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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE LINCOLN NATIONAL LIFE)	CV 15-3771-RSWL-Ex
INSURANCE COMPANY,)	
)	
Plaintiff,)	ORDER re: Plaintiff's
)	Motion for Partial
v.)	Summary Judgment or in
)	the Alternative Summary
)	Adjudication [36]
)	
PAMELA MCCLENDON,)	
)	
Defendant.)	
)	
)	

Currently before the Court is Plaintiff The Lincoln National Life Insurance Company's ("Plaintiff") Motion for Partial Summary Judgment, or in the Alternative, Summary Adjudication ("Motion") as to its claim for Money Had and Received against Defendant Pamela McClendon ("Defendant") [36]. Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** The Court **GRANTS**

1 Plaintiff's Motion [36].

2 **I. BACKGROUND**

3 **A. Factual Background**

4 Plaintiff is an Indiana corporation authorized to
5 do business in California. Compl. ¶ 1, ECF No. 1.
6 Defendant is the daughter of Netha McClendon, the
7 recipient of an annuity ("the Annuitant"). Id. at ¶ 5.

8 On August 13, 1992, Alexander Hamilton Life
9 Insurance Company of America issued a Single Life
10 Immediate Annuity, No. 4000073334 ("the Annuity") to
11 the Annuitant. Id.; Compl. Ex. 1, ECF No. 1-1. In
12 October 1995, Jefferson Pilot Life Insurance Company
13 ("Jefferson") acquired the Annuity. Id. at ¶ 6. In
14 April 2007, after merging with Jefferson, Plaintiff
15 acquired ownership of the Annuity and its
16 rights/obligations. Id. Starting September 20, 1992,
17 the Annuitant would receive \$3,000.00 monthly under the
18 "Single Life Immediate Annuity - Life Only" option.
19 Id. at ¶ 7; Compl. Ex. 1. Pursuant to the Annuity,
20 Plaintiff would make payments "as long as the Measuring
21 Life [the Annuitant] is living." See Compl. ¶¶ 8, 9,
22 Ex. 1 at 8. If the Annuitant died before all payments
23 were made, "the remaining guaranteed payments will be
24 paid, when due, to the Designated Beneficiary." Id.
25 The "Beneficiary" box on the Annuitant's contract
26 states: "Not Applicable." Compl. Ex. 1.

27 The Annuitant died on January 6, 1998. Compl. ¶¶
28 9, 10. Defendant did not inform Plaintiff of the

1 Annuitant's death. Id. at ¶ 13. As a result,
2 Plaintiff made 190 monthly payments to Annuitant—who it
3 thought was still alive—from January 1998 to October
4 2013, totaling \$570,000. Id. at ¶¶ 10, 16. The checks
5 were sent to the Annuitant's last-known address, where
6 Plaintiff alleges Defendant was living. Id. at ¶ 11.
7 Plaintiff alleges that Defendant deposited the mistaken
8 overpayments into her bank account. Id. Sometime in
9 2006, the Annuitant purportedly signed a Deed of Trust
10 transferring her property to Defendant, even though the
11 Annuitant had been dead for eight years. Decl. of
12 Douglas Burdick ("Burdick Decl.") ¶ 4, Ex. 2, ECF No.
13 36-2. On March 6, 2009, a caller identifying herself
14 as the Annuitant allegedly called Plaintiff, provided a
15 birth date and social security number, and requested
16 reinstatement of payments. Id. at ¶ 7, Ex. 5, ECF No.
17 36-2.

18 Plaintiff alleges that it was unaware of the
19 overpayments until October 2013. Compl. ¶ 16. On
20 December 18, 2013, Plaintiff sent letters to the
21 Annuitant's family, informing them of the overpayments
22 and requesting reimbursement. Id. at ¶ 17. On May 19,
23 2014, Defendant allegedly admitted responsibility for
24 the overpayments, but has yet to pay any of them back.
25 Id. at ¶¶ 18-19.

26 **B. Procedural Background**

27 On May 19, 2015, Plaintiff filed its Complaint,
28 alleging the following claims: (1) Unjust Enrichment;

1 (2) Money Had and Received; (3) Money Paid; (4)
2 Conversion; (5) Imposition of a Constructive Trust.
3 Compl. ¶¶ 21-23; 28-29; 35; 40; 45.

4 On December 21, 2016, the final day of its motion
5 filing cut-off date, Plaintiff filed the instant Motion
6 as to the Claim for Money Had and Received and its
7 Separate Statement of Uncontroverted Facts and
8 Conclusions of Law ("SUF") [36-1]. Defendant's
9 Opposition was due on January 3, 2017. Defendant
10 missed this deadline and filed an *ex parte* application
11 requesting an extension of time to file the Opposition
12 [40]. The Court granted the *ex parte* application,
13 allowing Defendant until 5 P.M. on January 6, 2017 to
14 file its Opposition [42]. On January 6, Defendant
15 filed its Opposition, Statement of Genuine Issues of
16 Material Fact, Objections to Plaintiff's Motion, and
17 Declarations [46, 47, 49]. Plaintiff's Reply was
18 timely filed on January 10, 2017 [51].

19 II. FINDINGS OF FACT

- 20 1. The Annuitant died on January 6, 1998. Pl's Facts
21 ¶ 5; see Decl. of Daniel S. Imber ("Imber Decl."),
22 Ex. 7 at 10:4-5, ECF No. 36-3.
- 23 2. The Annuity Contract provided for a monthly benefit
24 payment of \$3,000 under the Life Only option.
25 Pl.'s Stmt. of Uncontroverted Facts ("Pl.'s Facts")
26 ¶ 2, ECF No. 36-1; see Decl. of Douglas Burdick
27 ("Burdick Decl.") ¶ 3, Ex. 1, ECF No. 36-2
28 (undisputed).

