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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GemCap Lending, LLC,

Plaintiff,

v.

Quarles & Brady, LLP, James
Gatziolis, and Does 1
through 10, inclusive,

Defendants.

CV 14-07937-RSWL-Ex

ORDER re:

1. Defendants Quarles & Brady LLP and James Gatziolis' Motion for Summary Judgment or Partial Summary Judgment [116];

2. Plaintiff GemCap Lending I, LLC's Motion for Partial Summary Judgment[120];

3. Plaintiff's Motion to Strike Robert L. Kehr's Expert Report [113];

4. Defendants' Motion to Strike Stanley W. Lamport's Expert Report [114];

5. Defendants' Motion to Strike Portions of Douglas E. Johnston, Jr.'s Expert Report [115]

///

1 Currently before Court are the following Motions:
2 (1) Defendants Quarles & Brady LLP and James Gatziolis'
3 Motion for Summary Judgment or Partial Summary Judgment
4 [116]; and (2) Plaintiff GemCap Lending I, LLC's Motion
5 for Partial Summary Judgment [120].¹ Defendants' Motion
6 arises out of Plaintiff's action against Defendants for
7 professional malpractice, intentional
8 misrepresentation, negligent misrepresentation, and
9 concealment under California law. Plaintiff's Motion
10 relates to the latter three causes of action only.
11 Having reviewed all papers submitted pertaining to
12 these Motions, the Court **NOW FINDS AND RULES AS**
13 **FOLLOWS:** the Court **GRANTS** Defendants' Motion. The
14 Court **DENIES** Plaintiff's Motion.

15 I. BACKGROUND

16 A. Factual Background²

17
18 ¹ Also before the Court are: (1) Plaintiff's Motion to
19 Strike Robert L. Kehr's Expert Report [113]; (2) Defendants'
20 Motion to Strike Stanley W. Lamport's Expert Report [114]; and
21 (3) Defendants' Motion to Strike Portions of Douglas E. Johnston,
22 Jr.'s Expert Report [115]. The Court **NOW FINDS AND RULES AS**
23 **FOLLOWS:** the Court **DENIES** all three of these Motions to Strike.
24 See infra Part II.B.3.

25 ² The Court makes the following factual findings, and
26 additionally, adopts Defendants' proposed factual findings [117]
27 as true. See Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986)
28 ("There is no requirement that the trial judge make findings of
fact [when granting summary judgment because] the threshold
inquiry [is whether] there are any genuine factual issues.");
Taybron v. City & Cty. of San Francisco, 341 F.3d 957, 959 n.2
(9th Cir. 2003); C.D. Cal. R. 56-3 ("[T]he Court may assume that
the material facts as claimed and adequately supported by the
moving party are admitted to exist."). To the extent Defendants
describe or comment on exhibits, the Court only considers the
exhibits themselves. See, e.g., Defs.' Statement of Undisputed

1 1. Parties and Relevant Non-Parties

2 Plaintiff GemCap Lending I, LLC ("Plaintiff") is a
3 Delaware LLC with its principal place of business in
4 Malibu, California. Third Am. Compl. ("TAC") ¶ 1, ECF
5 No. 76. Plaintiff is a commercial-asset based lender.
6 Decl. of David Ellis in Supp. of Pl.'s Mot. ("D. Ellis
7 Decl.") ¶ 13, ECF No. 120-12. In making loans,
8 Plaintiff considers the value of a pledged asset that
9 can be liquidated to pay off a debt in the event of
10 default. Id. ¶ 3; Decl. of Richard Ellis in Supp. of
11 Pl.'s Mot. ("R. Ellis Mot. Decl.") ¶ 3, ECF No. 120-10.
12 If a borrower defaults, Plaintiff liquidates the
13 collateral to pay its lenders. Pl.'s Statement of
14 Undisputed Facts ("Pl.'s SUF") ¶ 6, ECF No. 136-1.

15 Defendant Quarles & Brady LLP ("Quarles & Brady")
16 is a Wisconsin limited liability partnership. TAC ¶ 2.
17 Defendant James Gatziolis ("Gatziolis") is an Illinois
18 citizen and a partner at Quarles & Brady. Id. ¶ 3.

19 Non-party Crop USA Insurance Agency, Inc. and Crop
20 USA Insurance Services, Inc. (collectively, "Crop USA")
21 is an insurance agency, as well as an intermediary
22 general agent, that enters into contracts with
23 insurance companies to sell farm insurance policies.
24 Pl.'s SUF ¶¶ 10-11; Pl.'s Suppl. Statement of
25 Undisputed Facts ("Pl.'s SSUF") ¶¶ 1-2, ECF No. 143-2.

26 _____
27 Facts ("Def.' SUF") ¶ 27, ECF No. 117. Plaintiff's other
28 disputes as to Defendants' proposed facts are not on point. See,
e.g., Pl.'s Response to Def.' SUF ¶ 6, ECF No. 143-2.

1 Crop USA retained Quarles & Brady to help it secure
2 loans from Plaintiff. Decl. of R. John Taylor in Supp.
3 of Pl.'s Mot. ("Taylor Mot. Decl.") ¶ 9, ECF No. 120-6.

4 Crop USA does not transact directly with farmers,
5 the insurance policy holders, but rather enters into
6 contracts with other insurance agencies, "sub-agents,"
7 to sell crop insurance policies. Pl.'s SUF ¶ 13. Crop
8 USA then pays a portion of the commissions received to
9 its sub-agents for selling insurance policies directly
10 to the farmers ("Sub-Agent Commissions"). Id. ¶ 14.
11 In 2011, Crop USA had a contract with Diversified Crop
12 Insurance Company ("Diversified"). Id. ¶ 12. This
13 contract involved the sale of insurance and
14 corresponding commissions. Taylor Mot. Decl., Ex. B at
15 10-21.

16 2. 2011 Loan and Loan Agreement

17 On November 23, 2011, Plaintiff entered into a Loan
18 and Security Agreement ("Loan Agreement") with Crop USA
19 in connection with a \$5,000,000 revolving loan (the
20 "Loan"). TAC ¶ 13, Ex. 1. The Loan was structured as
21 follows: Crop USA would deposit its collateral into a
22 lockbox account (the "Lockbox"), which Plaintiff could
23 take in event of a default. Pl.'s SUF ¶¶ 19-22.

24 As security for the Loan, Crop USA pledged all of
25 its property and assets to Plaintiff (the
26 "Collateral"). TAC ¶ 16. Paragraph 5.1 of the Loan
27 Agreement makes pledging of this security an essential
28 condition of the Loan. Taylor Mot. Decl., Ex. C ("Loan

1 Agmt.") at 36-37. The Collateral includes "Accounts,"
2 id., encompassing "Contract Receivables," id. § 1.3, or
3 "all of the right, title and interest" of Crop USA to
4 "commissions otherwise payable under a Sales Agent
5 Agreement," id. § 1.34.

6 In Paragraph 5.4 of the Loan Agreement, Crop USA
7 represents that the Collateral for the Loan belongs to
8 Crop USA "free and clear of all Liens (including any
9 claim of infringement) except those in Lender's favor."
10 Id. at 38. Paragraph 8.24 of the Loan Agreement
11 obligates Crop USA to provide Plaintiff with "true,
12 accurate and complete" representations and warranties
13 in connection with the Loan. Id. at 50.

14 3. First Legal Opinion Letter

15 In order for Plaintiff to approve the Loan, the
16 Loan Agreement required Crop USA to give Plaintiff a
17 written legal opinion that shall be "acceptable to"
18 Plaintiff, the lender. Id. at 41. On November 23,
19 2011, Defendants sent Plaintiff a legal opinion letter
20 ("2011 Opinion Letter"). Decl. of Douglas A. Fretty in
21 Supp. of Defs.' Mot. ("Fretty Mot. Decl."), Ex. 3, ECF
22 No. 118-3. Therein, Defendants made the following
23 statements: (1) they reviewed various Loan transaction
24 documents; (2) they assumed the Collateral was valid
25 and enforceable; (3) Plaintiff has rights in the
26 property and a security interest; (4) they were unaware
27 of any facts which would suggest that specific
28 representations in the Loan Agreement were untrue or

1 inaccurate; and (5) they were unaware of any pending
2 suits or investigations against Crop USA before a court
3 or governmental authority that might adversely affect
4 the validity of any Loan document. Id.

5 In the 2011 Opinion Letter, Defendants did not
6 disclose that Crop USA was subject to multiple pending
7 lawsuits. At the time, Crop USA was subject to at
8 least two lawsuits. Defs.' SUF ¶ 18. These lawsuits
9 were filed by Reed Taylor, the brother of Crop USA's
10 president R. John Taylor ("Taylor") and by Donna
11 Taylor, Reed Taylor's ex-wife (the "Litigation"). TAC
12 ¶ 29; see also Decl. of R. John Taylor in Supp. of
13 Pl.'s Opp'n ("Taylor Opp'n Decl.") ¶ 34. Defendants
14 allegedly represented Crop USA in the Litigation.
15 Taylor Opp'n Decl. ¶ 36. The Litigation included
16 claims against Crop USA for breach of contract,
17 engaging in fraudulent activities, breaching fiduciary
18 duties of loyalty, and commingling assets, among other
19 things. Fretty Mot. Decl., Ex. 22 at 109-20.
20 Plaintiff alleges that the Litigation has jeopardized
21 Crop USA's license status, financial viability, and
22 thus, its ability to repay the Loan. TAC ¶ 29.

23 Defendants allegedly were also representing AIA
24 Insurance, Inc. and AIA Insurance Services Corporation
25 (collectively, "AIA"), Taylor's other insurance
26 company, in various lawsuits filed by Reed and Donna
27 Taylor, regarding AIA's alleged fraudulent business
28 practices. TAC ¶ 30. Plaintiff avers that these

1 lawsuits too might adversely affect Crop USA's ability
2 to repay the Loan and are material to its Collateral.
3 Id. ¶ 31.

4 Defendants also allegedly did not disclose facts
5 regarding Crop USA's financial condition. Id. ¶ 32.
6 In 2008, Crop USA could not fulfill its government
7 requirements to sell crop insurance and thus sold its
8 assets to Hudson Insurance Company, its largest
9 creditor. Id. Plaintiff alleges that Defendants
10 represented Crop USA in the asset sale and were thus
11 aware of Crop USA's fragile financial status. Id.
12 According to Plaintiff, as Crop USA's agents,
13 Defendants entered into a written agreement with Hudson
14 Insurance Group, to negotiate disputes between Crop USA
15 and Clearwater Insurance Company. Id.

16 4. Borrower's Disclosure Schedule

17 Pursuant to section 1.11 of the Loan Agreement,
18 Crop USA was required to disclose to Plaintiff material
19 facts regarding its business operations, assets, and
20 contractual obligations in a borrower's disclosure
21 schedule ("Disclosure Schedule"). Loan Agmt. 24, 27,
22 31, 37, 47, 49. Specifically, Crop USA was obligated
23 to share (1) contracts that would materially and
24 adversely affect the Collateral or its liabilities and
25 financial condition; and (2) all payments made to
26 "affiliates," which were expressly prohibited without
27 Plaintiff's approval. Id.; TAC ¶ 33a-b.

28 On January 1, 2009, Crop USA entered into an

1 administrative agreement with its "affiliate," AIA (the
2 "Administrative Agreement"). Pl.'s SUF ¶¶ 32, 35.
3 Reed Taylor was AIA's majority shareholder. Id.
4 ¶ 41. Pursuant to the Administrative Agreement, Crop
5 USA would "pay and account for attorney's fees"
6 incurred in defending lawsuits against AIA. Id.
7 ¶ 36. On November 22, 2011, Defendants sent Plaintiff
8 the Disclosure Schedule, which did not disclose the
9 Administrative Agreement. Taylor Mot. Decl., Ex. E at
10 79, 81.

11 5. Second Legal Opinion Letter

12 On February 3, 2013, Plaintiff agreed to amend the
13 Loan and increased the Loan from \$5,000,000 to
14 \$10,000,00 ("Amended Loan"). TAC ¶ 35, Ex. 4.
15 Defendants prepared a second legal opinion letter
16 ("2013 Opinion Letter") on February 4, 2013. ECF No.
17 118-11. Defendants made similar statements as in the
18 2011 Opinion Letter, including "we know of no facts
19 which lead us to believe such factual matters are
20 untrue or inaccurate." Id. at 6. Plaintiff alleges
21 that Defendants failed to disclose the Litigation, the
22 2008 asset sale to Hudson Insurance Company, and Crop
23 USA's general financial instability, just as it had in
24 the 2011 Opinion Letter. TAC ¶¶ 39, 41-44.

25 Before close of the original Loan Agreement in
26 2011, Crop USA allegedly gave Plaintiff its standard
27 sub-agent agreement, which required all commission
28 payments from the crop insurance company, CGB

1 Diversified Services, Inc., dba Diversified Crop
2 Insurance ("Diversified"), be paid directly to Crop
3 USA. Id. ¶ 46b. Plaintiff avers, in turn, Crop USA
4 would pay the sub-agents. Id. Plaintiff claims these
5 commissions were part of the Collateral. Id. Both the
6 Loan Agreement and amended Loan Agreement required the
7 commission payments to be deposited into a lockbox
8 account that Plaintiff monitored. Loan Agmt. 61.

