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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARCH INSURANCE COMPANY, a
Missouri corporation,

Plaintiff,

v.

SIERRA EQUIPMENT RENTAL, INC., a
California corporation; MELVIN R.
WEIR, an individual; CAROLYN S.
SCAROLA, as trustee of the Dry Creek
Ranches Trust; CAROLYN S. SCAROLA,
an individual,

Defendants.

No. 2:12-cv-00617-KJM-KJN

ORDER

This matter is before the court on defendant Karrie Kindell’s (“Ms. Kindell”) motion to dismiss. (Def.’s Mot. Dismiss, ECF No. 113.) Plaintiff Arch Insurance Company (“Arch”) opposes the motion. (Pl.’s Opp’n, ECF No. 123.) The court held a hearing on January 16, 2015, at which Patrick Kirby appeared for Arch, Andrew Wiener appeared telephonically for Ms. Kindell, and Chris Kuhner appeared telephonically on behalf of the trustee Carolyn S. Scarola. As explained below, the court GRANTS in part and DENIES in part the motion.

I. BACKGROUND

Arch’s claims arise from its issuance of surety bonds to Sierra Equipment Rental, Inc. (“Sierra”) for Sierra’s contracted construction projects for the State of California Department

1 of Transportation (“CalTrans”) and Tutor-Saliba between December 2009 and January 2011.
2 (First Am. Compl. (“Compl.”), ECF No. 68 ¶¶ 12–13.) Defendant Ms. Kindell was Sierra’s
3 president. (*Id.* ¶ 157.) Arch alleges Sierra executed a General Indemnity Agreement (“GIA”)
4 promising to indemnify Arch against any losses that Arch might incur from issuing the bonds.
5 (*Id.* ¶ 16.) On January 31, 2012, Sierra notified Arch that it needed \$3 million in financial
6 assistance after defaulting on its project for CalTrans. (*Id.* ¶¶ 22–23.) In turn, Arch requested
7 that Sierra and the other Indemnitors deposit \$1,461,918.83 in collateral, the amount Arch
8 estimated it had received in claims; discharge Arch from the bonds; and allow Arch to inspect
9 books and records, consistent with the terms of the GIA. (*Id.* ¶ 24.) Arch asserts that Sierra and
10 the Indemnitors have not complied with these obligations. (*Id.* ¶¶ 31–33.)

11 The original complaint did not name Ms. Kindell as a defendant. (*See* ECF No. 2.)
12 Arch’s first amended complaint, the operative complaint, added Ms. Kindell as a party and
13 alleges the following claims against her: (1) conspiracy to convert; (2) violation of the Uniform
14 Fraudulent Transfer Act (“UFTA”), California Civil Code § 3439, *et seq.*; and (3) conspiracy to
15 violate the UFTA. (ECF No. 68.) Ms. Kindell now moves to dismiss all three claims. (ECF
16 No. 113 at 1–2.) Arch opposes Ms. Kindell’s motion (ECF No. 123), and Ms. Kindell has replied
17 (ECF No. 124).

18 II. STANDARD

19 “[F]ederal courts sitting in diversity jurisdiction apply state substantive law and
20 federal procedural law.” *Zamani v. Carnes*, 491 F.3d 990, 995 (9th Cir. 2007) (quoting *Freund v.*
21 *Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)). Because jurisdiction in this case is
22 based on diversity of citizenship, California substantive law applies to Arch’s state-law claims
23 and federal procedural law governs the procedural aspects of Ms. Kindell’s motion to
24 dismiss. *Freund*, 347 F.3d at 761.

25 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to
26 dismiss a complaint for “failure to state a claim upon which relief can be granted.” A court may
27 dismiss “based on the lack of cognizable legal theory or the absence of sufficient facts alleged

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1 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
2 1990).