1 3. Between January 12, 2007 and October 14, 2013,
2 Plaintiff issued 80 checks, \$3,000 each, payable
3 and addressed to the Annuitant, Netha McClendon.
4 Pl.'s Facts ¶ 4; see Burdick Decl. ¶ 8, Ex. 6
5 (undisputed).

6 **II. DISCUSSION**

7 **A. Legal Standard**

8 1. Motion for Summary Judgment

9 Federal Rule of Civil Procedure 56 states that a
10 "court shall grant summary judgment" when the movant
11 "shows that there is no genuine dispute as to any
12 material fact and the movant is entitled to judgment as
13 a matter of law." Fed. R. Civ. P. 56(a). "The party
14 moving for summary judgment has the initial burden of
15 proof to show "no genuine dispute as to any material
16 fact." Fed. R. Civ. P. 56(a); In re Oracle Corp.
17 Securities Litigation, 627 F.3d 376, 387 (9th Cir.
18 2010). "A party asserting that a fact cannot be . . .
19 genuinely disputed must support the assertion by:
20 citing to particular materials in the record, including
21 . . . stipulations." Fed. R. Civ. P. 56(c)(1)(A). "In
22 determining any motion for summary judgment . . ., the
23 Court may assume that the material facts as claimed and
24 adequately supported by the moving party are admitted
25 to exist without controversy except to the extent that
26 such material facts are (a) included in the 'Statement
27 of Genuine Disputes' and (b) controverted by
28 declaration or other written evidence filed in

1 opposition to the motion." Local Rule 56-3.

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

12 2. Partial Summary Judgment

13 Federal Rule of Civil Procedure 56(g) authorizes
14 courts to grant partial summary judgment in order to
15 limit the issues to be tried in a case. State Farm
16 Fire & Cas. Co. v. Geary, 699 F. Supp. 756, 759 (N.D.
17 Cal. 1987) (citing Lies v. Farrell Lines, Inc., 641
18 F.2d 765, 769 n.3 (9th Cir. 1981)). Absent a specific
19 statute authorizing otherwise, a partial summary
20 judgment under Rule 56(g) is not a final judgment but
21 rather an interlocutory summary adjudication or a
22 pre-trial order, neither of which is appealable prior
23 to the entry of a final judgment in the case. Wynn v.
24 Reconstruction Fin. Corp., 212 F.2d 953, 956 (9th Cir.
25 1954).

26 ///

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1 **B. Analysis**

2 1. Defendant's Evidentiary Objections

3 a. *Objections to Plaintiff's Exhibits*

4 Defendant objects to the copy of the Annuity
5 contract and Call Log Transcript and Log
6 Notes—reflecting the March 2009 and May 2014 phone
7 conversations—on the grounds of improper
8 authentication, hearsay, and lack of foundation.
9 Def.'s Objs. To Decl. & Exs. ("Def.'s Objs.") 2:8-13,
10 ECF No. 49; Burdick Decl. Exs. 1-2; 4-5.

11 "A document which lacks a proper foundation to
12 authenticate it cannot be used to support a motion for
13 summary judgment." Hal Roach Studios Inc. v. Richard
14 Feiner & Co., Inc., 896 F.2d 1542, 1551 (9th Cir.
15 1989). As required by Rule 56, documentary materials
16 need authentication through affidavits or declarations
17 from individuals with personal knowledge of the
18 document. Zoslaw v. MCA Distrib. Corp., 693 F.2d 870,
19 883 (9th Cir. 1982).

20 The aforementioned documentary evidence to which
21 Defendant objects was properly authenticated in the
22 Supplemental Declaration of Douglas Burdick, attached
23 to Plaintiff's Reply. Mr. Burdick is Plaintiff's Vice
24 President and custodian of records with personal
25 knowledge of these business records. Supp. Decl. of
26 Douglas F. Burdick ("Supp. Burdick Decl.") ¶ 1, ECF No.
27 51-1. Mr. Burdick demonstrates personal knowledge of
28 the declaration's contents as Plaintiff's Vice

1 President who personally reviewed and is "familiar with
2 the files in this Action, the records of Plaintiff as
3 they pertain to this matter, and Plaintiff's policies."
4 Id.; Curley v. Wells Fargo & Co., 120 F. Supp. 3d 992,
5 998-99 (N.D. Cal. 2015) (Vice President of Loan
6 Documentation who personally reviewed loan-related
7 records at issue and affirmed that records were made in
8 ordinary course of business established her familiarity
9 with the records).

10 Moreover, although Defendant objects to the
11 documentary evidence as inadmissible hearsay, the
12 evidence fits within the business-records exception.¹
13 As set forth in the declaration, the records were made
14 at or near the time of the recorded events and
15 maintained in the ordinary course of Plaintiff's
16 business by an individual with personal knowledge.
17 Supp. Burdick Decl. ¶ 1. As such, the Court **OVERRULES**
18 Defendant's objections on hearsay, lack of foundation,
19 and lack of authentication grounds to the Annuity
20 Contract, Transcript from Call Logs and log notes, and
21 March 6, 2009 copy of the log notes prepared by

22 ///

24 ¹ Under this exception, a document is admissible if its
25 proponent shows: (1) that the record was made at or near the time
26 of the event; (2) that the record was made by or from information
27 transmitted by a person with knowledge; (3) that the record was
28 kept in the course of a regularly conducted activity of a
business or organization; and (4) that it was a regular practice
of that business or organization to make such a record. Fed. R.
Evid. 803(6).