9 Defendants apparently knew, but did not disclose,
10 that Crop USA modified a standard sub-agent agreement
11 in connection with the Green Leaf reinsurance concept
12 ("Green Leaf Agreement"). TAC ¶ 46b. The Green Leaf
13 Agreement apparently sent commission payments directly
14 from Diversified to the sub-agents, rather than into
15 the Lockbox as intended. Id. Defendants also
16 apparently prepared, at Taylor's request, a private
17 placement memorandum for Green Leaf that disclosed the
18 Litigation and its adverse consequences. Fretty Mot.
19 Decl., Ex. 23 at 93-94. Defendants also allegedly
20 billed Crop USA \$125,000 in attorneys' fees for the
21 Green Leaf project, violating the Loan Agreement's
22 requirement for Plaintiff's approval for affiliate
23 payments. TAC ¶ 47.

24 **B. Procedural Background**

25 Plaintiff filed its Third Amended Complaint (the
26 "TAC") on December 29, 2016 [76]. On July 31, 2017,
27 Plaintiff filed its Motion for Partial Summary Judgment
28 ("Plaintiff's Motion") [120], and Defendants filed

1 their Motion for Summary Judgment or Partial Summary
2 Judgment ("Defendants' Motion") [116]. On August 22,
3 2017, Plaintiff timely filed its Opposition to
4 Defendants' Motion ("Plaintiff's Opposition") [141],
5 and Defendants timely filed their Opposition to
6 Plaintiff's Motion ("Defendants' Opposition") [139].
7 Plaintiff's Reply in Support of its Motion
8 ("Plaintiff's Reply") [156] and Defendants' Reply in
9 Support of their Motion ("Defendants' Reply") [150]
10 were timely filed on August 29, 2017.

11 II. DISCUSSION

12 A. Legal Standard

13 1. Summary Judgment

14 Federal Rule of Civil Procedure 56 states that a
15 "court shall grant summary judgment" when the movant
16 "shows that there is no genuine dispute as to any
17 material fact and the movant is entitled to judgment as
18 a matter of law." The party moving for summary
19 judgment has the initial burden of proof to show "no
20 genuine dispute as to any material fact." Id.; see In
21 re Oracle Corp. Securities Litigation, 627 F.3d 376,
22 387 (9th Cir. 2010). "A party asserting that a fact
23 cannot be . . . genuinely disputed must support the
24 assertion by: citing to particular materials in the
25 record, including . . . stipulations." Fed. R. Civ. P.
26 56(c)(1)(A). "In determining any motion for summary
27 judgment . . ., the Court may assume that the material
28 facts as claimed and adequately supported by the moving

1 party are admitted to exist without controversy except
2 to the extent that such material facts are (a) included
3 in the 'Statement of Genuine Disputes' and
4 (b) controverted by declaration or other written
5 evidence filed in opposition to the motion." C.D. Cal.
6 R. 56-3.

7 Where the non-moving party bears the burden of
8 proof at trial, the moving party need only prove that
9 there is an absence of evidence to support the non-
10 moving party's case. In re Oracle Corp., 627 F.3d at
11 387. If the moving party meets this burden, the burden
12 then shifts to the non-moving party to produce
13 admissible evidence showing a triable issue of fact.
14 Id.; Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210
15 F.3d 1099, 1102-03 (9th Cir. 2000); see Fed. R. Civ. P.
16 56(a).

17 2. Partial Summary Judgment

18 Federal Rule of Civil Procedure 56(g) authorizes
19 courts to grant partial summary judgment to limit the
20 issues to be tried in a case. State Farm Fire & Cas.
21 Co. v. Geary, 699 F. Supp. 756, 759 (N.D. Cal. 1987)
22 (citing Lies v. Farrell Lines, Inc., 641 F.2d 765, 769
23 n.3 (9th Cir. 1981)). Absent a specific statute
24 authorizing otherwise, a partial summary judgment under
25 Rule 56(g) is not a final judgment but rather an
26 interlocutory summary adjudication or a pre-trial
27 order, neither of which is appealable prior to the
28 entry of a final judgment in the case. Wynn v.

1 Reconstruction Fin. Corp., 212 F.2d 953, 956 (9th Cir.
2 1954).

3 **B. Analysis**

4 1. Requests for Judicial Notice

5 a. *Defendants' First Request for Judicial*
6 *Notice is **GRANTED***

7 A court "may judicially notice a fact that is not
8 subject to reasonable dispute because it: (1) is
9 generally known . . .; or (2) can be accurately and
10 readily determined from sources whose accuracy cannot
11 reasonably be questioned." Fed. R. Evid. 201(b). A
12 court "must" take judicial notice "if a party requests
13 it and the court is supplied with the necessary
14 information." Fed. R. Evid. 201(c)(2).

15 Defendants ask the Court to take judicial notice of
16 the following ("Defendants' First RJN"): (1) an order
17 entered by the U.S. District Court of the Central
18 District of California, Honorable S. James Otero, in
19 the matter of GemCap Lending I, LLC v. Crop USA
20 Insurance Agency, Inc., et al.; (2) the docket in the
21 matter of Reed Taylor v. AIA Services Corp., et al.,
22 Case No. CV-2007-0000208 from Nez Perce County, Idaho;
23 and (3) the docket in the matter of Donna Taylor, et
24 al. v. Hawley Troxell Ennis & Hawley LLP, et al., Case
25 No. 1:10-cv-00404 from the U.S. District Court of
26 Idaho, Honorable Candy W. Dale. Defs.' Req. for Jud.
27 Ntc. in Supp. of Defs.' Mot. ("Defs.' First RJN") 2:5-
28 23, Exs. 1-3, ECF No. 119. Plaintiff does not oppose

1 Defendants' First RJN.

2 Per Federal Rule of Evidence 201, "a court may take
3 judicial notice of 'matters of public record.'" Lee v.
4 City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)
5 (citing Mack v. South Bay Beer Distrib., 798 F.2d 1279,
6 1282 (9th Cir. 1986)). Because the District Courts'
7 order and docket are public records, the first and
8 third exhibits are appropriate for judicial notice.
9 See, e.g., Irvin v. Madrid, No. CV-16-1198-DMG(JEMx),
10 2016 WL 9132877, at *1 (C.D. Cal. Dec. 8, 2016).

11 A court may also "take judicial notice of the
12 existence of another court's opinion or of the filing
13 of pleadings in related proceedings; the Court may not,
14 however, accept as true the facts found or alleged in
15 such documents." Peel v. BrooksAmerica Mortg. Corp.,
16 788 F. Supp. 2d 1149, 1158 (C.D. Cal. 2011)(emphasis
17 added)(citations omitted). Because the second exhibit
18 contains only a copy of the docket and not the rulings,
19 the Court can take judicial notice of it. Thus, the
20 Court **GRANTS** Defendants' First RJN in its entirety
21 [119].

22 b. *Defendants' Second Request for Judicial*
23 *Notice is **GRANTED***

24 Additionally, Defendants seek judicial notice
25 ("Defendants' Second RJN") of two orders entered by the
26 U.S. District Court of the Central District of
27 California, Honorable S. James Otero, in the matter of
28 GemCap Lending I, LLC v. Crop USA Insurance Agency,

1 Inc., et al., namely, (1) the Order Granting in Part
2 and Denying in Part Defendant CGB Diversified Services,
3 Inc.'s Motion to Dismiss Plaintiff's Second Amended
4 Complaint under FRCP 12(b)(6) and 9(b); and (2) the
5 Order Granting Defendant CGB Diversified Services,
6 Inc.'s Motion for Summary Judgment as to All Claims.
7 Defs.' Req. for Jud. Ntc. in Supp. of Defs.' Opp'n
8 ("Defs.' Second RJN") 2:5-21, Exs. 1-2, ECF No. 140.
9 Plaintiff did not oppose Defendants' Second RJN.

10 Like in Defendants' First RJN, these two District
11 Court orders are matters of public record.
12 Accordingly, the Court **GRANTS** Defendants' Second RJN in
13 its entirety [140].

14 c. *Plaintiff's First Request for Judicial*
15 *Notice is **GRANTED in part and DENIED in***
16 ***part***

17 In support of its Opposition, Plaintiff requests
18 judicial notice of the following ("Plaintiff's First
19 RJN"): (1) Defendants' Motion to Dismiss the Second
20 Amended Complaint [25]; (2) Plaintiff's Opposition to
21 the Motion to Dismiss [30]; (3) Defendants' Reply in
22 Support of the Motion to Dismiss [32]; (4) the Court's
23 Order Denying the Motion to Dismiss [36];
24 (5) Plaintiff's Motion for Partial Summary Judgment
25 [120-1]; and (6) the Polk County, Iowa Court ruling and
26 order in the matter of Church Crop Insurance Services,
27 Inc., v. GemCap Lending I, LLC, Case No. EQCE077193.
28 Pl.'s Req. for Jud. Ntc. in Supp. of Pl.'s Opp'n

1 ("Pl.'s First RJN"), 2:13-3:3, Exs. Y, Z, AA, BB, CC,
2 and DD, ECF No. 141-12.

3 Because "it is well established that a court can
4 take judicial notice of its own files and records under
5 Rule 201," Gerritsen v. Warner Bros. Ent'mt Inc., 112
6 F. Supp. 3d 1011, 1034 (C.D. Cal. 2015), the Court
7 **GRANTS** Plaintiff's First RJN as to the first five
8 exhibits [141-12].

9 As discussed, while a court may judicially notice
10 the existence of another court's opinion, it cannot
11 "accept as true the facts found or alleged in such
12 documents." Peel, 788 F. Supp. 2d at 1158. Plaintiff
13 seeks judicial notice of the Iowa court's decision in
14 Church Crop, not to its existence but as to its factual
15 holdings. See Pl.'s Mot. for Summ. J. ("Pl.'s Mot.")
16 9:9-23, ECF No. 120-1 ("Quarles' Opinion Letters are
17 *Judicially Declared False.*"). The Court can consider
18 Church Crop as persuasive authority, but "to the extent
19 [Plaintiff] seek[s] to cite that case in support of
20 [its] arguments, judicial notice is also unnecessary:
21 the Court can, and will consider the reasoning of that
22 ruling for whatever persuasive value it may have."
23 Diversified Capital Inv., Inc. v. Sprint Commc'ns,
24 Inc., No. 15-cv-03796-HSG, 2016 WL 2988864, at *5 (N.D.
25 Cal. May 24, 2016). Therefore, the Court **DENIES**
26 Plaintiff's First RJN as to the sixth exhibit [141-12].³

27
28 ³ Because the Court denies Plaintiff's First RJN as to this
Iowa court ruling, it is unnecessary to address Defendants'

1 In sum, the Court **GRANTS** Plaintiff's First RJN as
2 to the five docket entries in the instant case, but
3 **DENIES** Plaintiff's First RJN as to the Church Crop
4 opinion [141-12].

5 d. *Plaintiff's Second Request for Judicial*
6 *Notice is **GRANTED***

7 In connection with its Reply, Plaintiff requests
8 judicial notice ("Plaintiff's Second RJN") of
9 Defendants' Reply in Support of Defendants' Motion to
10 Strike Expert Report of Stanley W. Lampert [132]. ECF
11 No. 156-6. Because courts "may take judicial notice of
12 court filings and other matters of public records,"
13 Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d
14 741, 746 n.6 (9th Cir. 2006) (citation omitted), the
15 Court **GRANTS** Plaintiff's Second RJN [156-6].

16 2. Evidentiary Objections

17 a. *Plaintiff's Objections to Documents*
18 *Produced by Cohen Tauber and the Green*
19 *Leaf Direction to Pay Are **OVERRULED***

20 Plaintiff objects to the following documents that
21 Adam Stein of Cohen Tauber Spievack & Wagner P.C.
22 ("Cohen Tauber")⁴ produced during discovery: (1) an
23 email attachment, "Form of Opinion of Counsel to
24 Borrowers and Guarantors," dated November 8, 2011 [118-

25 _____
26 hearsay objection and Plaintiff's response. Defs.' Reply in
27 Supp. of Defs.' Mot. ("Defs.' Reply") 20 n.6, ECF No. 150; Pl.'s
28 Reply in Supp. of Pl.'s Mot. ("Pl.'s Reply") 12 n.4, ECF No. 156.

28 ⁴ Cohen Tauber represented Plaintiff in the Loan
transactions. Defs.' SUF ¶¶ 3, 10.

1 5]; (2) an email attachment, "Certificate of Officer of
2 AIA Services Corporation and AIA Insurance, Inc." [118-
3 18]; and (3) an email attachment of a lien and
4 litigation report dated January 30, 2013 [118-24, 118-
5 25] (collectively, the "Stein emails"). Pl.'s Objs. to
6 Fretty Mot. Decl. ¶¶ 1-6, ECF No. 141-14.
7 Additionally, Plaintiff objects to the document
8 entitled, "Irrevocable Order and Direction to Pay, to
9 Green Leaf . . . from Crop USA" [118-30] ("Green Leaf
10 Direction to Pay"). Id. ¶¶ 11-12. The grounds for
11 each objection are identical: hearsay, lack of personal
12 knowledge/foundation, improper "expert" testimony of
13 non-expert, improper authentication, and improper
14 speculation. Id. ¶¶ 1-6, 11-12. Plaintiff also
15 objected to the first Stein email attachment of "Form
16 of Opinion" and the Green Leaf Direction to Pay on
17 relevance grounds. Id. ¶¶ 1-2, 11-12.

