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

8 Wells Fargo Bank NA,

9 Plaintiff,

10 v.

11 Breakwater Equity Partners LLC, et al.,

12 Defendants.

No. CV-13-01475-PHX-DGC

ORDER

13 Cross-Defendant Breakwater Equity Partners, LLC has filed a motion to dismiss
14 (Doc. 125) Cross-Claimants Richard Gee and Maxwell Drever's cross-claim (Doc. 104).
15 Cross-Defendant also moves to realign Cross-Claimants. Doc. 125. For the reasons set
16 forth below, the Court will deny each motion.¹

17 Since filing this motion, Cross-Defendant and Cross-Claimants have stipulated to
18 dismiss the cross-claim without prejudice (Doc.135) and the Court has granted the
19 stipulation (Doc. 136). The Court will deny the motion to dismiss as moot.

20 Cross-Defendant argues that Cross-Claimants have aligned themselves with
21 Plaintiff in opposition to all remaining Defendants. Doc. 125 at 4. Accordingly, Cross-
22 Defendant asks the Court to "look beyond the pleadings, and [realign] the parties
23 according to their sides in the dispute." *City of Indianapolis v. Chase Nat'l Bank of N.Y.*,
24 314 U.S. 63, 69 (1941) (internal quotes omitted). Realignment would defeat diversity
25 jurisdiction in this case.

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28 ¹ The request for oral argument is denied because the issues have been sufficiently
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 Courts are to realign parties “whose interests coincide respecting the ‘primary
2 matter in dispute.’” *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d
3 867, 873 (9th Cir. 2000) (quoting *Cont’l Airlines, Inc. v. Goodyear Tire & Rubber Co.*,
4 819 F.2d 1519, 1523 (9th Cir. 1987). Where a named defendant would benefit if a
5 plaintiff prevails, realignment may be appropriate. *Prudential*, 204 F.3d at 873. In this
6 case, Plaintiff and Cross-Claimants are clearly adverse.

7 The primary matter in dispute is whether Defendants converted Plaintiff’s money
8 or otherwise breached the parties’ contract. Cross-Claimants are the individuals who
9 sponsored the investment by other named Defendants in the property at issue. Cross-
10 Defendant argues that Cross-Claimants and Plaintiff both wish “to ignore all
11 responsibility lender and sponsor had in concocting an unsustainable investment and
12 blaming a third party for the outcome,” but the Court finds this characterization to be
13 incomplete and unpersuasive. Doc. 125 at 5. Plaintiff seeks to recover converted funds.
14 If Plaintiff succeeds, Cross-Claimants are not entitled to any recovery. To the contrary,
15 Cross-Defendant’s alleged conversion may trigger recourse against Cross-Claimants.
16 Doc. 104, ¶ 198. Because Cross-Claimants could be exposed to personal liability if
17 Plaintiff succeeds, the Court cannot accept Cross-Defendant’s assertion that the interests
18 of Cross-Claimants and Plaintiff are aligned.

19 Cross-Defendant argues that Cross-Claimants’ tactics pursued during the course of
20 this litigation reveal an alignment with Plaintiff’s interest. Doc. 125 at 4. For example,
21 Cross-Defendant finds this alignment in Cross-Claimants’ refusal to file a motion to
22 dismiss Plaintiff’s complaint. *Id.* But the Court may not look to “facts that arose after
23 the complaint was filed in federal court,” such as litigation tactics, in determining
24 whether to realign the parties. *See In re Digimore Corp. v. Derivative Litig.*, 549 F.3d
25 1223, 1236 (9th Cir. 2008) (finding that the district court erred in relying on evidence of
26 defendant’s cooperation with plaintiff three weeks after the suit was filed).

27 **IT IS ORDERED:**

- 28 1. Cross-Defendant’s motion to dismiss (Doc. 125) is **denied** as moot.

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- 2. Cross-Defendant's motion to realign (Doc. 125) is **denied**.
- 3. Cross-Defendant's motion for fees and costs (Doc. 125) is **denied**.

Dated this 30th day of December, 2013.



David G. Campbell
United States District Judge