1 Plaintiff's customer service representatives [49].²

2 b. *Objections to Douglas Burdick Declaration*

3 Defendant objects to several paragraphs of the
4 Burdick Declaration [36-2]. Defendant objects on
5 largely redundant grounds: lack of personal knowledge,
6 hearsay, relevance, conclusory/lacks foundation. See
7 generally Def.'s Objs.³

8 Because many of Defendant's objections are
9 boilerplate and "devoid of any specific argument or
10 analysis as to why any particular exhibit or assertion
11 in a declaration should be excluded," United States v.
12 HVI Cat Canyon, Inc., ---F. Supp. 3d---, 2016 WL
13 7011348, at *5 (C.D. Cal. Sept. 30, 2016), the Court
14 **OVERRULES** all of Defendant's objections as to
15 paragraphs 3, 6, 7, and 10 of the Burdick Declaration
16 [49].⁴ See Amaretto Ranch Breedables v. Ozimals, Inc.,

17
18 ² Defendant also objects to the Deed of Trust, in which
19 Defendant allegedly forged her mother's signature to transfer
20 property to herself. Burdick Decl. ¶ 4, Ex. 2. This Deed of
21 Trust allegedly contained the real property address to which
22 Plaintiff mistakenly sent the Annuitant's overpayments. Mot.
23 3:23-26. Because the Court does not consider this piece of
24 evidence in reaching its conclusions on this Motion, it **SUSTAINS**
25 as **MOOT** this Objection.

26 ³ As to all paragraphs the Court considered in its Motion,
27 Defendant objects on lack of personal knowledge grounds. Fed R.
28 Evid. 602. Defendant objects to all paragraphs, except for
paragraph 10, on hearsay grounds and conclusory/lacks foundation.
Fed R. Evid. 801, 803. Defendant attacks paragraphs 4, 6, and 7
on lack of authentication grounds. Fed R. Evid. 901.

⁴ Defendant objects to paragraph 4 of the Declaration where
Mr. Burdick states that Plaintiff obtained a Deed of Trust,
purportedly signed and notarized after the Annuitant's death,

1 907 F. Supp 2d 1080, 1081 (N.D. Cal. 2012) (summarily
2 overruling boilerplate objections that parties failed
3 to develop); Doe v. Starbucks, Inc., No. SACV 08-0582
4 AG (CWx), 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18,
5 2009)("[I]n motions for summary judgment with numerous
6 objections, it is often unnecessary and impractical for
7 a court to methodically scrutinize each objection and
8 give a full analysis of each argument raised.")

9 Even if the evidentiary objections are pertinent,
10 the Court is not satisfied that it should strike any of
11 the contested paragraphs in the Burdick Declaration.
12 Indeed, many of Defendant's rote objections can be
13 handled in one fell swoop. Many of the statements Mr.
14 Burdick makes are objected to as lacking personal
15 knowledge and conclusory/lacks foundation. Pursuant to
16 Federal Rule of Evidence 602, "[e]vidence to prove
17 personal knowledge may consist of the witness's own
18 testimony." As Plaintiff's Vice President and
19 custodian of records, Burdick Decl. ¶¶ 1, 2, Mr.
20 Burdick states that he has personal knowledge—and he
21 plausibly does—of Plaintiff's business records,
22 including the Annuity contract, call logs, call
23 transcripts, and Plaintiff's general practice of

24
25 _____
26 transferring property from the Annuitant to Defendant. Defendant
27 objects on grounds of relevance, lack of personal knowledge, lack
28 of authentication, hearsay, and conclusory/lacks foundation. The
Court **SUSTAINS** these objections as **MOOT** because it does not rely
on any of the specific portions of the Burdick Declaration to
which Defendant objects.

1 learning of an annuitant's death after checks are
2 returned or family members contact Plaintiff.

3 The hearsay objections can also be disposed of
4 because many of the documents at issue are admissible
5 under the business-records exception, party admissions,
6 or admissions against interest. Supp. Burdick Decl. ¶¶
7 1, 2 ("[T]he records . . . were made at or about the
8 time of the events recorded, and are maintained in the
9 ordinary course of Lincoln's business.") And the
10 relevance objections to paragraphs 6, 7, and 10 are
11 also improper, as the pieces of evidence objected to
12 all have a tendency to prove or disprove material
13 elements of the Money Had and Received claim, including
14 whether Defendant received the money at issue.⁵

15 2. Plaintiff's Evidentiary Objections

16 a. *Objections to Pamela McClendon Declaration*

17 Plaintiff objects to the Declaration and
18 Supplemental Declaration of Pamela McClendon [46-1, 50]

19 _____
20 ⁵ The Court also **OVERRULES** Defendant's blanket objections to
21 paragraphs 6 and 7 on lack-of-authentication grounds. The Court
22 already concluded in supra Part II.B.1.a. that the same exhibits
23 in the Burdick Declaration were properly authenticated by the
24 attached declaration from an individual with personal knowledge
25 of their contents. And if Defendant claims lack of
26 authentication as to some other part of the paragraph, she fails
27 to develop the objection in that respect. Defendant also does
28 not provide a thorough analysis for some of her other objections
or explain their relevance to the Court's determination,
including "speculative as to the intention of the caller" for the
phone conversation transcripts and logs. She also fails to
explain how the phone conversations between Defendant and
Plaintiff's customer service representatives were "inadmissible
settlement negotiations." Def.'s Objs. 3:12-14, 3:20-21. The
Court finds no reason to sustain those objections as well.

1 as they are unsigned and impermissibly contain her "e-
2 signature,"⁶ and lack credibility. Plaintiff also
3 generally objects to statements in the Declaration that
4 Defendant's sister and mother communicated to her as
5 inadmissible hearsay. The Court **OVERRULES** each of
6 these objections.