18 The Court **VERRULES** Plaintiff's foregoing
19 objections because they "are boilerplate and devoid of
20 any specific argument or analysis as to why any
21 particular exhibit or assertion in a declaration should
22 be excluded." United States v. HIV Cat Canyon, Inc.,
23 213 F. Supp. 3d 1249, 1257 (C.D. Cal. 2016); see also
24 Stonefire Grill, Inc. v. FGF Brands, Inc., 987 F. Supp.
25 2d 1023, 1033 (C.D. Cal. 2013)(refusing to "scrutinize
26 each objection and give a full analysis of identical
27 objections"); Amaretto Ranch Breedables v. Ozimals,
28 Inc., 907 F. Supp. 2d 1080, 1081 (N.D. Cal. 2012)

1 ("This Court need not address boilerplate evidentiary
2 objections." (citation omitted)); Capitol Records, LLC
3 v. BlueBeat, Inc., 765 F. Supp. 2d 1198, 1200 n.1 (C.D.
4 Cal. 2010)(noting that "it is often unnecessary and
5 impractical" to scrutinize "boilerplate recitations of
6 evidentiary principles or blanket objections" (citation
7 omitted)).

8 However, even assuming Plaintiff properly developed
9 its evidentiary objections, the foregoing evidence is
10 nevertheless admissible. For instance, Defendants
11 introduced this evidence to show Plaintiff was on
12 notice of the allegedly omitted information and, as
13 such, could not have reasonably relied on Defendants'
14 alleged misrepresentations or concealment. Defs.' Mot.
15 for Summ. J. ("Defs.' Mot.") 2:23-25, 5:1-3, 17:25-27,
16 25:7-11, ECF No. 116. Because Defendants did not offer
17 the evidence for the truth of the matter asserted, it
18 is not hearsay. See Entous v. Viacom Int'l, Inc., 151
19 F. Supp. 2d 1150, 1157 n.5 (recognizing the non-hearsay
20 purpose of showing the state of plaintiff's knowledge).

21 Moreover, Defendants properly authenticated each
22 piece of evidence. For example, each email was
23 uniquely addressed by Cohen Tauber, was produced by the
24 attorney who received or sent the email, and contained
25 identifiable matters related to the loan at issue. See
26 Del Campo v. Am. Corrective Serv., Inc., 718 F. Supp.
27 2d 1116, 1123 n.10 (N.D. Cal. June 3, 2010)(finding
28 plaintiff's documents properly authenticated after

1 plaintiff "attested to their authenticity" and
2 defendants failed to "specify any reason to doubt the
3 authenticity of documents that they themselves produced
4 in discovery"); Brown v. Wireless Networks, Inc., No.
5 C-07-4301-EDL, 2008 WL 4937827, at *4 (N.D. Cal. Nov.
6 17, 2008)(holding that the "e-mails are authenticated
7 because of their distinctive characteristics," such as
8 their signature blocks and contents).

9 Based on the foregoing, the Court **OVERRULES**
10 Plaintiff's objections to the Stein emails and the
11 Green Leaf Directive to Pay.

12 b. *Plaintiff's Objections to Expert Reports*
13 *Are **OVERRULED***

14 Plaintiff objects to the Initial Expert Report of
15 Arthur Norman Field ("Field") [118-27] in its entirety
16 on the following grounds: hearsay, lack of personal
17 knowledge/foundation, improper opinion testimony,
18 improper "expert" testimony of non-expert, improper
19 authentication, improper speculation, and relevance.
20 Pl.'s Objs. to Fretty Mot. Decl. ¶¶ 7-8. Plaintiff
21 also objects to the Expert Report of its own expert,
22 Stanley W. Lamport ("Lamport") [118-28] on the
23 following grounds: hearsay, lack of personal
24 knowledge/foundation, improper authentication, and
25 improper speculation. Id. ¶¶ 9-10.

26 As discussed, the Court need not scrutinize each
27 boilerplate objection. HIV Cat Canyon, 213 F. Supp. 3d
28 at 1257. Despite that, the Court turns to the merits

1 of Plaintiff's objections that both expert reports are
2 improper "expert" testimony of non-experts. "To be
3 admissible, expert testimony must (1) address an issue
4 beyond the common knowledge of the average layman,
5 (2) be presented by a witness having sufficient
6 expertise, and (3) assert a reasonable opinion given
7 the state of the pertinent art or scientific
8 knowledge." United States v. Vallejo, 237 F.3d 1008,
9 1019 (9th Cir. 2001).

10 First, both experts discuss the scope of the duty
11 an attorney owes when providing an opinion letter,
12 which is beyond the common knowledge of the average
13 layman. See Vaxiion Therapeutics, Inc. v. Foley &
14 Lardner LLP, 593 F. Supp. 2d 1153, 1165 (S.D. Cal.
15 2008)("In a legal malpractice action, expert testimony
16 is required to establish . . . the propriety of the
17 particular conduct by the practitioner in particular
18 circumstances."). Namely, Field asserts that the
19 lawyer must believe the opinion letter "is correct,
20 prepared in accordance with customary practice and is
21 fair, objective and not misleading."⁵ Field Report 23-

23 ⁵ Additionally, Field notes the "four corners" approach in
24 construing opinion letters, meaning that parties cannot
25 characterize the opinion as stating anything not explicit in it
26 or provided by custom. Fretty Mot. Decl., Ex. 26 ("Field
27 Report") at 14 (citing Prudential Ins. Co. v. Dewey, Ballantine,
28 Bushby, Palmer & Wood, 605 N.E.2d 318 (N.Y. 1992)). Neither
Defendants nor Field cite to California authority for the "four
corners" approach. See Pl.'s Opp'n to Defs.' Mot. ("Pl.'s
Opp'n") 9:26-27, ECF No. 141. Nevertheless, the admissibility of
the Field Report is unaffected because it meets the Ninth
Circuit's criteria for expert testimony. See Vallejo, 237 F.3d

1 24 (citing Restatement of Law Governing Lawyers § 95).
2 On the other hand, Lamport claims that an attorney
3 drafting an opinion letter "is subject to the same
4 duties and liabilities that extend to other agents" of
5 the client. Fretty Mot. Decl., Ex. 27 ("Lamport
6 Report") at 5. He explains that the attorney must also
7 reveal any known doubts about the client's or the
8 attorney's representations. Id. at 6, 8.

9 Second, Field and Lamport both are sufficiently
10 knowledgeable in connection with attorney duties. For
11 instance, Field has experience in receiving and
12 providing third party opinions, co-authored a three-
13 volume treatise on third party opinions, chaired the
14 three principal national legal opinion letter groups,
15 and has been qualified as an expert witness within the
16 past four years. Field Report 2-3. Moreover, Lamport
17 has been qualified as an expert on lawyer conflicts of
18 interest in numerous California courts, served on the
19 Commission for the Revision of the California Rules of
20 Professional Conduct and as a special adviser to the
21 State Bar in issuing formal ethics opinions, and was
22 the contributing author of Matthew Bender's Attorney
23 Ethics Handbook. Lamport Report 1-2.

24 Third, their opinions are reasonable. Both experts

25 _____
26 at 1019. Indeed, Field otherwise relies on California
27 authorities and national standards, and the Court considers the
28 Field Report as to such assertions. See, e.g., Field Report 11
(discussing the TriBar Opinion Committee, which the California
Bar recognizes as the "national standard setter"), 22 (citing a
California Bar Report).

1 reviewed various documents filed in this case,
2 including the operative Complaint, deposition
3 transcripts, and Loan documents. Field Report 3-4;
4 Lamport Report, Ex. C. Thereafter, they formulated
5 opinions on the scope of Defendants' duty, if any, and
6 whether Defendants breached their duty. See Vallejo,
7 237 F.3d at 1020 (finding reliable the expert's opinion
8 based on extensive review of relevant records).

9 Because the expert opinions are admissible under
10 the three prongs of the Vallejo standard, the Court
11 **OVERRULES** Plaintiff's objections to the Field Report
12 and the Lamport Report. See also infra Part II.B.3
13 (denying Defendants' Motion to Strike the Lamport
14 Report).

15 *c. Plaintiff's Objections to the Declaration*
16 *of James Gatziolis Are **OVERRULED***

17 Plaintiff objects to parts of the Declaration of
18 James Gatziolis ("Gatziolis Declaration") [139-13],
19 which Defendants filed in support of their Opposition
20 to Plaintiff's Motion. Pl.'s Objs. to Decl. of James
21 Gatziolis ("Pl.'s Objs. to Gatziolis Decl.") ¶¶ 1-3,
22 ECF No. 156-5.

23 First, Plaintiff objects to Gatziolis' statements
24 that (1) "no one discussed the 2009 Administrative
25 Agreement with me in the 2011 or 2013 time periods to
26 cause me to remember its existence"; (2) he "had never
27 seen a copy of the 2009 Administrative Agreement" at
28 the time of the Loan transactions; (3) he did not know

1 "whether the Administrative Agreement was still in
2 effect" at the time of the Loan transactions; and
3 (4) he never "considered . . . whether the 2009
4 Administrative Agreement [was a] 'Material Contract.'"'
5 Decl. of James Gatziolis ("Gatziolis Decl.") ¶ 4, ECF
6 No. 139-13. Plaintiff contends that these statements
7 are irrelevant; speculative; prejudicial, confusing,
8 and misleading; and not credible due to a prior
9 inconsistent statement. Since Plaintiff fails to state
10 the reason for every objection, the Court need only
11 rule on Plaintiff's argument that this is irrelevant
12 and a sham affidavit.⁶ See HIV Cat Canyon, 213 F. Supp.
13 3d at 1257.

14 Plaintiff emphasizes that the "relevant fact is
15 that . . . Gatziolis heard or knew" of, not discussed,
16 the Administrative Agreement. Pl.'s Objs. to Gatziolis
17 Decl. ¶ 1. However, Gatziolis suggests that he did not
18 remember the Administrative Agreement or believe it was
19 pertinent because he had not discussed it with anyone
20 at the time Plaintiff entered into the Loan with Crop
21 USA. Gatziolis Decl. ¶ 4. That distinction is
22 relevant to whether Gatziolis knowingly concealed the
23 Administrative Agreement when he drafted the opinion

24
25 ⁶ Nevertheless, the statements are not speculative because
26 Gatziolis qualifies the statements, "To my knowledge"
27 Fed. R. Evid. 402. Furthermore, any risk of undue prejudice,
28 confusion of issues, or misleading the jury does not
substantially outweigh the probative value of the statements.
Fed. R. Evid. 403. The evidence clearly demonstrates Gatziolis'
state of mind at the time of the opinion letters. Accordingly,
Plaintiff's objections are **OVERRULED**.

1 letters, or misrepresented his current knowledge as to
2 it. Thus, it is relevant, so the Court **OVERRULES** the
3 objection.

4 The Ninth Circuit employs the sham affidavit rule
5 to prevent a party from creating an issue of fact
6 through an affidavit that contradicts the party's prior
7 deposition testimony. Yeager v. Bowlin, 693 F.3d 1076,
8 1080 (9th Cir. 2012)(citations omitted). But this rule
9 should be applied cautiously as it is in tension with
10 the prohibition against credibility determinations in
11 summary judgment rulings. Id. (citation omitted). In
12 order to strike an affidavit under this rule, the
13 "court must make a factual determination that the
14 contradiction is a sham, and the 'inconsistency between
15 a party's deposition testimony and subsequent affidavit
16 must be clear and unambiguous.'" Id. (citation
17 omitted).

18 In his deposition, Gatziolis testified that he had
19 heard of the Administrative Agreement before he
20 prepared the 2011 Opinion Letter. Steinman Opp'n
21 Decl., Ex. J at 13:15-19. The Gatziolis Declaration
22 does not contradict that testimony because in it,
23 Gatziolis merely asserts he had not discussed or
24 considered it concurrently with the Loan transactions.
25 Accordingly, there is no "clear and unambiguous"
26 inconsistency such that the Court would find a sham
27 contradiction. The Court hereby **OVERRULES** Plaintiff's
28 sham affidavit objection.

1 In his Declaration, Gatziolis attests that he did
2 not state that he had worked on a prior crop insurance
3 loan and that he actually had not worked on one at the
4 time of the July 19 meeting. Gatziolis Decl. ¶ 5. He
5 also explained why he allegedly did not deny the
6 statements Lander attributed to him after receiving the
7 letter or at his deposition. Id. ¶ 6 (believing other
8 counsel would respond). Plaintiff objects to each
9 assertion pursuant to the sham affidavit rule. Pl.'s
10 Objs. to Gatziolis Decl. ¶¶ 2-3. The Court does not
11 find that these are sham Declarations because Gatziolis
12 explains the supposed contradiction between his earlier
13 testimony that the letter accurately captured the
14 meeting and this affidavit that the specific sentences
15 attributed to Gatziolis are incorrect. See Gatziolis
16 Decl. ¶ 6 ("I did not recall that allegation from Mr.
17 Lander's letter at the time of my deposition."). Thus,
18 Plaintiff's objections are **OVERRULED**.