3 Although a complaint need contain only “a short and plain statement of the claim
4 showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), in order to survive a motion
5 to dismiss this short and plain statement “must contain sufficient factual matter . . . to ‘state a
6 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
7 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something
8 more than “an unadorned, the-defendant-unlawfully-harmed-me accusation” or “‘labels and
9 conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’” *Id.* (quoting
10 *Twombly*, 550 U.S. at 555). Determining whether a complaint will survive a motion to dismiss
11 for failure to state a claim is a “context-specific task that requires the reviewing court to draw on
12 its judicial experience and common sense.” *Id.* at 679. Ultimately, the inquiry focuses on the
13 interplay between the factual allegations of the complaint and the dispositive issues of law in the
14 action. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

15 In making this context-specific evaluation, this court must construe the complaint
16 in the light most favorable to the plaintiff and accept as true the factual allegations of the
17 complaint. *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007). This rule does not apply to “‘a legal
18 conclusion couched as a factual allegation,’” *Papasan v. Allain*, 478 U.S. 265, 286 (1986), *quoted*
19 *in Twombly*, 550 U.S. at 555, nor to “allegations that contradict matters properly subject to
20 judicial notice” or to material attached to or incorporated by reference into the complaint.
21 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988–89 (9th Cir. 2001).

22 III. DISCUSSION

23 Ms. Kindell argues Arch’s claim for civil conspiracy to convert cannot proceed
24 because “(1) Sierra’s administration of its own money cannot be a basis of a conversion claim;
25 (2) [Arch] had no possessory or ownership right to the money allegedly converted; and (3) “[a]n
26 employee cannot conspire with her employer to convert corporate funds.” (ECF No. 113 at 2.)

27 Ms. Kindell argues Arch’s claims for violation of the UFTA and conspiracy to
28 violate the UFTA cannot proceed because “(1) [a] corporate debtor’s employee cannot be held

1 liable for the corporation’s alleged UFTA violation; (2) [t]he complained of act does not
2 constitute a violation of the UFTA as a matter of law; (3) [l]acking any independent statutory
3 duty to [p]laintiff under the UFTA, this [d]efendant cannot be held liable for conspiring to violate
4 the UFTA; and (4) [t]he First Amended Complaint does not allege facts sufficient to establish a
5 UFTA violation.” (*Id.*)

6 The court addresses each claim in turn.

7 A. Civil Conspiracy to Convert

8 Civil conspiracy is not an independent claim; rather, a plaintiff must plead an
9 underlying civil wrong along with conspiracy allegations. *See Rusheen v. Cohen*, 37 Cal. 4th
10 1048, 1062 (2006). “It is a legal doctrine that imposes liability on persons who, although not
11 actually committing a tort themselves, share with the immediate tortfeasors a common plan or
12 design in its perpetration.” *City of Indus. v. City of Fillmore*, 198 Cal. App. 4th 191, 211–12
13 (2011) (internal quotation marks omitted). “By participation in a civil conspiracy, a coconspirator
14 effectively adopts as his or her own the torts of other coconspirators within the ambit of the
15 conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate
16 tortfeasors.” *Id.* at 212 (internal quotation marks omitted). “The elements of a civil conspiracy
17 are (1) the formation of a group of two or more persons who agreed to a common plan or design
18 to commit a tortious act; (2) a wrongful act committed pursuant to the agreement; and
19 (3) resulting damages.” *Id.*

20 Here, the first and third elements are satisfied. Specifically, Arch alleges Ms.
21 Kindell knew of Sierra and Indemnitor’s “plan to divert and defalcate” the subject funds from
22 Arch. (Compl. ¶ 92.) With that knowledge, Ms. Kindell entered into an agreement with Sierra
23 and the other Indemnitors to convert the subject funds by “diversion and defalcation” on or before
24 September 7, 2011. (*Id.* ¶¶ 93–94.) As an example, Ms. Kindell “signed and issued a check
25 payable to” one of the other Indemnitors “on December 6, 2011 in the amount of \$300,000.” (*Id.*
26 ¶ 95. Treating these allegations as true, the court finds them sufficient to satisfy the first and third
27 elements of a conspiracy claim.