7 Plaintiff objects to the McClendon Declaration as
8 lacking credibility and self-serving because it
9 contradicts statements made during Defendant's
10 deposition. The sham affidavit rule prevents a party
11 from "creat[ing] an issue of fact by an affidavit
12 contradicting his prior deposition testimony." Van
13 Asdale v. Int'l Game Tech., 577 F.3d 989, 998 (9th Cir.
14 2009). The Court must make a factual finding that (1)
15 the contradiction is a "sham;" and the (2)
16 "inconsistency between a party's deposition testimony
17 and subsequent [declaration] . . . is clear and
18 unambiguous." Id. Plaintiff highlights inconsistencies
19 between the declaration and Defendant's deposition
20 testimony. For example, she states that she only
21 started depositing the Annuitant's checks in April 2012
22 after her sister died. McClendon Decl. ¶ 7. But in
23 her deposition, she testified that she deposited checks

24
25 ⁶ For declarations signed by individuals other than CM/ECF
26 Filers, Local Rule 5-4.3.4 requires a hand-signed signature. It
27 appears that Defendant is not a registered CM/ECF filer.
28 Plaintiff asks the Court to strike the declaration because
Defendant has failed to properly sign it, but does not
sufficiently develop this objection to compel the Court to strike
the declaration in its entirety.

1 long before her sister's death. McClendon Dep. 40:19-
2 41:14, Dec. 6, 2016, ECF No. 36-3. Plaintiff also
3 contrasts Defendant's statement that she relied on what
4 her mother and sister told her (rather than the Annuity
5 contract) with her deposition testimony that she never
6 spoke to her mother about the Annuity. Compare
7 McClendon Decl. ¶ 9, with McClendon Dep. 40:19-41:14.

8 These alleged inconsistencies are insufficient to
9 render the declaration a sham. The aforementioned
10 contradictions are not necessarily a "sham" but may be
11 more so a symptom of Defendant's own confusion as to
12 the precise timeline of events or her attempt to
13 clarify her prior testimony. Messick v. Horizon
14 Indus., Inc., 62 F.3d 1227, 1231 (9th Cir. 1995)
15 ("[M]inor inconsistencies that result from an honest
16 discrepancy, a mistake, or newly discovered evidence
17 afford no basis for excluding an opposition
18 affidavit.") Similarly, the Court cannot say with
19 certainty that the inconsistencies are clear and
20 unambiguous. In her declaration, Defendant states that
21 she "relied upon what my mother and sister told me,"
22 but it is unclear whether this refers to conversations
23 about the Annuity or other matters. The Court cannot
24 confidently say that this is clearly inconsistent with
25 her deposition testimony that she never spoke to her
26 *mother* regarding the Annuity. And the deposition
27 testimony makes no palpable contradiction as to
28 conversations had with her sister. Because the Court

1 should not make definitive credibility determinations
2 on a Motion for Summary Judgment, and the sham
3 affidavit rule is typically cautiously applied, the
4 Court **OVERRULES** Plaintiff's objections to the McClendon
5 Declaration. Van Asdale, 577 F.3d at 998.⁷

6 b. *Objections to Chandler Parker Declaration*

7 Plaintiff objects to the Declaration of Chandler
8 Parker [48] because the declarant "did not attach
9 identifying information for the discovery responses and
10 misstates the evidence." Reply 7:22-24. Discovery
11 documents produced during a Motion for Summary Judgment
12 require proper authentication through a declaration.
13 The Court **OVERRULES** this objection, as it sees no issue
14 with the copy of Plaintiff's internal policy and AWD
15 History Report, as they were produced during discovery
16 and Plaintiff apparently does not contest their
17 authenticity but instead vaguely complains that they
18 lack "identifying information." Maljack Prods., Inc.
19 v. GoodTimes Home Video Corp., 81 F.3d 881, n.12 (9th
20 Cir. 1996) (documents on party's letterhead and
21 produced during discovery, attached to a declaration

22
23 ⁷ The Court also **OVERRULES** Plaintiff's hearsay objection to
24 any statements in the McClendon Declaration made by the Annuitant
25 or Delores McClendon. Reply 7:19-21. Problematically, Plaintiff
26 does not point out specific statements it claims is hearsay. The
27 Court can only find that Defendant mentions she deposited
28 Plaintiff's checks "[p]ursuant to the directions of Delores,"
McClendon Decl. ¶ 7, and "relied upon what my mother and sister
told me." Supp. McClendon Decl. ¶ 9. These are not oral or
written assertions constituting a "statement" under the hearsay
definition, nor does Plaintiff show how they are "nonverbal
conduct . . . intended as an assertion." Fed R. Evid. 801(a).

1 were properly admitted.)⁸

2 3. Whether the Claim is Barred by the Statute of
3 Limitations

4 Before deciding whether there is a genuine dispute
5 of material fact for the Money Had and Received claim,
6 the Court must contend with whether its applicable
7 statute of limitations has lapsed.

8 A claim for Money Had and Received is essentially
9 an action on an implied contract and thus is subject to
10 a two-year statute of limitations. See Murphy v. Am.
11 Gen. Life Ins. Co., 74 F. Supp. 3d 1267, 1280 (C.D.
12 Cal. 2015); Cal. Code Civ. Proc. § 339(1) (two-year
13 limitations period applies to actions for contracts
14 "not founded upon an instrument of writing.") The
15 statute of limitations accrues upon plaintiff's
16 "discovery of the loss or damage." Code Civ. Proc. §
17 339(1).

18
19 ⁸ The Court also **OVERRULES** the objection that the Parker
20 Declaration misstates the evidence. Exhibit B contains
21 Plaintiff's response as to when it received notice of Annuitant's
22 death. Parker Decl. ¶ 3. The interrogatory correspondingly
states that Plaintiff received a report of the Annuitant's death
in January 2009. Parker Decl. Ex. B at 2:19-20.

23 Plaintiff also objects to Defendant's "late-filed documents"
24 and failure to comply with the Court's *ex parte* order extending
25 time for Defendant to file its Opposition until 5 P.M. on January
26 6, 2017 [42]. Defendant did so, filing its opposition before the
27 deadline. Defendant mostly complied with this Order. The Court
28 declines at this time to split hairs over the belatedness, later
on the evening of the 6th, during which Defendant filed various
attachments to its Opposition, its Declarations, its Evidentiary
Objections, and its Statement of Genuine Disputes of Material
Fact. The Court **OVERRULES** this objection.