19 d. *Plaintiff's Objections to the Declaration*
20 *of Douglas A. Fretty in Support of*
21 *Defendants' Opposition Are **SUSTAINED in***
22 ***Part and OVERRULED in Part***

23 Plaintiff objects to the following exhibits of the
24 Declaration of Douglas A. Fretty filed in Support of
25 Defendants' Opposition ("Fretty Opposition
26 Declaration"): (1) Plaintiff's internal memorandum
27 regarding the Loan [147]; (2) Richard Ellis' deposition
28 transcript [139-5]; (3) an email from Crop USA to

1 Plaintiff regarding "Cash Disbursements" made the week
2 of October 19, 2012 [139-6]; and (4) an email from Crop
3 USA to Plaintiff regarding disbursements made the week
4 of November 16, 2012 [139-7]. ECF No. 156-5. As in
5 Plaintiff's other objections, Plaintiff fails to
6 provide more than mere boilerplate recitations of the
7 Federal Rules of Evidence, e.g., hearsay, lack of
8 personal knowledge, improper authentication, best
9 evidence rule, irrelevant, and improper legal
10 conclusion. Although the Court need not rule on each
11 individually, the Court finds that most of the
12 objections lack merit.

13 First, Plaintiff's internal memorandum is not
14 hearsay because it is a statement made by and offered
15 against an opposing party. It is also not hearsay as
16 Defendants present it as evidence that Plaintiff was on
17 notice about the commission structure. Defs.' Opp'n to
18 Pl.'s Mot. ("Defs.' Opp'n") 8:16-20, ECF No. 139.
19 There is no evidence the declarant lacked personal
20 knowledge as to the content, especially when accounting
21 for the specific details reflected in it. It was
22 properly authenticated because Plaintiff admits that it
23 is its own memorandum. See Pl.'s Reply 24:20-22.
24 Finally, the best evidence rule is not violated because
25 the memorandum itself is offered. Thus, the Court
26 **OVERRULES** these objections to the internal memorandum.

27 Second, the Court **SUSTAINS** Plaintiff's objection to
28 Fretty's statement about Richard Ellis' deposition.

1 The Court only relies on the transcript itself under
2 the best evidence rule.

3 Third, the emails from Crop USA to Plaintiff
4 regarding Crop USA's "Cash Disbursements" are not
5 hearsay because Defendants offer them for the non-
6 hearsay purpose of notice. Indeed, the emails to
7 Plaintiff are relevant in that they disclosed Crop
8 USA's payments of legal fees to Crop USA's and AIA's
9 counsel in the Litigation, arguably revealing to
10 Plaintiff that there was an administrative agreement
11 with AIA and ongoing Litigation. Defs.' Opp'n 8:25-
12 9:5. There is no evidence of lack of personal
13 knowledge, and the exhibits were properly authenticated
14 in Richard Ellis' deposition. Fretty Opp'n Decl., Ex.
15 5 ("R. Ellis Dep.") 297:13-298:24. As such,
16 Plaintiff's objections to these exhibits are **OVERRULED**.

17 e. *Defendants' Objections to Plaintiff's*
18 *Evidence Are **SUSTAINED in Part and***
19 ***OVERRULED in Part***

20 In response to Plaintiff's Motion, Defendants
21 object to portions of the Declaration of Todd M. Lander
22 in Support of Plaintiff's Motion ("Lander Motion
23 Declaration") [120-8] and its exhibits [120-9], the
24 Declaration of Richard Ellis in Support of Plaintiff's
25 Motion ("Richard Ellis Motion Declaration") [120-10],
26 the Declaration of David Ellis ("David Ellis
27 Declaration") [120-12], and the Declaration of Peter
28 Steinman in Support of Plaintiff's Motion ("Steinman

1 Motion Declaration") exhibits [120-14]. ECF No. 139-
2 15. In response to Plaintiff's Opposition, Defendants
3 object to portions of the Declaration of R. John Taylor
4 ("Taylor Declaration") [141-1], the Declaration of
5 Peter Steinman in Support of Plaintiff's Opposition
6 ("Steinman Opposition Declaration") exhibits [141-5],
7 the Declaration of Richard Ellis in Support of
8 Plaintiff's Opposition ("Richard Ellis Opposition
9 Declaration") [141-6], and the Declaration of Todd M.
10 Lander in Support of Plaintiff's Opposition ("Lander
11 Opposition Declaration") [141-9] and its exhibits [141-
12 10]. ECF No. 153. The Court addresses these together
13 because much of the evidence and corresponding
14 objections are the same.

15 Many of the objections are based on the declarants'
16 lack of competence to testify to what a deponent
17 testified to, see Clark v. County of Tulare, 755 F.
18 Supp. 2d 1075, 1084 (E.D. Cal. 2010), and the best
19 evidence rule, see Fed. R. Evid. 1003. The Court
20 **SUSTAINS** each of these objections and hereby relies
21 solely on the documents themselves as opposed to the
22 declarants' quotations of and commentary on the
23 documents. Defs.' Objs. to Pl.'s Evid. in Supp. of
24 Pl.'s Mot. ("Defs.' Objs. to Pl.'s Mot.") ¶¶ 2-4, 6, 8-
25 13, 15, 19, 21-26, 28, ECF No. 139-15; Defs.'s Objs. to
26 Pl.'s Evid. in Supp. of Pl.'s Opp'n ("Defs.' Objs. to
27 Pl.'s Opp'n") ¶¶ 3-5, 8, 10, 16-21, 23, 44-46, ECF No.
28 153.

1 On hearsay grounds, Defendants object to the Lander
2 Motion Declaration and Lander Opposition Declaration's
3 references to a July 24, 2013 letter from Todd M.
4 Lander ("Lander") of Cohen Tauber to Gatziolis and the
5 letter itself. Defs.' Objs. to Pl.'s Mot. ¶¶ 1, 5;
6 Defs.' Objs. to Pl.'s Opp'n ¶¶ 43, 47. As to the
7 references in the Lander Motion Declaration and Lander
8 Opposition Declaration, the Court **SUSTAINS** Defendants'
9 objections because they quote a letter that is an out-
10 of-court statement offered for the truth of the matter
11 asserted—what the letter says. Fed. R. Evid. 801, 802.

12 On the other hand, the letter itself falls under
13 the hearsay exemption for opposing party statements.
14 Fed. R. Evid. 801(2)(B) (a statement that the opposing
15 "party manifested that it adopted or believed to be
16 true" is not hearsay). Lander wrote to Gatziolis
17 purporting to recount Gatziolis' statements at their
18 July 19 meeting. Lander Mot. Decl., Ex. H at 10-11.
19 Specifically, Lander wrote that Gatziolis indicated
20 that "based on personal experience in another crop
21 insurance matter where a lender failed economically,
22 [Gatziolis] believed that Diversified was obligated" to
23 pay commissions to the sub-agents "irrespective of the
24 status of the GemCap-Crop loan." Id. at 10. Gatziolis
25 responded by saying he took a "quick look" at the
26 letter without refuting any of its contents, Lander
27 Mot. Decl., Ex. I at 13, and later testified that while
28 he did not "remember [the letter] that well," he

1 thought Lander "did capture the July 19 meeting
2 relatively accurately," Steinman Mot. Decl., Ex. J at
3 28:17-29:9. In his Declaration, Gatziolis asserts that
4 "Lander's statement was misleading," but he "did not
5 see a reason to respond" to the letter because other
6 counsel was responsible for responding. Gatziolis
7 Decl. ¶ 6. The Court is not persuaded given that
8 Lander attributed this statement directly to Gatziolis,
9 and a person in his position would have likely
10 responded to it given that he responded at all. Thus,
11 the Court **OVERRULES** Defendants' objections to the
12 admission of the letter.⁷ Defs.' Objs. to Pl.'s Mot.
13 ¶ 5; Defs.' Objs. to Pl.'s Opp'n ¶ 47.

14 Additionally, Defendants object to the Richard
15 Ellis Motion Declaration and David Ellis Declaration's
16 characterization of Gatziolis's aforementioned
17 statements at the July 19 meeting. Defs.' Objs. to
18 Pl.'s Mot. ¶¶ 7, 20. Because the characterization
19 lacks foundation, this objection is **SUSTAINED**. See
20 Medina v. Multaler, Inc., 547 F. Supp. 2d 1099, 1105
21 n.8 (C.D. Cal. 2007)(without factual support, an
22 opinion is inadmissible).

23 Defendants also object to a few of the Richard
24 Ellis Motion Declaration and David Ellis Declaration's
25 purported legal arguments. Defs.' Objs. to Pl.'s Mot.

26

27 ⁷ The Court additionally agrees with Plaintiff that
28 California's litigation privilege does not apply to this business
meeting where Crop USA merely sought to devise a plan to satisfy
the Loan in the face of default. Pl.'s Reply 17:18-20.

1 ¶¶ 14, 16, 18, 27-31; Defs.' Objs. to Pl.'s Opp'n
2 ¶¶ 22, 24, 26. Legal arguments are inappropriate in
3 declarations. See King Cty. v. Rasmussen, 299 F.3d
4 1077, 1082 (9th Cir. 2002) ("Declarations, which are
5 supposed to 'set forth facts as would be admissible in
6 evidence,' should not be used to make an end-run around
7 the page limitations of Rule 7 by including legal
8 arguments outside of the briefs." (citing Fed. R. Civ.
9 P. 56(c)). These objections are thus **SUSTAINED**.

10 However, the statement, "[Diversified] refused to pay
11 the Gross Commissions to [Plaintiff]," is not a legal
12 argument but a fact. See Defs.' Objs. to Pl.'s Mot.
13 ¶ 17; Defs.' Objs. to Pl.'s Opp'n ¶ 25. As such, the
14 objection to this statement is **OVERRULED**.

15 Attached to the Steinman Motion Declaration is
16 Taylor's deposition in the matter of GemCap Lending I,
17 LLC v. Crop USA Insurance Agency, Inc., et al., Case
18 No. 2:23-cv-5504). Steinman Mot. Decl., Ex. M. The
19 Court agrees with Defendants that this testimony is
20 inadmissible hearsay because Defendants were not
21 parties to the case and Plaintiff did not have the same
22 motive to cross-examine Taylor that Defendants would on
23 the subject matter. Hub v. Sun Valley Co., 682 F.2d
24 776, 778 (9th Cir. 1982). Indeed, Plaintiff would be
25 motivated by the desire to reclaim the unpaid balance
26 on the Loan, and Defendants would be motivated to avoid
27 liability. Therefore, Defendants' objection to this
28 testimony is **SUSTAINED**. Defs.' Objs. to Pl.'s Mot.

1 ¶ 32; Defs.' Objs. to Pl.'s Opp'n ¶ 6.

2 Defendants object to the Steinman Motion
3 Declaration Exhibit P, containing deposition testimony
4 of their expert, Field. Defs.' Objs. to Pl.'s Mot.
5 ¶ 33; Defs.' Objs. to Pl.'s Opp'n ¶ 7. Field testified
6 that "a stream of commissions coming from insurance
7 companies, some of which would have been paid on to
8 agents," was the Collateral to be deposited in the
9 Lockbox. Steinman Mot. Decl., Ex. P at 63:2-6. Field
10 then said that his understanding was that Gross
11 Commissions were part of that Collateral. Id. at 63:7-
12 10. Defendants claim that it is hearsay as an
13 inadmissible statement of fact by an expert witness.
14 However, Field was testifying to his *understanding* of
15 the Collateral. Because his understanding is important
16 to the determination of reliability of his expert
17 opinion, this objection is **OVERRULED**.

18 As discussed above, the Court denied Plaintiff's
19 Request for Judicial Notice of the Church Crop order.
20 Accordingly, Defendants' objections to this order are
21 **SUSTAINED**. Defs.' Objs. to Pl.'s Mot. ¶ 34; Defs.'
22 Objs. to Pl.'s Opp'n ¶¶ 2, 48; Steinman Mot. Decl., Ex.
23 R.

24 Defendants object to a few statements in the Taylor
25 Declaration and Richard Ellis Opposition Declaration on
26 the grounds of lack of personal knowledge. Defs.'
27 Objs. to Pl.'s Opp'n ¶¶ 1, 9, 15. For instance, Taylor
28 asserted, "As counsel, Gatziolis knew of the insurer's

1 position in 2008." Taylor Opp'n Decl. ¶ 16. Richard
2 Ellis said that, "unbeknownst to [Plaintiff], this
3 pledge structure (i.e., Gross Commissions as
4 collateral) was identical to the failed pledge
5 structure in a prior crop insurance matter handled by
6 borrower Crop USA's counsel, Defendants." R. Ellis
7 Opp'n Decl. ¶ 24. As to these statements, Defendants'
8 objections are **SUSTAINED** because the declarants lacked
9 foundation. Nevertheless, Richard Ellis also declared
10 that "unknown to [Plaintiff], multiple lawsuits had
11 been initiated against Crop USA." R. Ellis Opp'n Decl.
12 ¶ 11. Defendants' corresponding objection is **OVERRULED**
13 because Richard Ellis, as co-president of Plaintiff,
14 has personal knowledge of the Litigation and what
15 Plaintiff knew of it.

16 Finally, Defendants make several objections to the
17 Richard Ellis Opposition Declaration—namely, statements
18 about Richard Ellis' alleged telephone conversation
19 with Gatziolis—arguing that it is a sham affidavit.
20 Defs.' Objs. to Pl.'s Opp'n ¶¶ 11-14. Defendants claim
21 this Declaration is the first time Richard Ellis
22 mentioned the statements he attributed to Gatziolis.
23 Id. ¶ 11. Moreover, they argue Richard Ellis has not
24 offered a "credible explanation as to how his
25 recollection was refreshed." Id. (citing Yeager, 693
26 F.3d at 1080).