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1 However, the second element, a wrongful act committed pursuant to the
2 agreement, is not satisfied. The underlying tort on which Arch bases its conspiracy claim is the
3 tort of conversion under California law. Generally, conversion is described as a wrongful
4 exercise of dominion over another’s personal property. *Fremont Indem. Co. v. Fremont Gen.
5 Corp.*, 148 Cal. App. 4th 97, 119 (2007). The fundamental elements of conversion are:
6 (1) plaintiff’s ownership or right to possession of personal property; (2) defendant’s disposition of
7 the property in a manner inconsistent with plaintiff’s property rights; and (3) damages. *Id.*

8 Ms. Kindell argues that because “revenue received by Sierra as the general
9 contractor on the project cannot plausibly be construed as funds held in trust for Arch,” in that
10 Sierra may use that money as it “deems appropriate,” “the manner in which Sierra handles that
11 money cannot be a premise for a claim of conversion.” (ECF No. 113-2 at 3.) “Simply put, a
12 person cannot convert one’s own money,” Ms. Kindell concludes. (*Id.*) Arch counters, “the GIA
13 expressly created a trust in favor of Arch from any funds Sierra received under the bonded
14 contracts and explicitly recognized Arch’s possession of those funds” (ECF No. 123 at 3.)

15 It is evident that the only contested element of conversion is whether Arch had a
16 recognized interest in the subject funds for purposes of a conversion claim under California law.
17 The allegations in the first amended complaint are insufficient to satisfy that element. For
18 example, the allegations do not explain how the GIA created a trust in favor of Arch, with Sierra
19 as the trustee; the allegations do not explain that Sierra had a duty to hold the subject funds, the
20 alleged trust res, for Arch’s benefit. Because the allegations of the first amended complaint are
21 insufficient to state an underlying claim for conversion, the court GRANTS Ms. Kindell’s motion
22 to dismiss Arch’s conspiracy to convert claim. However, the court GRANTS Arch leave to
23 amend if it can do so consonant with Rule 11.

24 B. Violations of the UFTA

25 Ms. Kindell argues because there are no allegations that she possessed Sierra’s
26 assets, Arch cannot seek a remedy under the UFTA from her. (ECF No. 113-2 at 5–6.) Arch
27 counters the UFTA permits recovery “even against a party that is not a debtor or transferee.”
28 (ECF No. 123 at 8.)

1 “A fraudulent conveyance claim is set forth in the [UFTA], which is codified in
2 Civil Code section 3439 *et seq.*” *Kirkeby v. Superior Court of Orange Cnty.*, 33 Cal. 4th 642, 648
3 (2004). “A fraudulent conveyance under the UFTA involves a transfer by the debtor of property
4 to a third person undertaken with the intent to prevent a creditor from reaching that interest to
5 satisfy its claim.” *Filip v. Bucurenciu*, 129 Cal. App. 4th 825, 829 (2005) (internal quotation
6 marks omitted). “A transfer under the UFTA is defined as every mode, direct or indirect,
7 absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset . . . , and
8 includes payment of money, release, lease, and creation of a lien or other encumbrance.”
9 *Kirkeby*, 33 Cal. 4th at 648 (internal quotation marks omitted, alteration in original). A transfer
10 of assets made by a debtor is fraudulent as to a creditor if the debtor made the transfer

11 (1) with an actual intent to hinder, delay, or defraud any creditor, or
12 (2) without receiving reasonably equivalent value in return, and
13 either (a) was engaged in or about to engage in a business or
14 transaction for which the debtor’s assets were unreasonably small,
15 or (b) intended to, or reasonably believed, or reasonably should
16 have believed, that he or she would incur debts beyond his or her
17 ability to pay as they became due.

18 *Id.*

19 Here, Arch alleges Ms. Kindell transferred the funds at issue from Sierra, the
20 debtor, to Melvin Weir, the transferee. (Compl. ¶ 137.) Ms. Kindell contends because she is only
21 an employee of Sierra and transferred the subject funds “as part of her corporate authority,”
22 Arch’s claim is against Sierra and not against her. (ECF No. 113-2 at 5.) The court finds
23 Ms. Kindell’s argument unpersuasive.