1 The parties dispute the precise date when the
2 statute of limitations began to run.⁹ The Complaint was
3 filed on May 19, 2015 [1]. Defendant argues that the
4 Action accrued in January 2009, when Plaintiff
5 discovered the Annuitant's death by using its
6 Repetitive Payment System Pension Benefit Inquiry
7 ("RPSPI") system to cross-check her against the Social
8 Security Index. Opp'n 6:21-23; Parker Decl. Ex. A, ECF
9 No. 48-2. At the very least, Defendant argues, whether
10 Plaintiff had inquiry notice at this time is a question
11 of fact for the jury. Id. at 7:1-2. Plaintiff
12 counters that in March 2009, an individual—at the time,
13 Plaintiff assumed the Annuitant—called Plaintiff,
14 furnished the Annuitant's birth date and social
15 security number to indicate she was still alive, and
16 continued to endorse and deposit the reinstated Annuity
17 payments. Reply 3:19-26; Burdick Decl. ¶ 7, Ex. 5.
18 These fraudulent activities tolled the statute of
19 limitations until at least October 2013, when Plaintiff
20 learned of the Annuitant's death. Id. at 3:26-4:1.

21 Defendant offers evidence, in the form of
22 Plaintiff's interrogatory responses, that Plaintiff

24 ⁹ Both parties rely on the three-year statute of limitations
25 in California Code of Civil Procedure § 338, reserved for actions
26 based on "fraud or mistake," including unjust enrichment and
27 conversion. The parties use this statute of limitations because
28 Defendant allegedly fraudulently endorsed checks on the
Annuitant's behalf, inducing Plaintiff to mistakenly make
& Received claim is two years, and the Court's analysis thus
flows from the section 339(1) statute of limitations.

1 typically runs RPSBPI reports to determine if an
2 annuitant has died and its admission that it received a
3 report in January 2009 indicating that Annuitant may
4 have died. Parker Decl. Ex. B, ECF No. 48-2.
5 Defendant also proffers an AWD History report showing
6 Plaintiff's access to the Social Security Index that
7 would tell it that Annuitant had died. Defendant uses
8 this evidence to make much of Plaintiff's January 2009
9 discovery of the Annuitant's death. But Plaintiff
10 never disputes that it received a report in January
11 2009 of the Annuitant's death and properly ceased
12 Annuity payments. Mot. 3:21. The precise issue,
13 rather, is whether the statute of limitations was
14 tolled beginning in March 2009 when Defendant
15 purportedly called Plaintiff, pretending to be the
16 Annuitant.

17 The statute of limitations may be tolled under the
18 doctrine of fraudulent concealment. "[W]hen the
19 defendant is guilty of fraudulent concealment of the
20 cause of action the statute [of limitations] is deemed
21 not to become operative until the aggrieved party
22 discovers the existence of the cause of action." Yumul
23 v. Smart Balance, Inc., 733 F. Supp. 2d 1117, 1130
24 (C.D. Cal. 2010) (internal quotation marks omitted)
25 (quoting Unruh-Haxton v. Regents of Univ. Of Cal., 162
26 Cal. App. 4th 343, 367 (Ct. App. 2008)).

27 Even if January 2009 is the logical starting point
28 and assuming that the Action was feasibly barred by the

1 two-year statute of limitations, Plaintiff has set
2 forth sufficient evidence that the statute of
3 limitations is tolled by the fraudulent concealment
4 doctrine. Although the RPSPI indicated Annuitant's
5 death, a call log from March 6, 2009 states that the
6 "Annuitant" called, "inquiring as to where her 2-20-09
7 check is." Burdick Decl. Ex. 5 at 1. Plaintiff's
8 representative verified the alleged Annuitant's social
9 security number and birth date, "believ[ing] it was
10 her." Id. A same-day call with a different
11 representative states that the Annuitant "is obviously
12 not deceased." Id. at 2. Again, the "Annuitant"
13 verified her social security number and date of birth.
14 Id.

15 There is no genuine dispute of material fact as to
16 whether the statute of limitations is tolled by
17 Defendant's fraudulent concealment of the fact that she
18 wrongfully retained Annuity payments owed to her
19 deceased mother. For fraudulent concealment to toll
20 the statute of limitations, something more than
21 nondisclosure is required. Affirmatively deceptive
22 conduct will suffice. Yumul, 733 F. Supp. 2d at 1131.
23 Defendant affirmatively misrepresented to Plaintiff
24 that the Annuitant was alive—even though she had been
25 deceased for eleven years—by requesting continued
26 Annuity payments and furnishing the Annuitant's
27 identifying information to continue said benefits. The
28 affirmatively deceptive conduct continued in earnest

1 from 2009 to 2013. Plaintiff believed the Annuitant
2 was still alive and continued to believe so, as
3 Defendant endorsed checks on behalf of her mother, the
4 intended Annuitant, by signing them "Netha McClendon,"
5 from April 12, 2009 to October 14, 2013. Burdick Decl.
6 Ex. 6 at 26-80; Acme Paper Co. v. Goffstein, 125 Cal.
7 App. 2d 175, 180 (Ct. App. 1954) (fraudulent
8 concealment tolled statute of limitations in money had
9 and received claim where employee falsely represented
10 his role and fraudulently endorsed thirty-four
11 different checks).

