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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GULF INSURANCE COMPANY,

NO. CIV. S-08-209 LKK/JFM

Plaintiff,

v.

O R D E R

FIRST BANK and DOES 1  
through 50, inclusive,

Defendants.

\_\_\_\_\_ /

Plaintiff Gulf Insurance Company ("Gulf") acted as a surety for third party Baldwin Ranch L.P., for construction of a subdivision. Defendant First Bank entered into an agreement with plaintiff to set aside funds to back bonds plaintiff issued on behalf of Baldwin Ranch. Pending before the court are the parties' cross-motions for summary judgment on the three causes of action alleged in plaintiff's Third Amended Complaint. The court resolves the motions on the papers and after oral argument.

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1 bonds to guarantee completion of certain aspects of the  
2 construction, including all labor and materials claims. Plaintiff  
3 Gulf agreed to act as Baldwin Ranch's surety. As a condition of  
4 issuing the bonds, Gulf required Baldwin Ranch to obtain a set-  
5 aside letter from First Bank. Although the parties dispute the  
6 precise characterization of a "set-aside letter," its general  
7 purpose is as a statement by the lender that a certain amount of  
8 its loan is allocated to the completion of the work required by the  
9 bonded government entity. See Decl. of Debra Kramer In Support of  
10 First Bank's Motion for Summ. J. ("Kramer Decl.") ¶ 12.

11       Upon Baldwin Ranch's request, First Bank issued the set-aside  
12 letter to Gulf on September 25, 2002. The letter provides,

13           In consideration of the execution by Gulf Insurance  
14 Company ("Surety") of bonds in the amount of \$7,759,521  
15 on behalf of Borrower [Baldwin Ranch] guaranteeing Nevada  
16 County ("Obligee") the completion of the improvements,  
17 and as a direct inducement to Surety to execute such  
18 bonds as Surety and in reliance on the Borrower's  
19 representation to Lender [First Bank] of the estimated  
20 cost of the improvements, Lender will allocate and set  
21 aside in the disbursement budget the sum of not less than  
22 \$7,759,521 for the improvement guaranteed to Obligee  
23 under the terms of the Development Agreement and secured  
24 by the referenced bond.

25 Decl. of Steven Pand In Support of Gulf Insurance's Motion for  
26 Summ. J. ("Pand Decl.") Ex. B. The letter also acknowledged that  
27 First Bank had already disbursed to Baldwin Ranch \$3,932,420.08 for  
28 improvements covered by the bonds.

29       The letter further provided that if Baldwin Ranch failed to  
30 complete or pay for improvements that were the subject of the First  
31 Bank loan, First Bank would disburse the remaining balance to Gulf.

1 It also stated that "the amount of the above allocation  
2 [\$7,759,521] has been determined pursuant to the Borrower's cost  
3 breakdown and Lender is not in a position to guarantee that the  
4 estimates are correct or that subsequent events will not increase  
5 the actual costs and assumes no liability should the allocation  
6 prove incorrect." Id.

7 Finally, the letter provided that it was "an irrevocable  
8 commitment of funds which is not subject to recall" and that First  
9 Bank's "liability . . . shall terminate on the full disbursement  
10 of the funds set aside or after the bonds are released by the  
11 Surety." Id. In reliance on this letter, Gulf issued to the county  
12 several surety bonds on Baldwin Ranch's behalf.

13 The managing partner of Baldwin Ranch has declared that in  
14 June 2003, Baldwin Ranch refinanced the First Bank loan with  
15 another entity, Metwest Mortgage Services, Inc. Fralick Decl. ¶ 10.  
16 According to him, the Metwest loan financed the same Phase II  
17 construction covered by the First Bank loan. Id. Upon the closing  
18 of the Metwest loan, Baldwin Ranch repaid the First Bank loan and  
19 the deed of trust on the property securing the loan was conveyed  
20 from First Bank to Baldwin Ranch. At this time, First Bank had  
21 disbursed \$5,581,900 to Baldwin Ranch. Both parties agree that  
22 First Bank, through its own error, failed to notify Gulf of the  
23 extinguishing of its loan to Baldwin Ranch and reconveyance of the  
24 deed of trust. It is undisputed that Gulf never released First Bank  
25 of its obligations under the set-aside agreement.