27 As discussed, in order to strike a declaration
28 under the sham affidavit rule, the Court must find that

1 a clear and unambiguous inconsistency, making the
2 contradiction with former testimony a sham. See
3 Yeager, 693 F.3d at 1080. In Plaintiff's interrogatory
4 responses, Plaintiff lists what due diligence it
5 conducted in preparation for the Loan. Fretty Mot.
6 Decl., Ex. 25 at 8-9 (response to interrogatory five).
7 Plaintiff answered that Gatziolis advised Richard Ellis
8 by phone that the Litigation "had been definitively
9 decided and/or settled, or was imminently to be finally
10 decided and/or settled," in Taylor and Crop USA's favor
11 and "would have no impact on . . . the [C]ollateral,"
12 telling Plaintiff "not to worry about it." Id. at 8.
13 That response is consistent with Richard Ellis'
14 Declaration, and Defendants do not contest the accuracy
15 of that response. Defs.' SUF ¶ 32. Moreover, contrary
16 to Defendants' position, Richard Ellis was not "vague
17 and evasive" in his deposition testimony. Defs.' Objs.
18 to Pl.'s Opp'n ¶ 11. Rather, Richard Ellis apparently
19 answered counsel's questions to the best of his
20 understanding. See, e.g., Defs.' Reply, Ex. 8 at 59:9-
21 10 ("I don't know how to answer that question.").
22 Because Richard Ellis testified that Gatziolis
23 portrayed the Litigation to mainly concern AIA and
24 Taylor, not Crop USA, the Court does not find his
25 Declaration to be a sham. See id. at 61:18-22. As
26 such, Defendants' objection is **OVERRULED**.

27 ///

28 ///

1 f. *Defendants' Objections to the Declaration*
2 *of Melvin Gilbert Are **SUSTAINED in part***
3 *and **OVERRULED in part***

4 Defendants object to many parts of the Declaration
5 of Melvin Gilbert ("Gilbert Declaration") [141-8].
6 Primarily, the objections are based on lack of personal
7 knowledge and hearsay because Melvin Gilbert's
8 ("Gilbert") statements include "alleged 'information'
9 that Gilbert was allegedly 'recently' told," and
10 Gilbert fails to reveal the source of such information.
11 Defs.' Objs. to Pl.'s Opp'n 22 n.1. The Court agrees
12 with Defendants and **SUSTAINS** these objections. Id.
13 ¶¶ 27, 31, 34, 36-38, 40-42; see Beyene v. Coleman Sec.
14 Servs., Inc., 854 F.2d 1179, 1183 (9th Cir. 1988)
15 (excluding an exhibit as hearsay on summary judgment).

16 Relying on the Best Evidence Rule, Defendants
17 object to some of Gilbert's descriptions of the
18 contents of the Loan documents. Id. ¶¶ 29, 33, 35, 39.
19 These objections are **SUSTAINED**, and the Court will only
20 consider the documents themselves for their content.

21 Finally, like in some of their objections to the
22 Richard Ellis Opposition Declaration, Defendants object
23 to Gilbert's assertions about Richard Ellis' telephone
24 call with Gatziolis on the basis of the sham affidavit
25 rule. Id. ¶¶ 28, 30, 32. As for the Richard Ellis
26 Opposition Declaration, the Court finds no clear and
27 unambiguous inconsistency, which would render the
28 contradiction a sham. See Yeager, 693 F.3d at 1080.

1 Instead, the Court finds Gilbert's deposition testimony
2 to be entirely consistent with his declaration. At his
3 deposition, Gilbert explained that Gatziolis told
4 Richard Ellis on the phone that the Litigation would
5 not negatively impact the Collateral. Defs.' Reply,
6 Ex. 9 at 77:15-78:20. In his Declaration, Gilbert
7 confirms this. Decl. of Melvin Gilbert ¶¶ 13-15, ECF
8 No. 141-8. Defendants' objections are thus **OVERRULED**.

9 3. The Court **DENIES** as **MOOT** Plaintiff's Motion to
10 Strike Expert Robert L. Kehr's Report [113],
11 **DENIES** Defendants' Motion to Strike Expert
12 Stanley W. Lamport's Report [114], and **DENIES**
13 as **MOOT** Defendants' Motion to Strike Portions
14 of Expert Douglas E. Johnston, Jr.'s Report
15 [115]

16 Because the Court grants summary judgment in favor
17 of Defendants without relying on either of the
18 corresponding expert reports, the Court **DENIES** the
19 following Motions as **MOOT**: (1) Plaintiff's Motion to
20 Strike Defendants' Expert Robert L. Kehr's "Rebuttal"
21 Witness Report and Preclude Kehr from Offering Any
22 Expert Testimony [113]; and (2) Defendants' Motion to
23 Strike Portions of the Expert Report of Douglas E.
24 Johnston, Jr. [115].

25 As for Defendants' Motion to Strike the Expert
26 Report of Stanley W. Lamport [114], the Court turns to
27 the merits because the parties discuss the Lamport
28 Report in their summary judgment papers. See Defs.'

1 Mot. 9:1-3, 10:4-7, 22 n.4; Defs.' Opp'n 8:9-11, 13:17-
2 20, 13 n.4; Defs.' Reply 13 n.4; Pl.'s Reply 3 n.3; see
3 also supra Part II.B.2.b (overruling Plaintiff's
4 objections to the Lamport Report).

5 An expert witness cannot render an opinion as to a
6 legal conclusion, as "instructing the jury as to the
7 applicable law is the distinct and exclusive province
8 of the court." Nationwide Transp. Fin. v. Cass Info.
9 Sys., Inc., 523 F.3d 1051, 1058 (9th Cir.
10 2008)(citation omitted). Lamport's expert testimony
11 sets forth various California Model Rules of
12 Professional Conduct, cases, statutes, and restatement
13 sections setting forth the duties owed between the
14 borrower's counsel and the lender. See generally Mot.
15 to Strike Lamport Report, Ex. 2 at 4-8, ECF No. 114-3.
16 An expert's interpretations of statutes and regulations
17 and whether a party violated those laws are "statements
18 of the law and legal conclusions" that "should be
19 excluded." Willard v. Foremost Ins. Co., EDCV 13-0262
20 JGB (DTBx), 2014 WL 12589331, at *3 (C.D. Cal. May 9,
21 2014). To the extent that Lamport offers statements of
22 law that the parties rely upon in their respective
23 Summary Judgment Motions, the Court may consider them
24 in determining the applicable duty owed, a question of
25 law for the Court to resolve. The Court does not,
26 however, consider Lamport's ultimate conclusions
27 regarding Defendants' duty of care in its analysis for
28 the cross-Motions for Summary Judgment.

1 Defendants' arguments that Lamport improperly
2 testifies as to their "knowledge, intent, and state[s]
3 of mind" are not well-taken. Mot. to Strike Lamport
4 Report 8:11-12. Defendants rely on Siring v. Oregon
5 State Board of Higher Education ex rel. Eastern Oregon
6 University, 927 F. Supp. 2d 1069, 1077 (D. Or. 2013),
7 which stated that an expert witness could not opine as
8 to a specific motive or subjective state of mind
9 underpinning a party's or witness's decisions. See
10 also M.H. v. Cnty. of Alameda, Case No.
11 11-cv-02868-JST, 2015 WL 54400, at *2 (N.D. Cal. Jan.
12 2, 2015)("[E]xperts cannot testify as to Defendants'
13 actual, subjective states of mind."). Here, Lamport
14 repeatedly opines regarding what Defendants "knew or
15 should have known" about various doubts that would
16 affect the Loan and Loan Agreement. See generally Mot.
17 to Strike Lamport Report, Ex. 2. In Alameda, the court
18 explained that testimony about what defendants knew or
19 should have known is permissible regarding the relevant
20 standard of care in law enforcement. 2015 WL 54400, at
21 *2. Here too, the Court finds that Lamport's opinions
22 regarding what Defendants knew or should have known is
23 not a legal conclusion about their subjective mindset,
24 but rather shows how their conduct did not align with
25 the relevant standard of care for legal opinion
26 writing.

27 Similarly, the Court disagrees that Lamport
28 improperly applies his self-provided legal standards to

1 factual findings to conclude that Defendants breached a
2 duty owed to Plaintiff. Mot. to Strike Lampport Report
3 10:7-12. Expert witnesses are not expressly prohibited
4 from rendering opinions on whether a defendant met the
5 relevant standard of care. See Iorio v. Allianz Life
6 Ins. Co. of N. Am., 2010 WL 11508761, at *9 (S.D. Cal.
7 Jan. 27, 2010)(expert opinions regarding whether
8 defendant deviated from standard of care were relevant
9 to issues in the case); Vaxiion Therapeutics, 593 F.
10 Supp. 2d at 1165 (“In a legal malpractice action,
11 expert testimony is required to establish . . . the
12 propriety of the particular conduct by the practitioner
13 in particular circumstances.”). Moreover, Defendants’
14 own standard-of-care expert, Field, expressly offers
15 conclusions as to whether Defendants satisfied the
16 requisite standard of care.

17 Lastly, Defendants attack Lampport’s qualifications
18 regarding customary practice in drafting legal opinion
19 letters. Mot. to Strike Lampport Report 11:27-28.
20 Defendants conclusively argue that Lampport lacks
21 specific expertise in preparing or assessing opinion
22 letters, and that his experience is only in
23 professional ethics. Id. at 11:27-12:2. Lampport’s
24 experience is well-suited for articulating the
25 requisite standard-of-care in a legal malpractice
26 claim, and Defendants do not clearly set forth the key
27 qualifications he lacks to opine on opinion letters,
28 beyond the fact that his background is in professional

1 ethics. Accordingly, the Court **DENIES** Defendants'
2 Motion to Strike the Lamport Report [114].

3 4. The Court **GRANTS** Defendants' Motion for Summary
4 Judgment [116] and **DENIES** Plaintiff's Motion
5 for Partial Summary Judgment [120-1]

6 The Court turns to the merits of the parties'
7 respective Motions for Summary Judgment [116, 120-1].
8 Defendants seek summary judgment in their favor as to
9 all four of Plaintiff's causes of action. Defs.' Mot.
10 9:6-20, 25:27-28; Defs.' Reply 25:7-11, 25:5-16.
11 Plaintiff seeks partial summary judgment as to the
12 following elements of the second, third, and fourth
13 claims (intentional misrepresentation, negligent
14 misrepresentation, and concealment): (1) duty,
15 (2) breach, and (3) justifiable reliance.⁸ Pl.'s Mot.
16 1:18-22, 25:21-22; Pl.'s Reply 1:2-4.

17 In its TAC, Plaintiff alleges the following causes
18 of action: (a) professional malpractice;
19 (b) intentional misrepresentation; (c) negligent
20 misrepresentation; and (d) concealment. TAC ¶¶ 61-90.
21 The Court discusses each in turn.

24 ⁸ As discussed below, the former two elements are only part
25 of Plaintiff's professional malpractice claim, not the claims for
26 which Plaintiff seeks summary judgment. See also Pl.'s Reply
27 2:6-7 ("[T]here is no 'standard of care' analysis with the
28 [intentional misrepresentation, negligent misrepresentation, and
concealment claims], since these are not based on professional
negligence."). Because the Court finds that summary judgment is
appropriate for Defendants on all claims, this discrepancy is
immaterial.

1 a. *Professional Malpractice*

2 The first issue is whether, as a matter of law,
3 Defendants committed professional malpractice. The
4 elements of a professional malpractice⁹ claim are
5 “(1) the duty of the professional to use such skill,
6 prudence, and diligence as other members of his
7 profession commonly possess and exercise; (2) a breach
8 of that duty; (3) a proximate causal connection between
9 the negligent conduct and the resulting injury; and
10 (4) actual loss or damage resulting from the
11 professional’s negligence.” Vaxiion Therapeutics, 593
12 F. Supp. 2d at 1165 (quoting Osornio v. Weingarten, 29
13 Cal. Rptr. 3d 246, 254 (Ct. App. 2007)).

14 i. *Duty*

15 An attorney issuing “a legal opinion intended to
16 secure benefit for the client” must use due care, “or
17 the attorneys who do not act carefully will have
18 breached a duty owed to those they attempted or
19 expected to influence on behalf of their clients.”
20 Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal.
21 Rptr. 901, 906 (Ct. App. 1976); see Osornio, 21 Cal.
22 Rptr. at 259-60. Additionally, a defendant,
23 professional or otherwise, always owes a duty not to
24

25 ⁹ Plaintiff sometimes refers to its professional malpractice
26 claim as legal malpractice. See, e.g., Pl.’s Opp’n at 9:11-12.
27 Legal malpractice is a kind of professional malpractice. See
28 Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421,
432 (Cal. 1971)(in bank)(“A similar but possibly longer absolute
limit may be desirable in actions for legal malpractice . . . or
indeed in all actions for professional malpractice.”).