24 A judgment may be entered against a person for whose benefit the transfer was
25 made. *Qwest Commc’ns Corp. v. Weisz*, 278 F. Supp. 2d 1188, 1190 (S.D. Cal. 2003)
26 (“[J]udgment may be entered against: (1) the first transferee of the asset; (2) a subsequent
27 transferee who did not take for value in good faith; or (3) the person *for whose benefit* the transfer
28 was made.” (emphasis in original)). While in most cases “the only likely beneficiaries of a
fraudulent transfer are the debtor who avoids his creditors and the transferee who receives the
assets,” it is “not so in all cases, . . . especially where, as here, the debtor is a corporation.” *Id.* at
1191. Here, Arch alleges Ms. Kindell conspired, along with the other Indemnitors, to defraud

1 Arch of the funds at issue. (ECF No. 68 ¶ 137.) For example, on December 6, 2011, Sierra
2 deposited \$465,355.15 into its Bank of Marin account for Arch’s benefit. (*Id.*) Yet on the same
3 day, Ms. Kindell, as Sierra’s president, allegedly transferred \$300,000.00 to Mr. Weir personally,
4 in furtherance of that conspiracy. (*Id.*) Ms. Kindell transferred those funds to defraud Arch. (*Id.*
5 ¶ 138.) Because Ms. Kindell, along with others, conspired to defraud Arch and because she
6 transferred the funds in furtherance of that conspiracy, she stands to benefit from the allegedly
7 fraudulent transfer. Viewing all of the factual allegations in the first amended complaint as true,
8 together with all reasonable inferences, the court finds Arch’s allegations sufficient to survive the
9 motion to dismiss.

10 Additionally, the UFTA “includes a broad remedial provision, Civil Code
11 § 3439.07(a)(3)(C), which permits a court, [s]ubject to applicable principles of equity, to award
12 [a]ny other relief the circumstances may require.” *Gutierrez v. Givens*, 1 F. Supp. 2d 1077, 1087
13 (S.D. Cal. 1998). Ms. Kindell’s motion “has not established that no set of facts could state a
14 claim for relief in light of . . . [the UFTA’s] broad remedial provision.” *Id.* (internal quotations
15 omitted, alterations in original).

16 Finally, Ms. Kindell argues there are no facts showing “the alleged transfer was
17 made without receipt by the debtor of reasonably equivalent consideration, which is necessary to
18 maintain a UFTA claim.” (ECF No. 113-2 at 6.) Arch counters that although it “actually does
19 plead the lack of reasonably equivalent value . . . , this is not a strict requirement.” (ECF No. 123
20 at 10.) Because Arch does expressly allege Sierra “did not receive reasonably equivalent value in
21 exchange for the transfer to Weir” (Compl. ¶ 139), Ms. Kindell’s argument is unavailing.

22 C. Conspiracy to Violate the UFTA

23 Ms. Kindell argues she “cannot be held liable for a conspiracy to violate the
24 [UFTA] when the [UFTA] does not place any duty on [her].” (ECF No. 113-2 at 6–7.) In
25 addition, she reasons she is shielded by the agent-immunity rule. (*Id.* at 7.) Arch counters there
26 is no duty requirement for a conspiracy claim and, even if there is, Ms. Kindell had a duty not to
27 commit fraud on Arch. (ECF No. 123 at 11.) As to Ms. Kindell’s agent-immunity rule, Arch

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1 claims the rule does not apply because Ms. Kindell participated in the alleged tortious conduct.
2 (*Id.*)

3 As noted above, California recognizes civil liability for conspiracy to commit a
4 tort. *See Taylor v. S & M Lamp Co.*, 190 Cal. App. 2d 700, 706 (1961). A claim under the UFTA
5 can provide the underlying tortious conduct for a conspiracy claim. *Filip*, 129 Cal. App. 4th at
6 837 (noting tortious conduct occurs when property is fraudulently transferred). “[T]here can be
7 liability for conspiring to commit an intentional tort even *absent* any duty.” *Fuller v. First*
8 *Franklin Fin. Corp.*, 216 Cal. App. 4th 955, 967 (2013) (emphasis in original). A president of a
9 debtor corporation has a duty not to commit a fraud upon a creditor. *Qwest Commc’ns Corp.*, 278
10 F. Supp. 2d at 1193. “Indeed, *everyone* owes a duty not to commit an intentional tort against
11 *anyone.*” *Id.* at 1193 n.4 (emphases in original).