26 Over the course of its relationship with Baldwin Ranch,

1 Metwest disbursed \$4,631,805 to it. The managing partner of Baldwin  
2 Ranch has declared that these disbursements went to improvements  
3 bonded by Gulf.<sup>2</sup> Id. ¶¶ 12-13. In December 2004, Baldwin Ranch  
4 refinanced its loan with Metwest with Owens Mortgage Investment  
5 Fund. Owens disbursed \$410,005, which has been asserted to have  
6 paid for improvements bonded by Gulf.

7 Gulf disputes several of the facts surrounding the Metwest  
8 loan, Owens loan, and First Bank disbursements as asserting  
9 improper opinion and legal conclusion. Gulf has also tendered the  
10 declaration of its bond claims counsel, which states, "Neither  
11 First Bank, nor any other lender, paid Gulf the undisbursed balance  
12 of the Set Aside Funds to complete the Improvements." Pand Decl.  
13 ¶ 32.

14 Baldwin Ranch eventually defaulted on certain of its  
15 performance and payment obligations. In May 2007, one of Baldwin  
16 Ranch's contractors made a claim against Gulf for \$1,538,662.36 for  
17 work performed on the project. In September 2007, another  
18 contractor made a similar claim against Gulf for \$18,367.29. The  
19 county also demanded that Gulf complete the bonded improvements on  
20 the construction project; Gulf has tendered some evidence that this  
21 claim is approximately \$2,500,000. Pand Decl. ¶ 18. Gulf has paid  
22 a total of \$252,358.36 on these claims. It has also retained  
23 consultants "to assist with the resolution of all claims asserted

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24  
25 <sup>2</sup>He has supplemented his declaration with a spreadsheet of  
26 construction costs that he asserts were paid with funds from  
Metwest disbursements, which covered "improvements" bonded by Gulf.  
Fralick Decl. ¶¶ 12-13, Ex. 3.

1 against the Baldwin Ranch Bonds." Id. ¶ 22-23.

2 On September 26, 2007, Gulf requested that First Bank provide  
3 a complete and detailed accounting of its disbursements of the set-  
4 aside funds and requested that First Bank disburse to it the  
5 remaining funds. At that time, First Bank informed Gulf of the  
6 refinancing and that at that time, it terminated the set-aside.

7 Gulf commenced this suit against First Bank on January 28,  
8 2008. After the court granted in part First Bank's motion to  
9 dismiss on June 4, 2008, Gulf filed a Third Amended complaint,  
10 which is the operative complaint. In it, it alleges causes of  
11 action for breach of contract, conversion, and declaratory relief.

12 On May 21, 2008, First Bank filed a third-party complaint  
13 against Baldwin Ranch, which has been answered.

14 **II. STANDARD FOR MOTION FOR SUMMARY JUDGMENT UNDER FEDERAL RULE**  
15 **OF CIVIL PROCEDURE 56**

16 Summary judgment is appropriate when there exists no genuine  
17 issue as to any material fact. Such circumstances entitle the  
18 moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c);  
19 see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970);  
20 Secor Ltd. v. Cetus Corp., 51 F.3d 848, 853 (9th Cir. 1995). Under  
21 summary judgment practice, the moving party

22 always bears the initial responsibility of informing the  
23 district court of the basis for its motion, and  
24 identifying those portions of "the pleadings,  
25 depositions, answers to interrogatories, and admissions  
on file, together with the affidavits, if any," which it  
believes demonstrate the absence of a genuine issue of  
material fact.

26 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed.

