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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ZURICH AMERICAN INSURANCE
COMPANY; AMERICAN GUARANTEE
AND LIABILITY INSURANCE
COMPANY; and AMERICAN ZURICH
INSURANCE COMPANY,

Plaintiffs,

v.

TRANS CAL ASSOCIATES; TRANS
CAL INSURANCE ASSOCIATES,
INC.; MARK SCOTT; GRAY SCOTT;
and DOES 1-50,

Defendants,

AND RELATED COUNTERCLAIMS AND
THIRD-PARTY COMPLAINT.

NO. CIV. 2:10-1957 WBS KJM

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

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Plaintiffs Zurich American Insurance Company, American
Guarantee and Liability Insurance Company, and American Zurich
Insurance Company filed a complaint against defendants Trans Cal
Associates ("Trans Cal"), Trans Cal Insurance Associates, Mark

1 Scott, and Gray Scott on July 22, 2010, arising from defendants'
2 alleged failure to remit over \$1.1 million in insurance premiums
3 that defendants had allegedly collected for plaintiffs. Trans
4 Cal filed two counterclaims against plaintiffs and a third-party
5 complaint against Zurich American Insurance Company of Illinois
6 (collectively "Zurich") arising from, inter alia, Zurich's August
7 4, 2010, affidavit and notice directing Wells Fargo Bank,
8 National Association, to refuse payment of funds from Trans Cal's
9 accounts for three days. Zurich now moves to dismiss the
10 conversion claim¹ pursuant to Federal Rule of Civil Procedure
11 12(b)(6) for failure to state a claim upon which relief can be
12 granted.

13 I. Factual and Procedural Background

14 Zurich² filed a complaint against defendants for breach
15 of contract, breach of fiduciary duty, breach of implied covenant
16 of good faith and fair dealing, conversion, fraud, and accounting
17 on July 22, 2010. (Docket No. 1.) On August 4, 2010, Nancy Dow,
18 a representative of Zurich, delivered an "Affidavit and Notice of
19 Adverse Claim to Funds Deposited in Bank Account" ("affidavit and
20 notice") to Wells Fargo Bank, National Association ("Wells
21 Fargo"), pursuant to California Financial Code section 952.
22 (Original Countercl. & Original Third Party Compl. of Trans Cal ¶
23 14, Ex. A (Docket No. 28).) Dow declared under penalty of

25 ¹ The other claim arises from the alleged fact that Trans
26 Cal has been refunding Zurich's customers when the insurance
27 policies were cancelled. This claim is not a subject of the
28 motion to dismiss.

² Zurich American Insurance Company of Illinois is not a
plaintiff.

1 perjury to Wells Fargo that Trans Cal was a fiduciary of Zurich
2 American Insurance Company, American Guarantee and Liability
3 Insurance Company, and American Zurich Insurance Company³ as to
4 funds in the sum of \$1,161,681.69 "now on deposit . . . in the
5 name of 'Trans Cal Associates[,]'" in Account No. 6528350298,
6 and in other accounts in the names of Trans Cal Associates and/or
7 Trans Cal Insurance Associates, Inc." (Id. Ex. A.)

8 Based on the belief that the funds were about to be
9 misappropriated, Dow stated: "[T]he undersigned, Nancy Dow,
10 directs that you refuse payment of funds from the accounts of
11 Trans Cal Associates and/or Trans Cal Insurance Associates, Inc.
12 for a period of three court days from the date that you receive
13 this Affidavit and Notice and for such further time as may be
14 ordered hereafter by a court of competent jurisdiction."⁴ (Id.)

15 Trans Cal had trust, payroll, and operating accounts
16 ("accounts") with Wells Fargo. (Id. ¶ 9.) The trust account
17 contained no Zurich funds but instead contained funds of nine
18 other insurers totaling \$109,253.77, with an additional amount of
19 \$2,116.52 for possible commission payments. (Id. ¶ 12.) Trans

20
21 ³ In the affidavit and notice, Dow did not name Zurich American Insurance Company of Illinois.