12 Fraudulent concealment tolls the statute of
13 limitations "until plaintiff discovers, or in the
14 exercise of reasonable diligence should have
15 discovered, the facts on which its cause of action is
16 based." Sears, Roebuck & Co. v. Blade, 139 Cal. App.
17 2d 580, 587 (Ct. App. 1956). Only by May 29, 2014 did
18 Plaintiff actually discover that Defendant had been
19 depositing the mistaken payments, when she admitted to
20 Plaintiff's representative that she had received the
21 payments after her sister died, that they "went in
22 [Defendant's] account," and that she would need to pay
23 Plaintiff back. Burdick Decl. Ex. 4 at 7. And even
24 through reasonable diligence, it is unlikely that
25 following up with the Annuitant would have unveiled
26 Defendant's scheme, as she was allegedly convinced that
27 she was owed the Annuity payments and steadfastly
28 committed to providing the Annuitant's personal

1 information to receive more checks. Moreover,
2 Plaintiff's policy in 2009, of accepting telephonic
3 verification of a birth date and social security number
4 as confirmation of an annuitant's identity—coupled with
5 Plaintiff's lack of a mechanism to investigate wrongful
6 receipt of annuity payments—suggests that it was
7 reasonable of Plaintiff not to automatically assume
8 that any caller verifying an annuitant's information
9 was a family member or shadowy figure wrongfully
10 receiving annuity payments.¹⁰ Indeed, the egregiousness
11 and outlandishness of Defendant's actions—regardless of
12 her claimed mistake of fact—underscores that Plaintiff
13 acted with reasonable diligence. Sears, 139 Cal. App.
14 2d at 591 (“[W]hether [Plaintiff] acted as a reasonably
15 prudent [person] in not investigating [Defendant] must
16 be viewed in the factual setting in which it was
17 made.”)

18 In sum, Defendant does not counter Plaintiff's
19 adequate evidence that supports tolling the statute of
20

21 ¹⁰ Defendant argues that Plaintiff's internal policies
22 dictate that it receive a written guarantee of the Annuitant's
23 death. Defendant proffers an internal policy, which states that
24 “[i]f the [RSPBI] report shows a client is deceased but in fact
25 they are alive, we require a letter of instruction with signature
26 guarantee stating that they are alive.” Parker Decl. Ex. 3 at 2,
27 ECF No. 48-3. This argument is misplaced, and does not disturb
28 the conclusion that summary judgment is appropriate as to the
statute of limitations issue. The policy Defendant presents was
effective on August 24, 2011, well after Plaintiff accepted
Annuitant's birth date and social security information during the
March 2009 phone call. This anachronistic piece of evidence does
little to undermine Defendant's scheme of fraudulent concealment
that tolls the Money Had and Received claim.

1 limitations until at least October 2013. The only
2 scintilla of evidence that Defendant offers otherwise
3 is that Plaintiff knew of the Annuitant's death as
4 early as January 2009. Once again, Plaintiff does not
5 contest this and it would have permanently ceased
6 payments but for Defendant's fraudulent concealment.
7 Thus, there is no genuine dispute as to whether the
8 statute of limitations merited tolling until October
9 2013. The Complaint was appropriately filed in May
10 2015.

11 4. Money Had and Received

12 The Court now turns to whether there is a genuine
13 dispute of material fact as to whether Plaintiff has
14 proven its Money Had and Received Claim.

15 A claim for Money Had and Received makes a
16 defendant indebted to a plaintiff "for money had and
17 received by the defendant for the use of the
18 plaintiff." Kandel v. Brother Int'l Corp., No. CV
19 08-1040 DSF (RCx), 2009 WL 9100406, at *1 (C.D. Cal.
20 Feb. 13, 2009) (citation omitted). Although the claim
21 is one at law, it arises in equity when "one person has
22 received money which belongs to another and which in
23 equity and good conscience . . . should be returned."
24 Hendrickson v. Octagon, Inc., Nos. 14-cv-01416 CRB,
25 2016 WL 7033781, at *13 (N.D. Cal. Dec. 2, 2016)
26 (internal quotation marks omitted) (quoting Mains v.
27 City Title Ins. Co., 34 Cal. 2d 580, 586 (1949)). The
28 elements are as follows: (1) defendant received money;

1 (2) the money defendant received was for plaintiff's
2 use; and (3) defendant is indebted to plaintiff.
3 Fireman's Fund Ins. Co. v. Commerce & Indus. Co., No.
4 C-98-1060VRW, 2000 WL 1721080, at *8 (N.D. Cal. Nov. 7,
5 2000).

6 a. *Whether Defendant Received Money*

7 The Court gleans no genuine issue of material fact
8 as to the evidence regarding this element. Plaintiff
9 presents 80 checks, totaling \$240,000, endorsed by
10 "Netha McClendon," the Annuitant, from January 2007 to
11 October 2013, long after her death in January 1998.
12 Burdick Decl. Ex. 6. Defendant herself admits that she
13 deposited checks from Plaintiff into the joint bank
14 account she had with her deceased mother, McClendon
15 Decl. ¶ 7, and endorsed each check in her mother's (the
16 Annuitant) name. Id. Defendant's December 2016
17 deposition also leaves little doubt that she received
18 and endorsed at least 80 checks from January 2007 to
19 October 2013. McClendon Dep. 82:15-24, 83:24-84:2.

20 b. *Whether the Money Received was for*
21 *Plaintiff's Use*

22 Defendant argues that because Plaintiff intended to
23 pay the Annuitant, Netha McClendon, Plaintiff cannot be
24 the intended beneficiary. Opp'n 7:11-14. Plaintiff
25 counters that the Annuity payments were made for its
26 own benefit because it was fulfilling its contractual
27 obligations to pay the Annuitant under the contract.
28 Reply 4:15-16.