1 R. Civ. P. 56(c)).

2 If the moving party meets its initial responsibility, the  
3 burden then shifts to the opposing party to establish the existence  
4 of a genuine issue of material fact. Matsushita Elec. Indus. Co.  
5 v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); see also First  
6 Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89  
7 (1968); Secor Ltd., 51 F.3d at 853. In doing so, the opposing party  
8 may not rely upon the denials of its pleadings, but must tender  
9 evidence of specific facts in the form of affidavits and/or other  
10 admissible materials in support of its contention that the dispute  
11 exists. Fed. R. Civ. P. 56(e); see also First Nat'l Bank, 391 U.S.  
12 at 289. In evaluating the evidence, the court draws all reasonable  
13 inferences from the facts before it in favor of the opposing party.  
14 Matsushita, 475 U.S. at 587-88 (citing United States v. Diebold,  
15 Inc., 369 U.S. 654, 655 (1962) (per curiam)); County of Tuolumme  
16 v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).  
17 Nevertheless, it is the opposing party's obligation to produce a  
18 factual predicate as a basis for such inferences. See Richards v.  
19 Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The  
20 opposing party "must do more than simply show that there is some  
21 metaphysical doubt as to the material facts . . . . Where the  
22 record taken as a whole could not lead a rational trier of fact to  
23 find for the nonmoving party, there is no 'genuine issue for  
24 trial.'" Matsushita, 475 U.S. at 586-87 (citations omitted).

25 **III. ANALYSIS**

26 The parties cross-move for summary judgment on plaintiff's

1 three causes of action, for breach of contract, conversion, and  
2 declaratory relief. As explained below, the court grants  
3 defendant's motion only as to plaintiff's claim for declaratory  
4 relief and grants plaintiff's motion on its causes of action for  
5 breach of contract and conversion.

6 **A. Breach of Contract**

7 Gulf alleges that First Bank breached the contract that was  
8 formed between them through the set-aside agreement by failing to  
9 disburse to it the remainder of the funds identified in the  
10 agreement. First Bank argues that, even if it did breach the  
11 agreement in this manner, Gulf did not suffer damages because more  
12 than the total amount at issue in the set aside agreement was  
13 disbursed to Baldwin Ranch by First Bank, Metwest, and Owens  
14 combined. The court cannot agree.

15 Under California law,<sup>3</sup> to succeed on a claim for breach of  
16 contract, the plaintiff must show that (1) there was a valid  
17 contract, (2) plaintiff performed or was excused for not  
18 performing, (3) defendant breached the agreement, and (4) this  
19 breach caused plaintiff's damages. Reichart v. Gen. Ins. Co., 68  
20 Cal. 2d 822, 830 (1968). Defendant acknowledges that the first  
21 three elements have been met, although it argues in its opposition  
22 to plaintiff's motion that it substantially performed its  
23 obligations under the contract and therefore its conduct does not  
24 constitute "breach." See Def.'s Combined Reply in Support of Its

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25 <sup>3</sup>The parties appear not to dispute that California law  
26 applies.



1 Mot. for Summ. J. and Opp'n to Pl.'s Mot. for Summ. J. at 7-8; see  
2 generally Def.'s Mot. for Summ. J. at 8-11. The court disagrees.

3       The doctrine of substantial performance provides that a party  
4 is deemed not to have breached a contract if its conduct was a  
5 "trivial and innocent" departure from the contract's requirements.  
6 Medico-Dental Building Co. of Los Angeles v. Horton & Converse, 21  
7 Cal. 2d 411, 433-34 (1942), citing Jacob & Young v. Kent, 230 N.Y.  
8 239, 241 (1921) (substantial performance where builder used a  
9 different brand of pipe in constructing a home than the brand  
10 specified in the contract, because the brand used was the same  
11 quality of that specified). This doctrine is inapplicable here,  
12 as defendant's conduct conflicted with the central purpose of the  
13 contract, which was for it to set aside a certain amount to fund  
14 the bonded construction and that the contract was irrevocable  
15 without plaintiff's consent. There is no dispute that defendant  
16 failed to do this, when it released the deed on the property  
17 guaranteeing the Baldwin Ranch loan upon refinancing. The  
18 refinanced loans were not the "substitution of equivalents"  
19 discussed in Jacob & Youngs, 230 N.Y. at 241, because they did not  
20 contain the same set-aside guarantees.