12 Here, Arch has alleged that Ms. Kindell, as Sierra’s president, wrote a check to
13 Melvin Weir personally for \$300,000. (Compl. ¶ 157.) Arch further alleges that Ms. Kindell
14 “was aware of Weir’s plans to fraudulently transfer [the subject funds] . . . to avoid payment to
15 Arch.” (*Id.* ¶ 158.) Ms. Kindell “agreed to facilitate Indemnitors’ transactions and carried out
16 part of the transactions.” (*Id.*) These allegations are sufficient to state a claim for conspiracy to
17 violate the UFTA. *See Qwest Commc’ns Corp.*, 278 F. Supp. 2d at 1193 (noting the president of
18 a corporation “was legally capable of committing a fraudulent conveyance in violation of the
19 UFTA”).

20 Ms. Kindell’s agent-immunity argument is unpersuasive. “It has long been the
21 rule in California that [a]gents and employees of a corporation cannot conspire with their
22 corporate principal or employer where they act in their official capacities on behalf of the
23 corporation and not as individuals for their individual advantage.” *Black v. Bank of Am.*, 30 Cal.
24 App. 4th 1, 4 (1994) (internal quotation marks omitted, alteration in original). “Specifically, the
25 agent’s immunity rule proscribes conspiracy claims between and against agents and their
26 principals.” *AccuImage Diagnostics Corp v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 947 (N.D.
27 Cal. 2003). However, an agent may be personally liable for conspiring with the corporation or
28 others to commit tortious acts for the agent’s own benefit, rather than on the corporation’s behalf.

1 *See Doctors' Co. v. Superior Court*, 49 Cal. 3d 39, 46 (1989); *AccuImage Diagnostics Corp*,
2 260 F. Supp. 2d at 947 (noting “the agent’s immunity rule does not apply in cases where directors
3 and officers of a corporation directly order[], authorize[], or participate[] in the tortious conduct.”
4 (internal quotation marks omitted, alterations in original)).

5 Here, Arch alleges that in her capacity as Sierra’s president, Ms. Kindell “wrote a
6 check drawn on that account to Melvin Weir personally for \$300,000.” (*Id.*) The first amended
7 complaint further alleges Ms. Kindell knew about the alleged plan to divert the funds from Arch
8 (*id.* ¶ 92), and entered into an agreement with the other Indemnitors to convert the subject funds
9 to their use (*id.* ¶ 93). The complaint further alleges as follows:

10 Arch is informed and believes that the conspiracy was formed no
11 later than payment application number 3 dated September 7, 2011
12 for the Lake County Highway 53 project when . . . Indemnitors and
[Ms.] Kindell began diverting and defalcating [the subject funds]
for the benefit of Indemnitors’ and their other business interests.

13 [A]s an example, [Ms.] Kindell knew of and facilitated the
14 conspiracy to divert [the subject funds] when she signed and issued
15 a check payable to Mr. Weir . . . on December 6, 2011 in the
amount of \$300,000.

16 (*Id.* ¶¶ 94–95.)

17 These allegations are sufficient to plead Ms. Kindell acted for her own benefit,
18 rather than Sierra’s, and that she participated in the alleged tortious conduct. If Ms. Kindell
19 participated in the conspiracy, and wrote the checks in furtherance of that conspiracy, as
20 explained above, it can be inferred that she benefited from it because the conspiracy succeeded.
21 *Cf. Moreland v. Ad Optimizers, LLC*, No. 13-00216, 2013 WL 3786311, at *4 (N.D. Cal. July 18,
22 2013) (“Absent allegations that an agent or employee was acting for his or her own benefit, a
23 claim for civil conspiracy between an agent or employees and the corporate principal fails as a
24 matter of law.”); *AccuImage Diagnostics Corp*, 260 F. Supp. 2d at 955 (“Although the complaint
25 alleges that [defendant] is the founder, President, Chief Executive Officer and Chairman of the
26 Board of TeraRecon and that he engaged in the conduct detailed above, plaintiff nowhere alleges
27 that [defendant] acted outside the scope of his authority as an officer of TeraRecon.”). Therefore,
28 the agent-immunity rule is inapplicable.

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IV. CONCLUSION

For the foregoing reasons, the court orders as follows:

1. Defendant's motion to dismiss is GRANTED with leave to amend as to plaintiff's claim for civil conspiracy to convert.
2. Defendant's motion to dismiss is DENIED as to plaintiff's claim for violation of the UFTA and conspiracy to violate the UFTA.

IT IS SO ORDERED.

DATED: April 20, 2015.


UNITED STATES DISTRICT JUDGE