1 In Fireman's Fund, the insurer defendant received
2 \$27,264,500 in a subrogation claim against a third-
3 party insurer. 2000 WL 1721080, at *1. Plaintiffs
4 raised a claim for Money Had and Received, claiming
5 entitlement to this amount because they paid \$5 million
6 to the insured and thus gained an assignment of the
7 insured's rights. Id. at *7. Plaintiffs could not,
8 however, show that any of the amount defendant received
9 from a third-party insurer was for plaintiffs' use.
10 The court stated: "defendant pursued subrogation
11 against [the third-party insurers] by itself;
12 plaintiffs elected not to join in the action . . .
13 [p]laintiffs may have had a separate subrogation claim
14 against those third-party insurers based on its \$5
15 million payment to the insured. But plaintiffs cannot
16 establish that any portion of the money received by
17 defendant was for plaintiffs' use." Id. at *8.
18 Nevertheless, the court noted circumstances under which
19 a plaintiff could show the money was intended for its
20 own use; for instance, if defendant received money as a
21 result of its scam and "induced [the money] under the
22 guise that it would be used for plaintiffs." Id.
23 (citation omitted). The key, the court explained, was
24 that defendant "received money *for the use of the*
25 *plaintiff.*" Id. (emphasis in original).

26 Plaintiff has demonstrated there is no triable
27 issue of fact whether the Annuity payments were
28 intended for its use. The facts here slot neatly into

1 the example provided in Fireman's Fund: Defendant
2 received the Annuity overpayments from her scam of
3 endorsing her mother's signature on the checks. She
4 induced the payments under the guise that the money was
5 for Plaintiff's use in the sense that Plaintiff would
6 send the money to fulfill its obligations to pay the
7 Annuitant under the contract.

8 Defendant insists that the money was only for the
9 Annuitant—not the insurance company Plaintiff's—use.
10 This blinkered approach to the definition of a
11 beneficiary ignores the realities of litigating a Money
12 Had and Received claim. Per Defendant, in the instance
13 of an annuity or insurance contract, only the payee is
14 the intended beneficiary. Under Defendant's logic,
15 only the payee can stake out a claim for Money Had and
16 Received; any time a company with an Annuity contract
17 raises a claim, it is defeated.

18 It is not uncommon that an insurance company, bank,
19 or other third-party will raise a Money Had and
20 Received claim even though the insured or payee was the
21 one who literally received the benefit of the money at
22 issue. The Fifth Circuit rejected this type of
23 argument—that a plaintiff insurance company lacked
24 "standing" because a financial recovery on the Money
25 Had and Received claim would only benefit its insured
26 after the insured's employee had "pilfered and filched
27 checks through the financial filter of forged
28 endorsements." Peerless Ins. Co. v. Tex. Commerce

1 Bank-New Braunfels, N.A., 791 F.2d 1177, 1178 (5th Cir.
2 1986). The Fifth Circuit summarily disposed of this
3 argument:

4 Whether styled as a "standing" argument or more
5 properly as an assertion that Peerless is not a
6 real party in interest, Texas Commerce's claim
7 is frivolous. Peerless has a real pecuniary
8 interest in this case. Any recovery from Texas
9 Commerce reduces Peerless' obligation to North
10 American and brings Peerless closer to the point
11 where it can begin, through proceedings against
12 other parties, to recover the money it paid to
13 North American . . . [w]e refuse to accept such
14 a result.

15 Id. at 1181.

16 Here too, allowing Plaintiff to recover from
17 Defendant would reduce its obligation to the
18 Annuitant—or in this case, her estate—and uphold its
19 contractual obligations to pay the Annuitant (the plans
20 do not designate a beneficiary to whom Plaintiff could
21 otherwise pay). Granting summary judgment as to the
22 Money Had and Received claim allows Plaintiff to start
23 recovering the \$500,000 it mistakenly paid due to
24 Defendant's avarice. Denying summary judgment based on
25 Defendant's specious and fallacious argument that only
26 the Annuitant—and not the insurance company who paid
27 her hundreds of thousands of dollars pursuant to an
28 Annuity contract—stands to benefit from the payments

1 would lead to an incorrect result.

2 *c. Whether Defendant is Indebted to Plaintiff*

3 The third element effectively measures whether
4 Defendant has returned the ill-gotten money to
5 Plaintiff. No dispute of material fact as to this
6 element exists; Defendant has yet to reimburse
7 Defendant for nearly \$240,000 in wrongful proceeds.
8 Defendant did not return the payments, as evidenced by
9 letters from December 18, 2013, January 21, 2014, and
10 April 29, 2014 requesting that Defendant remit Annuity
11 overpayments from January 20, 1998 to October 20, 2013.
12 Burdick Decl. Ex. 3. In each subsequent letter,
13 Plaintiff noted that it had not received any response
14 or payment. *Id.* Defendant also acknowledged her
15 indebtedness to Plaintiff during the May 29, 2014 phone
16 conversation, stating that she would have to "make the
17 payments back" and requesting the contact information
18 of the Annuities Department to which she should send
19 the reimbursement. Burdick Decl. Ex. 4 at 6, 11-12.

20 *d. Whether Defendant was an Innocent*
21 *Beneficiary that Reasonably Relied to Her*
22 *Detriment*

23 Defendant argues that granting summary judgment on
24 the Money Had and Received claim is inappropriate even
25 if there are no genuine disputes regarding the
26 elements, as she has a viable defense. Defendant
27 argues that she is an innocent beneficiary who did not
28 know of Plaintiff's mistaken payments and detrimentally

1 relied on the payments while spending the money on the
2 "necessities of life." Opp'n 4:12-13, 5:6-7.