21       Elsewhere in its briefing, defendant acknowledges that its  
22 argument is properly characterized as asserting that plaintiff was  
23 not damaged, not that defendant did not breach the contract. See  
24 Def.'s Combined Reply in Support of Its Mot. for Summ. J. and Opp'n  
25 to Pl.'s Mot. for Summ. J. at 1, 25. The California Civil Code  
26 provides that damages are recoverable by "every person who suffers

1 detriment from the unlawful act or omission of another." Cal. Civ.  
2 Code § 3281. For a breach of contract, the damages typically are  
3 "the amount which will compensate the party aggrieved for all the  
4 detriment proximately caused thereby. . . ." Cal. Civ. Code § 3300.  
5 Similarly, a plaintiff may not recover "a greater amount in damages  
6 for the breach of an obligation, than he could have gained by the  
7 full performance thereof on both sides." § 3358. In other words,  
8 "[a] breach of contract is not actionable without damage." Bramalea  
9 Cal., Inc. v. Reliable Interiors, Inc., 119 Cal. App. 4th 468, 473  
10 (2004); see also Patent Scaffolding Co. v. William Simpson Constr.  
11 Co., 256 Cal. App. 2d 506 (1967) Whipley v. McKune, 12 Cal. 352  
12 (1859) ("An act, however erroneous, which does no injury to a  
13 party, cannot be the subject to a legal complaint on his part.").  
14 This is true because contract remedies have the purpose of putting  
15 the non-breaching party in the position he would have been had the  
16 contract been fully performed. Plut v. Fireman's Fund Ins. Co., 85  
17 Cal. App. 4th 98, 108 (2000).

18       Here, there is no question that First Bank breached the terms  
19 of its set-aside agreement with Gulf. The agreement required First  
20 Bank to "allocate and set aside" \$7,759,521 that would either be  
21 disbursed to Baldwin Ranch for the bonded construction or would be  
22 disbursed to Gulf in the event of Baldwin Ranch's failure to  
23 complete or pay for the improvements. Pand Decl. Exh. B. It is  
24 undisputed that when Baldwin Ranch failed to complete or pay for  
25 the bonded construction, First Bank did not disburse the credit to  
26 Gulf. The dispositive question, therefore, is whether plaintiff

1 suffered any harm from this breach. See Bramalea Cal., 119 Cal.  
2 App. 4th at 473.

3         The plain language of a contract is controlling. Cal. Civ.  
4 Code § 1638. The set-aside agreement contains no provision  
5 specifically addressing what the parties would do if Baldwin Ranch  
6 sought to refinance the First Bank loan. Nonetheless, the plain  
7 words of the contract appear to address the issue, if not directly,  
8 than by necessary implication.

9         Through the set-aside agreement, plaintiff bargained for and  
10 received defendant's agreement to set aside a certain amount of  
11 funds. This obligation was irrevocable and, similarly, the  
12 agreement contained no provision allowing for defendant's  
13 obligations to be passed on to a subsequent lender. As the parties  
14 acknowledged at oral argument, although the amount of the set-aside  
15 was determined by cost estimates of the construction project,  
16 Baldwin Ranch was not required to draw down any of the set-aside  
17 funds to pay for bonded improvements. In other words, the fact that  
18 Baldwin Ranch may have obtained other sources of funding could not  
19 operate to discharge defendant's obligations under the set-aside  
20 agreement.