22 ⁴ Nancy Dow provided the facts on which she based her
23 declaration. These facts included that the contract between
24 Trans Cal and plaintiffs provided for Trans Cal to collect, hold
25 in trust, and remit payments owed to plaintiffs. (Original
26 Countercl. & Original Third Party Compl. of Trans Cal Ex. A
27 (Docket No. 28).) The facts also included that Trans Cal had
28 failed to remit \$1,161,681.69 owed to plaintiffs, despite
plaintiffs' request, and that Trans Cal claimed that it did not
have sufficient funds to comply with the contractual duty to
remit the insurance premiums, did not know the location of
plaintiffs' funds, and threatened to file bankruptcy "if Zurich
employ[ed] any 'heavy handed' tactics to recover the money."
(Id.)

1 Cal does not allege how much was contained in the other two
2 accounts. Following delivery of the affidavit and notice, Trans
3 Cal alleges that "Counter-Defendants froze all Accounts of Trans
4 Cal during the period August 4, 5, and 6, 2010[,] thus depriving
5 Trans Cal of access to its deposits and thus preventing all
6 withdrawals of money on deposit, including checks written against
7 the accounts."⁵ (Id. ¶ 15.)

8 Trans Cal alleges that "the wrongful interference with
9 the Accounts constituted a conversion of said Accounts." (Id.)
10 Zurich allegedly knew or should have known that the trust account
11 contained other insurers' funds and that the other accounts did
12 not contain Zurich's funds. (Id. ¶ 16.) The damages are
13 presently unknown but include returned checks not honored and
14 rejected loan and credit card payments. (Id. ¶ 18.) On
15 September 3, 2010, Trans Cal filed two counterclaims and a third-
16 party complaint. Zurich now moves to dismiss the conversion
17 claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

18 II. Discussion

19 To survive a motion to dismiss, a plaintiff must plead
20 "only enough facts to state a claim to relief that is plausible
21 on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
22 (2007). This "plausibility standard," however, "asks for more
23 than a sheer possibility that a defendant has acted unlawfully,"
24 and where a complaint pleads facts that are "merely consistent

25
26 ⁵ In opposition, Trans Cal states that the payroll and
27 operating accounts were released before the expiration of the
28 three days. (Def.'s Opp'n to Mot. to Dismiss Def.'s Countercl.
for Conversion at 2:21-23 (Docket No. 41).) This was not clear
from the allegations and it remains unclear how long these two
accounts were frozen.

1 with" a defendant's liability, it "stops short of the line
2 between possibility and plausibility." Ashcroft v. Iqbal, ---
3 U.S. ----, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks
4 omitted). In deciding whether a plaintiff has stated a claim,
5 the court must assume that the plaintiff's allegations are true
6 and draw all reasonable inferences in the plaintiff's favor.
7 Usher v. City of L.A., 828 F.2d 556, 561 (9th Cir. 1987).
8 However, the court is not required to accept as true "allegations
9 that are merely conclusory, unwarranted deductions of fact, or
10 unreasonable inferences." In re Gilead Scis. Sec. Litig., 536
11 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks
12 omitted).

13 California Financial Code section 952 requires banks to
14 "disregard[]" adverse claims to deposits and immunizes banks from
15 liability to the adverse claimant.⁶ Cal. Fin. Code § 952; see
16 generally AARTS Prod., Inc. v. Crocker Nat'l Bank, 179 Cal. App.
17 3d 1061, 1069 (6th Dist. 1986) ("[T]he purpose of Financial Code
18 section 952 is to protect banks from getting caught in a
19 crossfire between its depositors and strangers claiming
20 entitlement to its accounts."). This general rule applies even
21

22 ⁶ California Financial Code section 952 provides:

23 Notice to any bank of an adverse claim . . . to a
24 deposit standing on its books to the credit of . . .
25 any person shall be disregarded, and the bank,
26 notwithstanding the notice, shall honor the checks,
27 notes, or other instruments requiring payment of money
28 by or for the account of the person to whose credit the
account stands . . . , without any liability on the
part of the bank; subject, however, to the exceptions
provided in subdivisions (a) and (b):