3 In Bank of America v. Sanati, the court briefly
4 touched upon the "detrimental reliance by an innocent
5 beneficiary" theory that Defendant espouses. In that
6 case, Mr. Sanati's Bank of America erroneously
7 transferred an unintended principal portion (\$203,750)
8 of his bank account and accrued interest to the joint
9 account he held with his wife. 11 Cal. App. 4th 1079,
10 1082 (Ct. App. 1992). The Court recognized that
11 detrimental reliance by an innocent beneficiary was a
12 "widely acknowledged" defense to restitution. Id. at
13 1084. While the court permitted the bank to receive
14 restitution from the unintended beneficiaries and
15 granted the motion for summary judgment based on a
16 different defense, Defendant's case is distinguishable
17 from Sanati even from a cursory glance at the facts.
18 In Sanati, the court considered whether the "discharge
19 for value" rule impeded Bank of America from recovering
20 the erroneously-transferred funds. But unlike here,
21 the Sanati defendants were always intended recipients
22 of the funds; indeed, Mr. Sanati arranged for Bank of
23 America in London to send monthly accruing interest
24 from his separate account to his joint account with Ms.
25 Sanati. By contrast, Defendant was never the intended
26 recipient of the Annuity payments here—the Annuity
27 contract very clearly states that the Annuitant had no
28 designated beneficiary to receive remaining payments

1 after the Annuitant's death. Compl. Ex. 1.

2 Defendant's defense makes little sense then; if she
3 is not even a designated beneficiary for the Annuity,
4 it defies logic for her to argue that she is an
5 innocent beneficiary. This emphasis on the actual,
6 intended beneficiary in a Money Had and Received claim
7 took shape in Lowery, where the court granted summary
8 judgment for a Money Had and Received claim as to an
9 attorney defendant because the plaintiff had only paid
10 money to the attorney's client, a motion-picture
11 distribution company. Like the attorney defendant in
12 Lowery—ancillary to the proper flow of payments between
13 plaintiff and the distribution company—Defendant is not
14 even a proper player in a Money Had and Received claim,
15 let alone an innocent beneficiary. Even if she were,
16 her argument that she is "innocent" is weakened by the
17 fact that she improperly endorsed the Annuitant's
18 signature on countless checks.

19 In contrast to Defendant's insistence that she did
20 not know the payments were not meant for her, the
21 Annuity contract terms clearly state that Defendant
22 never should have received Annuity payments, let alone
23 after the Annuitant had died. First, the Annuity
24 Contract from August 13, 1992 very clearly states,
25 "[w]e will make annuity payments as specified on the
26 Policy Schedule as long as the Measuring Life [Netha
27 McClendon] is living. If the Measuring Life dies before
28 all guaranteed payments have been made, the remaining

1 guaranteed payments will be paid, when due, to the
2 Designated Beneficiary." Burdick Decl. Ex. 1 at 3.
3 Defendant was not a Designated Beneficiary, let alone
4 mentioned anywhere in the Annuity contract. Indeed,
5 the space to designate a beneficiary reads "Not
6 Applicable," and states that "This section does not
7 apply if Life Only Option is chosen." Id. at 1. The
8 annuitant had the "Single Life Immediate Annuity"
9 option. Id. Defendant wanly protests that she was
10 unaware of the contractual terms and continued to
11 endorse checks thinking she was the beneficiary, per
12 her mother and her sister's orders. Burdick Decl. Ex.
13 4 at 7, 9; McClendon Decl. ¶ 7. This is not enough to
14 generate a triable issue of material fact.
15 Defendant's, her mother's, and her sister's ignorance
16 of the Annuity terms—whether willful, imprudent, or
17 otherwise—have no place in the legal argument for Money
18 Had and Received and do not create a triable issue of
19 material fact as to this claim.

20 Contrary to Defendant's "innocent beneficiary"
21 theory, the evidence indicates that Plaintiff
22 mistakenly paid Defendant. "A plaintiff may bring a
23 claim for money had and received if the plaintiff has
24 paid money under the mistaken belief that he was under
25 a duty to do so." Lowery v. Blue Steel Releasing,
26 Inc., No. CV 02-0003-DSF(CTx), 2004 WL 6215611, at *7
27 (E.D. Cal. Nov. 1, 2005) (citation omitted). A
28 plaintiff is entitled to restitution for mistaken

1 payment if defendant induced the mistake through fraud.
2 Id. Plaintiff sent mistaken overpayments it thought it
3 owed to the Annuitant, operating under the assumption
4 that she was still alive. These mistaken payments were
5 induced through Defendant's fraud of calling Plaintiff,
6 pretending to be her mother through corroborating
7 information, and requesting continued payments.

8 The only shred of contrary evidence Defendant
9 offers is her self-serving statements that she
10 continued to deposit payments because her mother told
11 her that she wanted Defendant and her now-deceased
12 sister, Delores McClendon, to share the Annuity
13 proceeds after her death. Opp'n 5:4-5. This mistaken
14 belief was also apparently perpetuated by Defendant's
15 now-deceased sister. Defendant unconvincingly protests
16 that she was unaware that the Annuity was only for her
17 mother's benefit.¹¹ Apparently, Defendant believed that
18 the monthly payments would continue after Annuitant's
19 death until all sums had been paid out. Opp'n 5:1-3,
20 4:27-5:1. This argument is unconvincing and has no
21 place in the elements and law for Money Had and
22 Received.

23 At bottom, Defendant fashions a theory that mistake
24 of fact or a defendant's willful blindness to an
25 Annuity contract's terms can dismantle a Money Had and
26 Received claim. Defendant provides no case law to

27
28 ¹¹ However, both are deceased and unable to provide
declarations or exhibits to shore up Defendant's arguments.

1 support this novel theory, nor does she provide a
2 scintilla of evidence to doubt that the Annuity was
3 only intended for the Annuitant, regardless of a
4 mother's well-meaning wishes for her daughters to
5 posthumously share in her Annuity. Accordingly, the
6 "innocent beneficiary" defense is unavailing, and there
7 is no triable issue of material fact as to any of the
8 elements required for a Money Had and Received claim.

9 **III. CONCLUSION**

10 Based on the foregoing, the Court **GRANTS**
11 Plaintiff's Motion for Partial Summary Judgment [36]
12 as to the Money Had and Received claim.

13
14 **IT IS SO ORDERED.**

15
16 DATED: January 26, 2017

RONALD S.W. LEW

17 **HONORABLE RONALD S.W. LEW**
18 Senior U.S. District Judge
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