21         Defendant argues that the obvious purpose of the  
22 irrevocability provision was to ensure that the total amount of the  
23 set-aside funds were made available to Baldwin Ranch, and that this  
24 was plainly plaintiff's intent in including this provision in the  
25 set-aside agreement. As such, defendant argues, plaintiff received  
26 the benefit of its bargain with defendant when Metwest and Owens

1 ultimately disbursed the same amount (and more) to Baldwin Ranch.  
2 See generally Lewis Jorge Const. Mgmt., Inc. v. Pomona Unified Sch.  
3 Dist., 34 Cal. 4th 960, 971-73 (2004).

4       The court cannot agree. The language of the set-aside  
5 agreement is plain. See Cal. Civ. Code § 1639. Plaintiff sought to  
6 have defendant set-aside a certain amount of funds for disbursement  
7 to Baldwin Ranch or to plaintiff. That was its intent. The  
8 agreement further provided, in plain and direct language, that the  
9 set-aside was irrevocable. These two provisions taken together  
10 demonstrate that the plaintiff's intent in executing the set-aside  
11 agreement was to require defendant to set aside a certain amount  
12 of funds until they were either fully disbursed to Baldwin Ranch  
13 or plaintiff, and that defendant could not transfer its  
14 responsibility to another entity without release by the plaintiff.  
15 There is no ambiguity in the language of the agreement in this  
16 regard. Because defendant's conduct frustrated the plain purpose  
17 of plaintiff in entering into the agreement, it is not the case  
18 that plaintiff received the benefit of its bargain through the  
19 subsequent loans by Metwest and Owens, as defendant argues.  
20 Defendant's position would have the court essentially ignore the  
21 irrevocability provision in the agreement, which the court may not  
22 do. See Cal. Civ. Code § 1641. Through defendant's release of the  
23 deed of trust securing the loan prior to its full disbursement to  
24 either Baldwin Ranch or plaintiff, defendant deprived plaintiff of  
25 the irrevocable guarantee of set-aside, for which it had bargained,  
26 and thus caused damage to plaintiff. For this reason, plaintiff's

1 motion must be granted and defendant's denied on this cause of  
2 action.<sup>4</sup>

3 Although not dispositive to this holding, the court also  
4 remains unpersuaded that the Metwest and Owens loans may properly  
5 be characterized as refinances of the original loan. The only  
6 direct evidence on this point is the declaration of Chad Fralick,  
7 Baldwin Ranch's managing partner. His statements, however, are not  
8 supported by other facts on the record. First, he buttressed his  
9 declaration with reference to a portion of a spreadsheet titled  
10 "Phase 2 Hard Costs," declaring that these costs were paid with  
11 disbursements by Metwest and were the types of improvements bonded  
12 by plaintiff. Fralick Decl. ¶ 13. It is frankly impossible to  
13 discern from the evidence tendered to the court whether this latter  
14 contention is accurate. The set-aside letter only describes vaguely  
15 what portions of Baldwin Ranch's construction were bonded by  
16 plaintiff. See id. Ex. 2 at 1 ("First Bank . . . has arranged or  
17 is arranging financing for Baldwin Ranch . . . , one of the purposes  
18 of which will be to finance, among other things, off-site and on-  
19 site improvements ("Improvements") for a 114 lot subdivision near  
20 Auburn, CA."). Additionally, the spreadsheet tendered as part of  
21 the Fralick declaration indicates that Phase 2 "hard costs" were  
22 paid with Metwest funds, while other evidence tendered indicates  
23 that the First Bank loan covered "soft costs" of Phase 2

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25 <sup>4</sup>It is plain speculation to try, after the fact, to determine  
26 what plaintiff would have done had it been timely notified of the  
intended refinancing of Baldwin's loan.

1 construction. Kramer Decl. ¶ 8. The court simply cannot conclude,  
2 based on the evidence tendered, that as a matter of law the Metwest  
3 loan was used to finance the "Improvements" bonded by plaintiff.