1 defraud others. Vega v. Jones, Day, Reavis & Pogue, 17
2 Cal. Rptr. 3d 26, 34 (Ct. App. 2004) ("Jones Day did
3 have the same duty others have "not to defraud
4 another, even if that other is an attorney negotiating
5 at arm's length.'" (citation omitted)); Jackson v.
6 Rogers & Wells, 258 Cal. Rptr. 454, 459 (Ct. App.
7 1989)("[T]he fact [that an attorney committed fraud in
8 dealing with a third party] in the capacity of attorney
9 for a client does not relieve him of liability.").
10 Thus, a duty of disclosure exists if "the defendant
11 makes representations but does not disclose facts which
12 materially qualify the facts disclosed, or which render
13 his disclosure likely to mislead." Linear Tech. Corp.
14 v. Applied Materials, Inc., 61 Cal. Rptr. 3d 221, 2
15 (Ct. App. 2007); see also Goodman, 556 P.2d at 745;
16 Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491
17 P.2d 421, 429 (Cal. 1971)(in bank).

18 For instance, in Vega, the defendant law firm
19 argued that because it owed no duty to disclose the
20 suppressed transaction to the adverse party in the
21 merger, it was not liable for concealment. 17 Cal.
22 Rptr. 3d at 33. However, because the defendant
23 "specifically undertook to disclose the transaction" in
24 the first place, the Court said it was "not at liberty
25 to conceal a material term." Id. In the context of
26 opinion letters, the Roberts court held that the
27 defendant law "firm had a duty to reveal to plaintiff
28 [its] doubt as to the status of the partnership as a

1 general partnership, since the firm knew that
2 disclosure of this doubt might well be determinative of
3 plaintiff's decision to make loans to [the firm's
4 client]." 128 Cal. Rptr. at 906. "Even though
5 defendants may have believed there was a general
6 partnership in spite of the claims of some of the
7 general partners"—and even though the plaintiff did not
8 allege the opinion was incorrect—the defendants could
9 be liable for negligent misrepresentation. Id. While
10 these cases are based on misrepresentation causes of
11 action, they are pertinent to Plaintiff's professional
12 malpractice claim because Plaintiff alleges breach by
13 way of misrepresentation.¹⁰ TAC ¶¶ 63-64, 66.

14 Plaintiff's expert witness, Lamport, explains that
15 the foregoing duties do not conflict with the lawyer's

16
17 ¹⁰ The California standard is largely consistent with
18 Defendants' contention that their duties to Plaintiff are limited
19 by the information Defendants provided in the Opinion Letters, or
20 their "four corners." Defs.' Mot. 11:16-20 (citing Field &
21 Smith, Legal Opinions in Business Transactions at § 3:32 (Prac.
22 Law Inst. 3d ed. 2014); Prudential Ins., 80 N.Y. 2d at 385-86).
23 After all, Plaintiff was not Defendants' client, but the adverse
24 party in the Loan transactions. Id. at 11:4-11. As such,
25 although Defendants owed no duty to speak, they could not make
26 misrepresentations through their voluntary disclosures. But
27 contrary to the "four corners" limitation, Defendants can be
28 liable for any misrepresentation—whether or not in the Opinion
Letters—just as any other individual would be. Vega, 17 Cal.
Rptr. 3d at 34. On the other hand, Plaintiff's suggestion that
Defendants owed a duty of "full and fair disclosure" of all facts
within their knowledge relating to the statements in the Opinion
Letters is overbroad compared to California law. See Pl.'s Mot.
10:2-4, 12:24-25. Notwithstanding that this language arises from
a California case, it did not involve opinion letters, and,
regardless, is limited to situations where the defendant
undertakes to speak on the matter. See Rogers v. Warden, 125
P.2d 7, 9 (Cal. 1942) ("If he speaks at all, he must make a full
and fair disclosure." (emphasis added)).

1 duty to the client because the lawyer must not engage
2 in fraudulent conduct or advance the client's fraud by
3 not disclosing information. Lampport Report 4-5.
4 Defendants' expert witness, Field, adds that lawyers'
5 liability in the context of third-party opinions—as
6 with any duty of care analysis—is linked to customary
7 practice standards. Field Report 5, 11.

8 In sum, Defendants owed Plaintiff a general duty of
9 care in providing the Opinion Letters as well as a duty
10 to disclose facts that materially qualify the
11 representations Defendants made.

12 ii. *Breach*

13 Plaintiff points to a number of alleged breaches
14 Defendants made in the Opinion Letters and Disclosure
15 Schedule. The Court addresses each in turn and finds
16 that Plaintiff fails to raise a genuine issue of
17 material fact. Fed. R. Evid. 56. Plaintiff's only
18 dispute with the following discussion is based on
19 Plaintiff's mischaracterization of the language in
20 Defendants' Opinion Letters and Gatziolis' statements
21 memorialized in Lander's letter. But these are merely
22 arguments. Based on the actual documents themselves
23 and as a matter of law—law which Plaintiff
24 misconstrues—no reasonable juror could find in
25 Plaintiff's favor.

26 (1) *Plaintiff's Ability to Collect*
27 *Gross Commissions from Diversified*

28 Plaintiff argues that Defendants concealed their

1 doubts that Diversified might pay Crop USA's sub-agents
2 instead of Plaintiff in the event of default.¹¹ Pl.'s
3 Mot. 13:23-26. Plaintiff alleges that Gatziolis knew
4 Diversified would do so from his "'personal experience'
5 in 'another crop insurance matter,'" which Gatziolis
6 revealed at his July 19 meeting with Cohen Tauber,
7 Plaintiff's counsel in the Loan transactions. Id.;
8 Lander Mot. Decl., Ex. H at 10. According to
9 Plaintiff, Defendants breached their duty by concealing
10 this doubt while asserting in the Opinion Letters'
11 "Knowledge Qualifier" paragraphs that Defendants knew
12 of no facts to lead them to believe that the factual
13 matters in the Loan documents were untrue or
14 inaccurate. ECF No. 118-3 ("2011 Opinion Letter") at
15 6; ECF No. 118-11 ("2013 Opinion Letter") at 7.
16 Defendants counter that Plaintiff misconstrues both the
17 "Knowledge Qualifier" as well as Gatziolis' alleged

18

19 ¹¹ Because Plaintiff did not plead this theory in its TAC,
20 Defendants argue that Plaintiff is barred from seeking summary
21 judgment on it. Defs.' Opp'n 14:27; see IV Solutions, Inc. v.
22 Conn. Gen. Life Ins. Co., No. CV-13-9026, 2015 WL 12843822, at
23 *14 (C.D. Cal. Jan. 29, 2015) ("Allowing a plaintiff . . . to
24 allege one theory, but then pursue relief on an entirely
25 different theory at summary judgment and trial, is inconsistent
26 with the Federal Rules."); see also Coleman v. Quaker Oats Co.,
27 232 F.3d 1271, 1292 (9th Cir. 2000). In its TAC, Plaintiff
28 alleges that Crop USA overstated its borrowing base by including
commissions that Diversified paid directly to certain sub-agents,
not into the Lockbox. Defs.' Opp'n 14:21-25; TAC ¶¶ 46(b), 48,
53. Contrary to Plaintiff's contention that its references to
"Collateral" encompass this new theory, Pl.'s Reply 15:11-12, the
TAC's only mention of what might happen *in the event of default*
is that Plaintiff might need a loan workout to get paid, TAC
¶ 53. Nevertheless, summary judgment for Defendants on this
theory is warranted on the merits.

1 remarks at the July 19 meeting.¹² Defs.' Opp'n 17:21-
2 28, 21:9-10.

3 The "Knowledge Qualifier" paragraph states in
4 relevant part:

5 Wherever we indicate that our opinion with
6 respect to the existence or absence of facts is
7 based on our knowledge, our opinion is based
8 solely on (i) the current actual knowledge of
9 the attorneys currently with our firm who have
10 represented [Crop USA] and (ii) the
11 representations and warranties of said parties
12 contained in the Loan Documents; we have made no
13 independent investigation as to such factual
14 matters. However, we know of no facts which
15 lead us to believe such factual matters are
16 untrue or inaccurate.

17 2011 Opinion Letter 5; see also 2013 Opinion Letter 6
18 (same except as to "Amended Loan Documents").

19 By its terms, the "Knowledge Qualifier" only
20 applies to statements in the Opinion Letters where
21 Defendants indicate their own knowledge as to a
22 particular subject matter. Defs.' Opp'n 21:23-25.
23 Because Plaintiff fails to point to any reference of
24 "knowledge" regarding Plaintiff's ability to collect
25 Gross Commissions from Diversified, these paragraphs
26 are no basis to hold Defendants liable.

27 Moreover, Plaintiff's interpretation of Gatziolis'
28 statements at the July 19 meeting fare no better. The

25 ¹² Despite that Defendants dispute that Gatziolis ever said
26 the statements Lander attributes to him in his letter, Gatziolis
27 Decl. ¶¶ 4-6, the Court finds no genuine dispute of *material*
28 fact, Fed. R. Evid. 56. If Gatziolis made those remarks,
Defendants are still entitled to summary judgment because—as
discussed below—the remarks do not support a finding that
Defendants breached their duty or made any misrepresentation or
concealment.

1 statements appear to represent Gatziolis' opinion in
2 July 2013 that Diversified might pay commissions to its
3 sub-agents rather than the Lockbox if Plaintiff
4 foreclosed on the Loan. Defs.' Opp'n 17:21-24; Lander
5 Mot. Decl., Ex. H at 10-11. These July 2013 statements
6 do not represent Defendants' subjective knowledge in
7 November 2011 and February 2013 that Plaintiff was
8 lending against commissions that Crop USA ultimately
9 owed to sub-agents. Defs.' Opp'n 17:25-28; Pl.'s Mot.
10 6:4-6. Indeed, Gatziolis testified that his
11 understanding of the Collateral was consistent with the
12 definition in the Loan Agreement, "[a]ll of the assets
13 of CropUSA." Fretty Opp'n Decl., Ex. 8 at 305:20-22.

14 Based on the foregoing, the Court finds Defendants
15 did not conceal doubts as to Plaintiff's ability to
16 collect under the Loan and did not make any
17 misrepresentation through the "Knowledge Qualifier."

18 (2) *Crop USA's Rights and Title to*
19 *Gross Commissions*

20 In the Opinion Letters, Defendants opined that
21 "[t]he provisions of the Loan Agreement create a valid
22 security interest in favor of [Plaintiff] in the
23 respective rights, title and interests of [Crop USA] in
24 and to all Collateral in which a security interest may
25 be created under Article 9 of the [California] Uniform
26 Commercial Code." 2011 Opinion Letter 4; 2013 Opinion
27 5. This paragraph "does not encompass or address the
28 priority of any lien or security interest granted or

1 created pursuant to any of the Loan Documents." 2011
2 Opinion Letter 8; see also 2013 Opinion Letter 10 (same
3 except as to "the perfection of or the priority of any
4 lien" and "Amended Loan Documents").

5 Plaintiff argues Defendants meant a valid security
6 interest in the Gross Commissions, which would be a
7 misrepresentation because Gatziolis concurrently
8 believed that Diversified would not honor Crop USA's
9 pledge of Gross Commissions. Pl.'s Mot. 15:13-17. In
10 support of this argument, Plaintiff relies on an Iowa
11 state court decision in Plaintiff's lawsuit against one
12 of Crop USA's sub-agents where the Iowa court found
13 that "Crop USA lacked 'rights' in the commissions owed
14 to [the sub-agent] within the meaning of the California
15 UCC." Id. at 6:18-19. The Iowa court thus ruled
16 Plaintiff could not collect those commissions from the
17 sub-agent. Defs.' Opp'n 19 n.5. As a preliminary
18 matter, this Court is not bound by that court's ruling.
19 Additionally, at issue in this case is Defendants'
20 opinion that Plaintiff had a valid security interest in
21 the Collateral, not in the commissions belonging to
22 that sub-agent.

23 Neither the Loan documents nor Opinion Letters
24 mention "gross commissions." Defs.' Opp'n 16:4-12;
25 Pl.'s Reply 11:20-23. Instead, Crop USA pledged
26 "Collateral," which is defined as "[a]ll of the assets
27 of CropUSA." Defs.' Mot. 16:2-3. Although Plaintiff
28 notes that the definition includes "all of the right,

1 title and interest of [Crop USA] in and
2 to . . . commissions" under any "Sales Agent
3 Agreement," the key terms are that Crop USA must still
4 have the "right, title and interest" to those
5 commissions. See Loan § 1.34. If Crop USA did not
6 have rights to the Sub-Agent Commissions—as Plaintiff
7 describes the Iowa state court holding—then those
8 commissions are not encompassed in the Collateral or
9 Plaintiff's security interest. Inasmuch as Plaintiff
10 alleges that Crop USA overstated its borrowing base by
11 including commissions that were not payable to
12 Plaintiff's Lockbox, TAC ¶ 46(b), Plaintiff has failed
13 to produce any evidence showing that Defendants were
14 aware of this or made any representations on the
15 matter, Defs.' Mot. 18:4-9. Finally, Defendants did
16 not opine as to Plaintiff's priority to the Collateral.
17 2011 Opinion Letter 8; 2013 Opinion Letter 10; see also
18 Defs.' Reply 18:16-23.

19 As a result, the Court finds Defendants did not
20 breach their duty in this manner because they did not
21 make any misrepresentation about Plaintiff's security
22 interest in the Collateral.