28 Cal. Fin. Code. § 952.

1 when the deposit account clearly indicates that the depositor is
2 a fiduciary of the adverse claimant. Cal. Fin. Code § 952(c);
3 see generally Desert Bermuda Prop. v. Union Bank, 265 Cal. App.
4 2d 146, 151-152 (2d Dist. 1968) (“[W]hen the Legislature adopted
5 what is now [section 952] it relieved banks from any general duty
6 to police fiduciary accounts (a duty which a bank could not
7 reasonably be expected to carry out effectively). In 1941 the
8 protection of the statute was further broadened by an amendment
9 applying its provisions to accounts carrying a specific
10 qualifying designation, such as agent or trustee.”).

11 There are two exceptions to the general rule that
12 requires banks to ignore adverse claims and immunizes them in
13 doing so. First, subsection (a) requires banks to refuse payment
14 of the deposit for no more than three court days upon delivery of
15 an affidavit⁷

16 stating that of the adverse claimant’s own knowledge the
17 person to whose credit the deposit stands . . . is a
18 fiduciary for the adverse claimant and that the adverse
19 claimant has reason to believe the fiduciary is about to
misappropriate the deposit . . . , and stating the facts
on which the claim of fiduciary relationship and the
belief are founded

20 Cal. Fin. Code § 952(a) (emphasis added). In refusing payment of
21 the deposit for three days, the bank is “without liability on its
22 part and without liability for the sufficiency or truth of the
23 facts alleged in the affidavit.” Id. The second exception to
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25 ⁷ Section 952 does not define affidavit, but California
26 Civil Procedure Code section 2003 defines an affidavit as “a
27 written declaration under oath, made without notice to the
28 adverse party.” Cal. Civ. Proc. Code § 2003. Section 2015.5
provides that an unsworn declaration under penalty of perjury
under the laws of the state of California suffices for an
affidavit. Id. § 2015.5.

1 the general rule is provided in subsection (b), which provides
2 that “[i]f at any time, either before, after, or in the absence
3 of the filing of an affidavit by the adverse claimant,” the
4 adverse claimant delivers a court order or injunction to the
5 bank, “the bank shall comply with the order or injunction,
6 without liability on its part.”⁸ Id. § 952(b).

7 Here, Trans Cal alleges that Zurich’s use of section
8 952 was wrongful because Zurich knew or should have known that
9 the trust fund contained other insurers’ funds and that the other
10 accounts did not contain Zurich’s funds. Without any remedies
11 provided under section 952, Trans Cal brings a claim for
12 conversion.

13 “Conversion is the wrongful exercise of dominion over
14 the property of another.” Oakdale Vill. Group v. Fong, 43 Cal.
15 App. 4th 539, 543 (3d Dist. 1996). “The elements of a conversion
16 claim are (1) the plaintiff’s ownership or right to possession of
17 the property at the time of the conversion; (2) the defendant’s
18 conversion by a wrongful act or disposition of property rights;
19 and (3) damages.” Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590,
20 601 (9th Cir. 2010). “Conversion is also a strict liability tort
21 Therefore, questions of good faith, lack of knowledge and
22 motive are ordinarily immaterial.” Oakdale Vill. Group, 43 Cal.
23 App. 4th at 544.

24 “It is necessary to show that the alleged converter has

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26 ⁸ It is not without precedent that an adverse claimant
27 delivers an affidavit, but then decides not to seek a court order
28 before the expiration of the short statutorily-prescribed period.
See, e.g., Steven R. Perles, P.C. v. Kagy, No. Civ.A. 01-0105,
2005 WL 3262905, at *3 (D.D.C. Aug. 29, 2005).