4 Furthermore, even if Metwest financed the type of improvements  
5 covered by the First Bank loan, the court cannot conclude, based  
6 on the evidence tendered, that Metwest's loan may accurately be  
7 characterized as a refinance of the First Bank loan. It is  
8 undisputed that First Bank disbursed to Baldwin Ranch \$5,581,900.69  
9 of the \$7,759,521 set aside pursuant to its agreement with  
10 plaintiff, leaving a difference of \$2,177,620.31. It is also  
11 undisputed that Metwest disbursed a total of \$4,631,805 to Baldwin  
12 Ranch. No evidence has been tendered, aside from the few statements  
13 by Chad Fralick, of the terms of the Metwest loan. The Metwest  
14 loan, however, was more than twice the amount of the undisbursed  
15 First Bank loan. Thus it seems inappropriate to characterize the  
16 Metwest loan simply as a refinancing of the First Bank loan. This  
17 is particularly critical, as defendant's argument hinges on its  
18 contention that through Metwest, and eventually Owens, plaintiff  
19 received the benefit of its bargain with defendant.<sup>5</sup>

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20  
21 <sup>5</sup>Plaintiff does not move for summary judgment on the issue of  
22 the amount of damages to be awarded for defendant's breach of  
23 contract. See Pl.'s Mot. for Summ. J. at 15. The court therefore  
24 need not reach the question of whether plaintiff may recover for  
the costs of claims against it and for investigating those claims,  
which may or may not be considered special or consequential  
damages. See, e.g., Lewis Jorge Constr. Mgmt., 34 Cal. 4th at 967-  
69.

25 Because the court awards plaintiff damages for conversion, the  
26 court notes that under California law, it would appear plaintiff  
is prohibited from being awarded the same damages for breach of  
contract. See Plut, 85 Cal. App. 4th at 107-11 (holding that the

1 **B. Conversion**

2 In its Third Amended Complaint, plaintiff alleges that  
3 defendant committed the tort of conversion by failing to disburse  
4 the full amount set forth in the set-aside agreement. Plaintiff  
5 seeks summary judgment on this cause of action. Defendant cross-  
6 moves for summary judgment on the grounds that defendant suffered  
7 no damages from any wrongful conversion and that the cause of  
8 action is barred by the statute of limitations.

9 **1. Statute of Limitations**

10 The parties agree that the statute of limitations for this  
11 cause of action is three years, see Cal. Civ. Code § 338(c), but  
12 disagree on at what point the limitations period began to run.  
13 Plaintiff contends that the period began to run when it was  
14 entitled to possession of the funds. Defendant argues that the  
15 period began to run when the wrongful taking occurred, i.e., when  
16 Baldwin Ranch refinanced the First Bank loan and First Bank  
17 reconveyed the deed of trust securing the loan. The court agrees  
18 with plaintiff.

19 Under California law, a conversion action accrues when the  
20 plaintiff obtains an immediate right to possession of the item in  
21 question. See Bastanchry v. Times-Mirror, Co., 68 Cal. App. 2d 217,  
22 236 (1945). Thus, for example, a lien constitutes a property  
23 interest that may be converted, but the claim does not accrue until  
24 the obligee has become entitled to immediate possession of the

25 \_\_\_\_\_  
26 collateral source rule does not apply to breach of contract  
actions).

1 property at issue. Hartford Financial Corp. v. Burns, 96 Cal. App.  
2 3d 591, 598 (1979); Imperial Valley Co. v. Globe Grain & Milling  
3 Co., 187 Cal. 352 (1921); Weiss v. Marcus, 51 Cal. App. 3d 590  
4 (1975). While defendant is correct, that defendant's wrongful act  
5 is also an essential element of the claim, the statute of  
6 limitations on a claim cannot begin to run until all of its factual  
7 predicates have occurred.