23 (3) *Consent Required to Pledge Gross*
24 *Commissions*

25 In the Opinion Letters, Defendants concluded,
26 "Neither the execution and delivery of the Transaction
27 Documents by [Crop USA] nor the consummation of the
28 transactions contemplated by the Loan Documents,

1 requires an exemption, consent, approval or
2 authorization of . . . any other Person.” 2011 Opinion
3 Letter 5; 2013 Opinion Letter 5. Plaintiff argues this
4 was a misrepresentation—and accordingly, a breach of
5 Defendants’ duty to Plaintiff—since Crop USA only had
6 title to the Net Commissions, not the Gross
7 Commissions—and would need the sub-agents’ consent to
8 pledge the Gross Commissions. Pl.’s Mot. 17:7-12.
9 Because Gatziolis believed that Diversified was
10 obligated to pay a portion of the Gross Commissions to
11 sub-agents, Defendants, at a minimum, had doubts about
12 Crop USA’s ability to pledge the Gross Commissions.¹³
13 Id. at 17:9-13. Moreover, Plaintiff contends that the
14 fact that Diversified was allegedly obligated to pay
15 commissions to sub-agents even if Plaintiff declared a
16 default meant that the sub-agents had to consent to the
17 pledge agreement. Pl.’s Opp’n 22:24-27.

18 Defendants counter that in the Loan, Crop USA
19 pledged all of its assets, i.e., the Collateral.
20 Defs.’ Opp’n 18:27-28. Crop USA did not need the sub-
21 agents’ consent to this Loan transaction, and Crop
22 USA’s ownership rights in the commissions flowing
23 through the Lockbox do not retroactively change that.

24
25 ¹³ Like for Plaintiff’s Gross Commissions theory, Defendants
26 purport that this Consent theory is unpled and unwarranted for
27 summary judgment. Defs.’ Opp’n 18:21-25; see IV Solutions, 2015
28 WL 12843822, at *14. Citing TAC paragraph 56, Plaintiff argues
it already alleged this theory. Pl.’s Reply 18:1-2. However,
the Court finds no mention of “consent” or any allegation that
could be interpreted as such. Regardless, Plaintiff fails to
meet its burden on this theory.

1 Id. at 18:28-19:5. Defendants argue that Plaintiff
2 conflates "consent to the transaction, on the one hand,
3 and an ultimate right to be paid commissions by Crop
4 [USA], on the other." Defs.' Reply 19:11-14. Further,
5 Defendants dismiss Plaintiff's reliance on the Iowa
6 state court ruling because it "nowhere holds that [the
7 sub-agent's] 'consent' was at issue." Defs.' Opp'n 19
8 n.5; see also Defs.' Reply 20:13-19.

9 The Court agrees that under the express language in
10 the Opinion Letters, Defendants opined only to consent
11 to the Loan transactions, not to any occurrence after
12 the fact. Therefore, Plaintiff's argument that
13 Defendants misrepresented the consent needed to pledge
14 Gross Commissions fails. Because Plaintiff has not
15 established anyone's consent was needed to pledge the
16 Collateral or enter into the Loan Agreement, the Court
17 holds that Defendants made no misrepresentation or
18 concealment.

19 (4) *Borrower's Disclosure Schedule*

20 Plaintiff also points to a number of alleged
21 misrepresentations made in Crop USA's Disclosure
22 Schedule. As an initial matter, the language in the
23 Opinion Letters does not indicate that Defendants
24 ratified Crop USA's Disclosure Schedule. Cf. Shafer v.
25 Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone,
26 131 Cal. Rptr. 2d 777, 789 (Ct. App. 2003) ("A
27 misrepresentation can occur through direct statement or
28 through affirmation of a misrepresentation of another,

1 as when a lawyer knowingly affirms a client's false or
2 misleading statement." (citation omitted)).

3 First, as discussed, the "Knowledge Qualifier"
4 paragraphs only applied to the portions of the Opinion
5 Letters where Defendants represented their knowledge on
6 the particular issue. Because Plaintiff fails to
7 establish that any of those portions relate to Crop
8 USA's Disclosure Schedule—and more importantly, to the
9 sections Plaintiff alleges were fraudulent—Plaintiff
10 cannot rely on the "Knowledge Qualifier" as the basis
11 of Defendants' liability. See Pl.'s Mot. 17:19-21.

12 Second, Plaintiff affords undue weight to the
13 "assumptions" Defendants make in the Opinion Letters.
14 See id. In each opinion letter, Defendants "assumed,"
15 "[f]or the purposes of this opinion," that (1) the
16 Collateral exists, and Crop USA and Taylor have rights
17 or title to it, (2) all statements in the Loan
18 Documents are true, and (3) all parties complied with
19 any requirement of good faith. 2011 Opinion Letter 3-
20 4; 2013 Opinion Letter 3-4; see also TAC ¶¶ 27(b)-(d),
21 39(b)-(d). Under customary opinion letter practice,
22 "stated assumptions . . . shift to the opinion
23 recipient the responsibility for confirming the assumed
24 facts for itself or taking the risk that what is
25 assumed might turn out to be untrue." TriBar II Report
26 § 2.3.¹⁴ According to Defendants' expert, Field, use of

27
28 ¹⁴ The State Bar of California recognizes the TriBar Opinion
Committee as "the de facto national standard setter for opinion

1 assumptions informs the recipient that no diligence has
2 been done; the recipient only takes solace in the fact
3 that the assumption will not be used if the opinion
4 giver knows it is or likely is false. Field Report 21.

5 Additionally, Defendants argue that the statements
6 in the Disclosure Schedule are not actionable as to
7 Defendants under the agent's immunity rule. Defs.'
8 Mot. 14:17-21. The agent's immunity rule absolves an
9 attorney from liability for the client's own
10 representations. Berg & Berg Enters., LLC v. Sherwood
11 Partners, Inc., 32 Cal. Rptr. 3d 325, 335 (Ct. App.
12 2005). The two exceptions to this rule are where:
13 (1) the attorney breaches an independent duty to the
14 plaintiff; or (2) the attorney's acts surpass the
15 performance of the duty to the client and are done for
16 the attorney's personal financial gain. Id. (citations
17 omitted). As discussed, Defendants owed an independent
18 duty not to defraud Plaintiff; thus, the agent's
19 immunity rule is inapplicable. However, Plaintiff
20 fails to establish a breach of this duty.

21 Plaintiff fails to show that Defendants owed
22 Plaintiff a duty for the Disclosure Schedule—unlike the
23 Opinion Letters—other than the duty not to defraud
24 others. Because Defendants made no representations in
25 or as to Crop USA's disclosures, there was no breach.
26 Nor did Defendants sign the Disclosure Schedule or act

27
28 _____
practice." Field Report 11.

1 in any manner beyond their duty to Crop USA for their
2 own personal gain. Although Defendants billed Crop USA
3 for "preparation of disclosure schedules," Crop USA,
4 not Defendants, made the statements inside the
5 Disclosure Schedule. Janus Capital Grp., Inc. v. First
6 Derivative Traders, 564 U.S. 135, 142 (2011) ("One who
7 prepares or publishes a statement on behalf of another
8 is not its maker.").

9 (5) *Administrative Agreements as*
10 *Material Contracts*

11 In the Loan Agreement, Crop USA did not disclose
12 its Administrative Agreement with AIA, under which Crop
13 USA was obligated to pay AIA's legal expenses. See
14 Loan Agmt. § 10.10. Plaintiff claims that this was a
15 "Material Contract,"¹⁵ so Crop USA needed to disclose it
16 pursuant to the Disclosure Schedule's terms. Pl.'s
17 Mot. 19:5-8. Specifically, the Administrative
18 Agreement requires Crop USA to "pay and account for
19 attorney's fees incurred relating to defense of
20 lawsuits filed against AIA." Administrative Agreement
21 § 4(g), ECF No. 120-7. Plaintiff asserts that clause
22 makes it a "Material Contract" because Crop USA would

23
24 ¹⁵ A "Material Contract" is defined as "any
25 contract . . . to which [Crop USA] is a party as to which the
26 breach, nonperformance, cancellation or failure to
27 renew . . . could have a Material Adverse Effect . . . on (a) the
28 Business . . . assets, liabilities, [or] financial
condition . . . , (e) the value of the Collateral or the rights
of [Plaintiff] therein, [or] (h) the timely payment of the
principal of or interest on the Loan(s)." Loan Agmt. § 1.83.
The Loan specifies that "[a]ll determinations of materiality
shall be made by [Plaintiff] in its reasonable judgment." Id.

1 incur legal fees impacting its financial condition and
2 rights to the Collateral if it breached the agreement.
3 Pl.'s Mot. 20:2-5. Defendants counter that the
4 materiality of this agreement is disputed because
5 Taylor was not sure what impact a breach would have,
6 but "Crop [USA] would have continued on." Defs.' Opp'n
7 23:3-6 (citing Taylor Dep. 91:1-10, ECF No. 139-2).

8 Because Defendants billed Crop USA for "preparation
9 of disclosure schedules" on November 21, 2011 (two days
10 before the Loan closed), Pl.'s SUF ¶ 52, Plaintiff
11 claims that Defendants knew of this nondisclosure,
12 particularly because Gatziolis had already heard of the
13 Administrative Agreement, Pl.'s Mot. 19:9-13. Merely
14 because Defendants prepared the Disclosure Schedule
15 does not mean that they advised Crop USA as to what to
16 include, Defs.' Opp'n 20:26-27, but they may still be
17 held liable for any corresponding reliance on the
18 nondisclosure in the Opinion Letters. Moreover, when
19 Gatziolis represented Crop USA in an asset purchase
20 agreement with Hudson Insurance Company in 2008, Crop
21 USA disclosed a prior iteration of the Administrative
22 Agreement as a Material Contract. Pl.'s Reply 21:19-
23 25. Although Defendants made no representation in the
24 Disclosure Schedule, Defendants could still be liable
25 for making an assumption in the Opinion Letters that
26 was incompatible with this nondisclosure. Pl.'s Opp'n
27 18:21-26; see 2011 Opinion Letter 3 (assuming that "all
28 statements, representations and warranties made in the

1 Loan Documents . . . are true and correct"); 2013
2 Opinion Letter 4 (same except as to "Amended Loan
3 Documents").

4 On the other hand, Defendants argue that Plaintiff
5 has not presented evidence that Gatziolis knew about
6 the legal fees provision or whether the Administrative
7 Agreement was still in effect at the time of the Loan
8 transactions. Defs.' Opp'n 6:24-7:1. Gatziolis
9 attested he had never seen the Administrative Agreement
10 and did not discuss it with anyone to cause him to
11 remember it at the time of the Loan. Gatziolis Decl.
12 ¶ 4. Plaintiff's only rebuttal is that Gatziolis had
13 "heard of" the Administrative Agreement before the
14 Loan, but that does not establish he remembered it or
15 knew it should be disclosed. See Pl.'s Mot. 19:9-13.
16 Thus, even assuming this was a "Material Contract,"
17 Defendants did not breach their duty to Plaintiff by
18 not revealing it if they were unaware of it or its
19 materiality.¹⁶

20
21
22 (6) *Failure to Disclose Payments to*
23 *Affiliates*

24 Gatziolis testified that AIA and Crop USA were
25 affiliates as defined under the Loan Agreement.

26
27
28

¹⁶ Notably, under customary opinion letter practice, an attorney does not have a duty to investigate. Glazer, FitzGibbon & Weise, *On Legal Opinions* § 4.2.3.1 (Aspen 3d ed. 2008).

1 Gatziolis Dep. 436:11-19, ECF No. 120-14. And as
2 discussed, under the Administrative Agreement, Crop USA
3 was obligated to pay AIA's legal fees. Finally, the
4 Disclosure Schedule required Crop USA to list all
5 affiliates to whom payments could be made under the
6 Loan Agreement. Loan Agmt. § 10.10. Despite the
7 foregoing, Plaintiff argues that Defendants failed to
8 disclose to Plaintiff that Crop USA would pay AIA.
9 Pl.'s Mot. 20:25-28; Pl.'s Reply 23: 11-13.

10 Defendants respond by asserting that (1) to the
11 extent Crop USA made legal payments to AIA's counsel,
12 AIA was obligated to reimburse Crop USA and (2) any
13 payments were not "Payments to Affiliates," but rather,
14 expenses posted to an account merely noting the
15 expenses as "due from" AIA. Defs.' Opp'n 23:19-28.
16 Moreover, as discussed, Plaintiff has proffered no
17 evidence showing that Defendants even knew about this
18 clause of the Administrative Agreement. Thus,
19 Defendants did not breach their duty.

20 (7) *Litigation Paragraph*

21 In the Opinion Letters, Defendants advised, "[T]o
22 our knowledge, there [is] no [lawsuit] pending or
23 threatened against [Crop USA] that (a) asserts the
24 invalidity of any Loan Document, (b) seeks to prevent
25 the consummation of any of the transactions [therein],
26 [or] (c) . . . might (i) adversely affect the validity
27 or enforceability of any Loan Document" 2011
28 Opinion Letter 5; 2013 Opinion Letter 5 (same except as

1 to "Amended Loan Documents"). Because Defendants
2 represented their "knowledge" in this paragraph, the
3 "Knowledge Qualifier" applies, meaning that Defendants
4 would be liable if they knew any facts to the contrary.