1 assumed control over the property 'or that the alleged converter
2 has applied the property to his own use.'" Mindys Cosmetics,
3 Inc., 611 F.3d at 601 (quoting Oakdale Vill. Group, 43 Cal. App.
4 4th at 543-44). "It is not necessary that there be a manual
5 taking of the property." Oakdale Vill. Group, 43 Cal. App. 4th
6 at 544. Even when there is a manual taking, the alleged
7 converter must assume control over the property or apply the
8 property to his own use. See, e.g., Jordan v. Talbot, 55 Cal. 2d
9 597, 610 (1961) (holding that there was no conversion when lessor
10 moved lessee's property to a storage unit).

11 Here, Trans Cal has stated enough facts to survive
12 Zurich's motion to dismiss the conversion claim. Trans Cal does
13 not need to show that Zurich applied the deposits to its use or
14 even possessed them. In Pilch v. Milikin, 200 Cal. App. 2d 212,
15 224 (2d Dist. 1962), in holding that the plaintiff had stated a
16 claim for conversion, the court noted that conversion has been
17 defined broadly as "any act of dominion wrongfully exerted over
18 another's personal property in denial of or inconsistent with his
19 rights thereto" and that it was immaterial that the third-party
20 bank possessed the money and not the defendant. Id. That case
21 involved a defendant joint account holder who refused to execute
22 a joint withdrawal form to release money that belonged to the
23 plaintiff. Id.

24 Because of the affidavit and notice from Zurich's
25 representative Dow and pursuant to section 952(a), Wells Fargo
26 allegedly refused payment of the deposits in Trans Cal's three
27 accounts on August 4, 5, and 6, 2010. (Original Countercl. &
28 Original Third Party Compl. of Trans Cal ¶¶ 14-15, Ex. A.) The

1 trust account contained other insurers' funds and the payroll and
2 operating accounts contained Trans Cal's funds. (See id. ¶ 16.).
3 These facts plausibly suggest that Zurich wrongfully "assumed
4 control over the property," Mindys Cosmetics, Inc., 611 F.3d at
5 600, when it directed the bank to refuse payment on Trans Cal's
6 accounts.

7 At this stage, the court is unable to conclude that the
8 affidavit and notice was privileged communication pursuant to
9 California Civil Code section 47(b). "The usual formulation is
10 that the privilege applies to any communication (1) made in
11 judicial or quasi-judicial proceedings; (2) by litigants or other
12 participants authorized by law; (3) to achieve the objects of the
13 litigation; and (4) that have some connection or logical relation
14 to the action." Silberg v. Anderson, 50 Cal. 3d 205, 215 (1990).
15 The privilege has been extended to "any publication . . . that is
16 required or permitted by law in the course of a judicial
17 proceeding to achieve the objects of the litigation, even though
18 the publication is made outside the courtroom and no function of
19 the court or its officers is invoked." Albertson v. Raboff, 46
20 Cal. 2d 375, 380-81 (1956).

21 Not every affidavit and notice pursuant to section 952
22 is protected by the litigation privilege. Cf. Action Apartment
23 Ass'n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232, 1251
24 (2007) ("[C]ourts have developed a test for determining when a
25 communication regarding prospective litigation is subject to the
26 litigation privilege. Because this test involves a question of
27 fact, it is impossible to conclude . . . that every action
28 brought pursuant to the notice provision, [which prohibits

1 landlords from serving notices to quit under certain
2 circumstances,] necessarily would be barred by the litigation
3 privilege."). The affidavit and notice does not mention
4 litigation or the threat of litigation, and the court cannot
5 conclude without a factual inquiry that it was intended to
6 achieve the objects of litigation. Cf. id. ("Whether a
7 prelitigation communication relates to litigation that is
8 contemplated in good faith and under serious consideration is an
9 issue of fact.").

10 Accordingly, because Trans Cal has stated a claim for
11 conversion and a factual inquiry is required to determine whether
12 the litigation privilege bars the claim, IT IS HEREBY ORDERED that
13 Zurich's motion to dismiss the claims for conversion in Trans Cal's
14 counterclaim and third party complaint be, and the same hereby is,
15 DENIED.

16 DATED: November 30, 2010

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19 WILLIAM B. SHUBB
20 UNITED STATES DISTRICT JUDGE
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