8 Here, First Bank reconveyed the deed of trust on June 3, 2003.  
9 Kramer Decl. ¶ 18. However, Gulf did not acquire a right to  
10 immediately possess the undisbursed balance until Baldwin Ranch  
11 "fail[ed] to complete or pay for the Improvements." Pand Decl. Ex.  
12 B. It is undisputed that the first claim against Gulf was made on  
13 May 23, 2007 for Baldwin Ranch's failure to pay for bonded  
14 improvements. In this claims letter, the claimant stated that  
15 Baldwin Ranch had not paid it as of May 1, 2007. Pand Decl. Ex. M.  
16 Therefore, that was the earliest date on which statute of  
17 limitations for the claim of conversion began to run, under the  
18 terms of the set-aside agreement. Accordingly, plaintiff's  
19 conversion claim is not time-barred.

## 20 **2. Elements of Conversion**

21 In general terms, conversion is the "wrongful exercise of  
22 dominion over the property of another." Spates v. Dameron Hosp.  
23 Ass'n, 144 Cal. App. 4th 208, 221 (2003) (internal citations  
24 omitted). In order to prevail on a claim for conversion, a  
25 plaintiff must prove that (1) the plaintiff had ownership or a  
26 right to possession of property at the time of the conversion, (2)



1 the defendant converted this property through its wrongful act or  
2 disposition of the property rights, and (3) that plaintiff suffered  
3 damages. Id.

4 First, despite the defendant's arguments on this point in the  
5 instant motion, the court had already ruled that under California  
6 law, set-aside funds can be subject to conversion. See Order, June  
7 4, 2008, at 5-6. This is an exception to the general rule that a  
8 claim for money cannot be the subject of a conversion claim. Id.  
9 Additionally, plaintiff's ownership interest in the funds was  
10 triggered upon Baldwin Ranch's failure to complete or pay for the  
11 construction covered by plaintiff's bonds. Id. Accordingly,  
12 plaintiff has met the first element of the conversion action.

13 Second, defendant's reconveyance of the deed of trust securing  
14 the loan prior to it being fully disbursed to plaintiff or Baldwin  
15 Ranch constituted a wrongful act, as it operated to interfere with  
16 plaintiff's ownership interests in the funds. See, e.g., Naftzger  
17 v. Am. Numismatic Soc'y, 42 Cal. App. 4th 421, 428-29 (1996).  
18 Defendant appears not to dispute that this conduct constitutes a  
19 wrongful act, sufficient to satisfy the second element of a  
20 conversion action. See Def.'s Mot. for Summ. J. at 14-15; Def.'s  
21 Opp'n to Pl.'s Mot. for Summ. J. at 18-20.

22 Finally, for the reasons discussed in relation to the first  
23 cause of action, plaintiff did suffer damages from the conversion.  
24 It is undisputed that there remained \$2,177,620.31 undisbursed to  
25 Baldwin Ranch or plaintiff. Plaintiff seeks this amount plus  
26 interest, see Pl.'s Mot. for Summ. J. at 23, which is by statute

1 presumed to be the appropriate measure of damages for a claim of  
2 conversion. Cal. Civ. Code § 3336. In California, the rate of  
3 interest is presumed to be seven percent per annum, unless there  
4 is a contrary statute. Cal. Const. art. XV § 1. In conversion  
5 action, seven percent is the proper measure of interest. Irving  
6 Nelkin & Co. v. South Beverley Hills Wilshire Jewelry & Loan, 129  
7 Cal. App. 4th 692 (2005). Interest accrues from the time of the  
8 wrongful conversion until the date of an adjudication that  
9 plaintiff is entitled to the possession of the property. Id. at  
10 704. In this case, interest runs from May 23, 2007 to the date of  
11 this order.