5 Defendants argue that this paragraph was accurate
6 in that the only pending cases against Crop USA during
7 the Loan were the John Reed and Donna Taylor cases,
8 which did not seek any ruling related to "the validity
9 or enforceability" of the Loan.¹⁷ Defs.' Mot. 19:16-22.
10 Plaintiff construes the paragraph differently to mean
11 that no litigation was pending that might adversely
12 "impair the collateral." Pl.'s Opp'n 14:18-19, 24:15-
13 16. An adverse ruling in either aforementioned case
14 might have impaired the Collateral because Crop USA
15 would be subjected to "significant monetary damages."
16 ECF No. 118-23 at 61.

17 The Opinion Letters expressly refer to the
18 "validity or enforceability of the Loan Documents," not
19 Crop USA's financial resources or the Collateral it
20 pledged to Plaintiff. Whether or not Crop USA paid
21 "significant monetary damages" does not have any effect
22 on the validity of the Loan and Plaintiff's ability to
23 enforce it. See, e.g., Seymour v. Hull & Moreland

24
25 ¹⁷ Plaintiff contests that those were the only two pending
26 cases against Crop USA. Pl.'s Opp'n 14:20-21. However,
27 Plaintiff fails to provide any evidence of other cases. See
28 Pl.'s SSUF ¶¶ 75-76. Even so, the Green Leaf memorandum provided
to Plaintiff lists other cases that had been filed against Crop
USA, so Plaintiff was on notice of those. Fretty Mot. Decl., Ex.
23 at 93-94; see also Defs.' SUF ¶¶ 18-31.

1 Eng'g, 605 F.2d 1105, 1113 (9th Cir. 1979) (noting that
2 plaintiffs had "a judgment for several thousand dollars
3 against an insolvent defendant"). Therefore,
4 Defendants did not breach their duty by making a
5 misrepresentation or concealing any litigation as
6 defined in this part of the Opinion Letters.

7 (8) *Gatziolis' Statements During a*
8 *Conference Call with Richard Ellis*

9 In a conference call between Gatziolis and Richard
10 Ellis prior to the 2011 Opinion Letter, Gatziolis
11 advised that the Litigation "had been . . . or was
12 imminently to be finally decided and/or settled, in
13 favor of John Taylor and Crop USA, and that the
14 litigation would have no impact on [the Loan] or the
15 collateral securing that loan, and 'not to worry about
16 it.'" Fretty Mot. Decl., Ex. 25 at 8. Defendants
17 argue that this is not a factual representation, but a
18 "'prediction' that the pending litigation would be
19 resolved in [Crop USA's] favor." Defs.' Mot. 13:7-8.
20 Opinions of future events are not actionable as
21 misrepresentations. Neu-Visions Sports, Inc. v.
22 Soren/McAdam/Bartells, 103 Cal. Rptr. 2d 159, 163 (Ct.
23 App. 2000)(citations omitted). In response, Plaintiff
24 focuses on its reliance on these statements, but fails
25 to rebut that they are not misrepresentations at the
26 outset. Pl.'s Opp'n 5:23-28, 24:15-20. In conclusion,
27 Gatziolis' statements during the conference call are no
28 basis for Defendants' alleged breach.

1 ///

2 iii. *Causation*

3 As with other negligence causes of action, in
4 transactional malpractice cases, the plaintiff must
5 "establish causation by showing either (1) but for the
6 negligence, the harm would not have occurred, or
7 (2) the negligence was a concurrent independent cause
8 of the harm." Viner v. Sweet, 70 P.3d 1046, 1051 (Cal.
9 2003). Thus, to prevail on the causation element,
10 Plaintiff needs to prove that had Defendants not made
11 the alleged misrepresentations and concealment,
12 Plaintiff would not have proceeded with the Loan. See
13 TAC ¶ 67. Essentially, Plaintiff needs to show it
14 reasonably relied on Defendants' actions. OCM
15 Principal Opportunities Fund v. CIBC World Mkts. Corp.,
16 68 Cal. Rptr. 3d 828, 855 (Ct. App. 2007).

17 Additionally, Defendants must have proximately caused
18 Plaintiff's harm. Id. at 860-61 (citation omitted).

19 "Reasonable reliance, judged 'in light of the
20 plaintiff's intelligence and experience,' remains the
21 standard in fraudulent misrepresentation actions, and
22 California courts . . . take [this standard] quite
23 seriously." Atari Corp. v. Ernst & Whinney, 981 F.2d
24 1025, 1031 (9th Cir. 1992). If the plaintiff possesses
25 facts demonstrating that the representations are
26 "patently and obviously false," reliance is "manifestly
27 unreasonable," and the misrepresentations were not the
28 cause of the plaintiff's injury. Id.

1 Because the Opinion Letters state that no one other
2 than the lender shall be entitled to rely on them,
3 Plaintiff claims its reliance as the lender was
4 justified. Pl.'s Mot. 23:17-25; see also 2011 Opinion
5 Letter 10; 2013 Opinion Letter 11. Moreover, Gatziolis
6 testified that Defendants knew Plaintiff would rely on
7 the Opinion Letters. Steinman Mot. Decl., Ex. Q at
8 76:17-22. Finally, in a law firm brochure, Defendants
9 represent that they are "a group of highly skilled
10 attorneys," providing "sophisticated legal services to
11 clients." Pl.'s Mot. 25:6-8; Steinman Mot. Decl., Ex.
12 T at 97-98. Based on the foregoing, Plaintiff argues
13 "there was nothing that was so 'patently and obviously
14 false' to alert [Plaintiff] that [Defendants] lacked
15 the requisite 'skill and knowledge' to write an
16 accurate and honest opinion letter." Pl.'s Mot. 25:12-
17 14.

18 Regardless of whether reliance arguably would have
19 been justified, Defendants point out that, in the
20 instant case, Plaintiff could not have relied on any
21 alleged omissions because Plaintiff had actual
22 knowledge of the Litigation. Defs.' Mot. 24:14-18.
23 Plaintiff received reports and a warning from Crop USA
24 that the Litigation was ongoing. Defs.' SUF ¶¶ 22-24,
25 28-30; Fretty Mot. Decl., Ex. 23 at 93-94. Although
26 Plaintiff asserts that the impact of the Litigation,
27 not the Litigation itself, should have been disclosed,
28 Plaintiff's "intelligence and experience" as a lender

1 makes it unreasonable for Plaintiff to have entered
2 into the Loan—whilst knowing about the Litigation—on a
3 belief that the Litigation would have no impact on Crop
4 USA’s finances. This is particularly true because the
5 Green Leaf memorandum, which Plaintiff received,
6 expressed that Crop USA might owe “significant monetary
7 damages.” Fretty Mot. Decl., Ex. 23 at 61.

8 Furthermore, in an internal memorandum circulated
9 in July 2012, Plaintiff recognized that Crop USA was
10 paying over 90% of its commissions from Diversified
11 back to sub-agents. Defs.’ Opp’n 24:21-25; Fretty
12 Opp’n Decl., Ex. 2 at 2. Yet Plaintiff increased Crop
13 USA’s borrowing amount to \$8 million eight days after
14 issuing the memorandum and to \$10 million in February
15 2013. Id. at 24:27-25:1. Plaintiff’s knowledge as
16 such conflicts with its alleged interpretation that the
17 Collateral included Sub-Agent Commissions, so Plaintiff
18 could not have reasonably—let alone actually—relied on
19 that interpretation. In its Reply, Plaintiff sidesteps
20 this point by asserting its reliance on Defendants’
21 alleged statements that “no consent” was required for
22 Crop USA to pledge the “Gross Commissions.” Pl.’s
23 Reply 24:20-25:1. But as discussed, the Opinion
24 Letters only discussed consent as to Collateral, which
25 did not mean “Gross Commissions.” Therefore, Plaintiff
26 fails to rebut this issue.

27 Contrary to Plaintiff’s argument that Defendants
28 need to prove their “statements were ‘obviously

1 false,'" Pl.'s Reply 25:10-11, Plaintiff needed to show
2 that its reliance was justified as the party with the
3 burden at trial. Moreover, if Plaintiff's
4 interpretation of the statements was "obviously false,"
5 then it would be unreasonable for Plaintiff to rely on
6 that interpretation, regardless of the falsity of the
7 statements. Here, it was unreasonable for Plaintiff to
8 rely on its interpretation of the Opinion Letters due
9 to the notice it had to the contrary. See also Hadland
10 v. NN Inv'rs Life Ins. Co., 30 Cal. Rptr. 2d 88, 95
11 (Ct. App. 1994)(holding that reliance on
12 representations conflicting with "the express
13 provisions of the written contract" was "unjustified as
14 a matter of law"). In sum, Defendants were neither the
15 "but for" nor proximate cause of Plaintiff's harm.

16 Accordingly, the Court **GRANTS** Defendants' Motion as
17 to Plaintiff's professional malpractice claim.¹⁸

18 b. *Intentional Misrepresentation*

19 The next issue is whether Defendants made any
20 intentional misrepresentation as a matter of law. To
21 establish intentional misrepresentation, the claimant
22 must prove the following: "(1) a misrepresentation;
23 (2) knowledge of falsity; (3) intent to induce
24 reliance; (4) actual and justifiable reliance; and
25 (5) resulting damage." Cisco Sys., Inc. v.

26

27 ¹⁸ The parties do not discuss, and the Court need not rule
28 on, damages because Defendants satisfied their burden that no
reasonable juror could find for Plaintiff on either the breach or
causation elements. In re Oracle Corp., 627 F.3d at 387.

1 STMicroelectronics, Inc., 77 F. Supp. 3d 887, 897 (N.D.
2 Cal. Dec. 29, 2014)(citing Lazar v. Sup. Ct., 909 P.2d
3 981 (Cal. 1996)).

4 As discussed, Plaintiff fails to establish any
5 misrepresentation by Defendants inside or outside the
6 Opinion Letters. See supra Part II.B.4.a.ii.
7 Therefore, Defendants had no knowledge of any alleged
8 falsity or intent to induce Plaintiff's reliance on
9 that falsity. Moreover, similar to the causation
10 element of professional malpractice, Plaintiff did not
11 actually or justifiably rely on any of the
12 representations. As a result, the Court **GRANTS**
13 Defendants' Motion and **DENIES** Plaintiff's Motion as to
14 Plaintiff's intentional misrepresentation cause of
15 action.

16 c. *Negligent Misrepresentation*

17 Next, the Court must decide, as a matter of law,
18 whether Defendants made a negligent misrepresentation.
19 The elements of negligent misrepresentation are the
20 same as of intentional misrepresentation, other than
21 that the former requires "a misrepresentation of fact
22 by a person who has no reasonable grounds for believing
23 it to be true," as opposed to "knowledge of falsity."
24 Cisco Sys., 77 F. Supp. 3d at 897. Additionally, under
25 California law, "'omissions' or nondisclosures cannot
26 give rise to liability for negligent
27 misrepresentation." Id. (citation omitted).

28 As discussed, Defendants made no affirmative

1 misrepresentations. See supra Part II.C.4.a.ii.
2 Therefore, even assuming Defendants omitted information
3 from Plaintiff, they would not be liable for negligent
4 misrepresentation. See supra Part II.B.4.a.ii. The
5 reasonableness of their belief in the truth of their
6 statements is of no significance because there was no
7 misrepresentation. As a result, the Court **GRANTS**
8 Defendants' Motion and **DENIES** Plaintiff's Motion for
9 the negligent misrepresentation claim.

10 d. *Concealment*

11 The final issue is whether Plaintiff showed
12 concealment as a matter of law. A concealment cause of
13 action requires proof of the following elements:
14 (1) concealment of a material fact; (2) duty to
15 disclose the fact; (3) intent to defraud; (4) the
16 plaintiff was unaware of the fact and would have acted
17 differently if the plaintiff knew; and (5) resulting
18 damage. Falk v. Gen. Motors Corp., 496 F. Supp. 2d
19 1088, 1097 (N.D. Cal. 2007)(quoting Lovejoy v. AT&T
20 Corp., 14 Cal. Rptr. 3d 117 (Ct. App. 2004)).

21 As discussed, Defendants did not conceal or
22 suppress any material fact in breach of a duty. See
23 supra Part II.B.4.a.ii. Additionally, Plaintiff has
24 not shown fraudulent intent, and Defendants have proved
25 that Plaintiff was aware of all allegedly concealed
26 facts. Thus, the Court **GRANTS** Defendants' Motion and
27 **DENIES** Plaintiff's Motion as to the concealment cause
28 of action.

1 **III. CONCLUSION**

2 Thus, the Court **GRANTS** Defendants' Motion for
3 Summary Judgment [116] and **DENIES** Plaintiff's Motion
4 for Partial Summary Judgment [120]. Additionally, the
5 Court **DENIES** Defendants' Motion to Strike Stanley W.
6 Lamport's Expert Report [114], **DENIES AS MOOT**
7 Plaintiff's Motion to Strike Robert L. Kehr's Expert
8 Report [113], and **DENIES AS MOOT** Defendants' Motion to
9 Strike Portions of Douglas E. Johnston, Jr.'s Expert
10 Report [115].

11 **IT IS SO ORDERED.**

12
13 DATED: September 13, 2017

s/ RONALD S.W. LEW

14 **HONORABLE RONALD S.W. LEW**
15 senior U.S. District Judge
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