59. Plaintiffs’ motion,  
3 in effect, asks the Court to extend the deadline for amending pleadings.

4 A schedule established under Rule 16 of the Federal Rules of Civil Procedure may  
5 be extended only upon a showing of “good cause.” Fed. R. Civ. P. 16(b)(4). Rule 16’s  
6 good cause standard primarily considers the diligence of the party seeking the  
7 amendment. *Johnson v. Mammoth Recreation, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).  
8 “The district court may modify the pretrial schedule ‘if it cannot reasonably be met  
9 despite the diligence of the party seeking the extension.’” *Id.* (quoting Fed. R. Civ. P. 16  
10 advisory committee notes (1983 amendment)).

11 Plaintiffs’ motion does not address the good cause requirement, much less show  
12 good cause for extending the amendment deadline. The Court will therefore deny the  
13 motion.

### 14 **III. Cross-Claim.**

#### 15 **A. Motion to Dismiss.**

16 When analyzing a complaint for failure to state a claim to relief under  
17 Rule 12(b)(6), the well-pled factual allegations are taken as true and construed in the light  
18 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th  
19 Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the  
20 assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are  
21 insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec.*  
22 *Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). To avoid a Rule 12(b)(6) dismissal, the  
23 complaint must plead enough facts to state a claim to relief that is plausible on its face.  
24 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard “is not  
25 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a  
26 defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at  
27 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere  
28 possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the

1 pleader is entitled to relief.” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

2       The Kelly Defendants rely heavily on Plaintiffs’ Second Amended Complaint  
3 (“SAC”) as a basis for their motion to dismiss. They argue that “Plaintiffs have  
4 abandoned any allegations that Wells Fargo was a guarantor of the Irrevocable  
5 Commitment with their proposed Second Amended Complaint, and no party currently  
6 contends that Wells Fargo is obligated to pay any amount as a guarantor.” Doc. 60 at 4.  
7 They also argue that the SAC effectively eliminates contract claims, leaving only tort  
8 claims against Wells Fargo, and that Wells Fargo cannot obtain indemnification for tort  
9 claims against the Kelly Defendants because Arizona and Texas have barred such claims.  
10 As noted above, the Court has denied Plaintiffs’ motion for leave to file the SAC. The  
11 Kelly Defendants therefore cannot rely upon that pleading as the basis for their motion.

12       The Kelly Defendants’ arguments regarding the abolishment of indemnification  
13 claims are deficient for several other reasons. They acknowledge that the abolition of  
14 joint and several liability in Texas and Arizona (and the related abolition of contribution  
15 actions, which they equate to abolishing indemnification in this case) has several  
16 exceptions, but they do not discuss the exceptions in any detail or explain why they do  
17 not apply here. The Kelly Defendants also argue that Texas law applies because the law  
18 applicable to a case does not change upon transfer of venue, but they do not explain why  
19 Texas law would have applied in this case before the transfer of venue. A choice of law  
20 analysis may be required in this case. In addition, the Kelly Defendants argue for the first  
21 time in their reply that Wells Fargo’s cross-claim is deficient under the Supreme Court’s  
22 decisions in *Twombly* and *Iqbal*. Doc. 66 at 4. The Court will not consider arguments  
23 raised for the first time in a reply brief. *Lentini v. Cal. Center for the Arts, Escondido*,  
24 370 F.3d 837, 843 n. 6 (9th Cir. 2004).

25       Finally, the Kelly Defendants argue that Texas’ circuitry of action doctrine would  
26 bar Wells Fargo’s indemnity claim. Doc. 60 at 6. In addition to the unresolved question  
27 of whether Texas law applies, Wells Fargo points out that the cited authority would  
28 support the dismissal of *Plaintiffs’ claims* based on the circuitry of action doctrine, not

1 Wells Fargo's claims. Doc. 65 at 8; *see also In re El Paso Refinery, LP*, 302 F.3d 343,  
2 349-50 (5th Cir. 2002) (noting that "Texas courts apply the circuitry of action doctrine to  
3 extinguish a plaintiff's cause of action when, as a result of indemnification obligations or  
4 settlement agreements between parties, a plaintiff would end up indemnifying another  
5 party for its own original claim"). Wells Fargo is correct. This argument also does not  
6 provide a basis for dismissing Wells Fargo's claim. The Court will deny the Kelly  
7 Defendants' motion to dismiss.

8 **B. Motion to Bifurcate.**

9 The Kelly Defendants argue in the alternative that the Court should bifurcate  
10 Wells Fargo's indemnity claims for a separate trial. Doc. 60 at 7. They argue that if they  
11 "were required to litigate the indemnity claims at this time, they would lose one of the  
12 most important benefits of settlement" because they "would be forced to incur all the  
13 costs of litigation solely on the basis of the dubious indemnity claims filed by Wells  
14 Fargo[.]" *Id.* The Kelly Defendants further argue that bifurcation would promote  
15 judicial economy because the Court "may not need to reach any indemnification claim."  
16 *Id.* at 8. Finally, the Kelly Defendants argue that Wells Fargo would not be prejudiced by  
17 bifurcation because the indemnification claims "cannot be litigated in any practical  
18 purpose until a judgment determines that Wells Fargo is without fault[.]" *Id.* at 9.

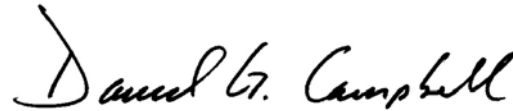
19 Wells Fargo counters that bifurcation is not appropriate because "[t]he  
20 determination of Wells Fargo's fault (if any) for Plaintiffs' losses and the indemnity  
21 liability of the Kelly Defendants to Wells Fargo will involve the same witnesses and  
22 documentary evidence." Doc. 65 at 11. Wells Fargo also contends that it would be  
23 prejudiced by bifurcation because it "would be forced to litigate the same issues twice,  
24 risk inconsistent verdicts or findings, and lose the efficiency of having the Kelly  
25 Defendants as parties, subject to the normal rules of discovery, in the Plaintiffs' action."  
26 *Id.* at 13.

27 The Kelly Defendants have neither demonstrated that bifurcating Wells Fargo's  
28 cross-claim would avoid prejudice, nor that it would promote convenience or judicial

1 economy. As Wells Fargo notes, the witnesses and evidence required for their cross-  
2 claim are the same as those required for the underlying claim. Bifurcating this case could  
3 result in discovery being conducted twice, once in the main action and a second time in  
4 the indemnification action. In addition, legal issues and other motions to be resolved by  
5 the Court should be resolved only once, with all parties participating fully.

6 **IT IS ORDERED** that Plaintiffs' motion for leave to amend (Doc. 59) is **denied**.  
7 The Kelly Defendants' motion to dismiss or, in the alternative, to bifurcate (Doc. 60) is  
8 also **denied**.

9 Dated this 18th day of February, 2014.

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14 David G. Campbell  
15 United States District Judge  
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