### 12 **3. Declaratory Relief**

13 In its third cause of action, plaintiff seeks declaratory  
14 relief as to the parties' obligations under the set-aside  
15 agreement. In its motion, plaintiff specifies that it seeks a  
16 declaration under California Code of Civil Procedure § 1060 that  
17 (1) First Bank has an obligation to disburse the undisbursed set-  
18 aside funds to Gulf, (2) that the set-aside agreement is  
19 irrevocable, and that (3) Gulf does not have any repayment  
20 obligations to First Bank with respect to the set-aside funds.  
21 Pl.'s Mot. for Summ. J. at 17. The court concludes that a  
22 declaratory judgment is not merited.

23 Under the California Code of Civil Procedure § 1060, a party  
24 may seek a declaration of the construction or validity of a  
25 contract in which it has an interest. The declaration "may" issue  
26 before there has been any breach of the contract. Cal. Code Civ.

1 Proc. § 1060. The court may decline to issue the declaration if it  
2 finds it would be "not necessary or proper at the time under all  
3 the circumstances." Id. § 1061. The purpose of the statute is to  
4 resolve uncertainties or controversies that may otherwise result  
5 in litigation. See, e.g., County of San Diego v. State, 164 Cal.  
6 App. 4th 580 (2008); Roberts v. Reynolds, 212 Cal. App. 2d 818  
7 (1963); Coruccini v. Lambert, 113 Cal. App. 2d 486 (1952).

8 As the court explained in its June 2008 order, under  
9 California law, declaratory relief under Code of Civil Procedure  
10 § 1060 is not appropriate where the plaintiff has also brought an  
11 action for breach of contract. Order, June, 4, 2008 at 12, citing  
12 Canova v. Trustees of Imperial Irrigation Dist. Employee Pension  
13 Plan, 150 Cal. App. 4th 1487, 1497 (2007), Roberts v. Los Angeles  
14 County Bar Ass'n, 105 Cal. App. 4th 604, 618 (2003), and Babb v.  
15 Superior Court, 3 Cal. 3d 841, 848 (1971). The first two issues for  
16 which plaintiff seeks declaratory relief -- regarding the nature  
17 of First Bank's obligations under the set-aside agreement and  
18 whether the agreement is irrevokable -- appear to be redundant to  
19 the issues resolved in the breach of contract cause of action.  
20 Moreover, as the court has observed, First Bank appears not to  
21 dispute that the set-aside agreement is irrevokable, and thus this  
22 issue is not the type for which declaratory judgment is  
23 appropriate. See Cal. Code Civ. Proc. §§ 1060, 1061.

24 Plaintiff has also tendered no evidence to suggest that a  
25 controversy exists as to its reimbursement obligations to defendant  
26 under the set-aside agreement, which may be resolved through a

1 declaratory judgment. It appears that plaintiff views this as a  
2 present controversy because the claims against it by the county are  
3 for a yet-undetermined amount and the plaintiff seeks to know  
4 whether it would be required to reimburse defendant for amounts in  
5 excess of the claims. See Pl.'s Reply In Support of Motion for  
6 Summ. J. at 15-16. Because, however, the question of the amount of  
7 damages for breach of contract to which plaintiff is entitled  
8 remains unresolved, no such declaration is yet necessary. See Cal.  
9 Code Civ. Proc. §§ 1060, 1061.


10 **IV. CONCLUSION**

11 For the reasons herein, the court ORDERS as follows:

- 12 1. Plaintiff's motion for summary judgment is GRANTED as to  
13 its first and second causes of action and DENIED as to  
14 its claim for declaratory relief. On its cause of action  
15 for conversion, plaintiff is awarded damages of  
16 \$2,177,620.31 plus interest at the rate of seven (7)  
17 percent per annum from May 23, 2007 to the date of this  
18 order.
- 19 2. Defendant's motion for summary judgment is GRANTED as to  
20 plaintiff's claim for declaratory relief and DENIED as  
21 to plaintiff's remaining claims.

22 IT IS SO ORDERED.

23 DATED: April 10, 2009.

24  
25   
26 LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT