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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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11 MARCO KOZLOWSKI, et al.,

No. 2:13-cv-00291-JAM-DAD

12 Plaintiffs,

**ORDER GRANTING DEFENDANT TRACI  
SOUTHWELL'S MOTION TO DISMISS**

13 v.

14 HUIB STROOMBERG, et al.,

15 Defendants.

16

17 Presently before the Court is Defendant Traci Southwell's  
18 ("Defendant") Motion to Dismiss Pursuant to Rule 12(c) (Doc.  
19 ##29-30). Plaintiffs Marco Kozlowski, Brad Wakeman, Kadri A.  
20 Egbeyemi, the Kozlowski/Wakeman/Egbeyemi Partnership, and Luxury  
21 Home Solutions, Inc. (collectively "Plaintiffs") filed a Response  
22 (Doc. #40) and a Statement of Disputed Facts (Doc. #41) in  
23 opposition to Defendant's motion.<sup>1</sup>

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27 <sup>1</sup> This motion was determined to be suitable for decision without  
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was  
originally scheduled for July 24, 2013.

1 I. BACKGROUND

2 This action arises out of Plaintiffs' allegations that co-  
3 defendant Stroomwell Investment Group, Inc. ("Stroomwell"),  
4 acting through its agent and additional co-defendant Mihai Algiu  
5 ("Algiu"), committed fraud when selling Plaintiffs a piece of  
6 property located in Cerbere, France (the "Cerbere Property").  
7 Plaintiffs allege that Algiu misrepresented the condition of the  
8 property in making the sale. Plaintiffs concede that the  
9 property was represented as unfinished when they agreed to buy  
10 it, but they allege that Algiu promised that the construction  
11 would be completed by June 1, 2011. Plaintiffs allegedly sent  
12 funds totalling \$258,630.24 as a down payment on February 10 and  
13 14, 2011. Plaintiffs allege that construction on the property  
14 was never completed. Plaintiffs also allege that Algiu  
15 represented himself as a sales agent of co-defendant Stroomwell  
16 throughout the sale process.

17 Plaintiffs contend that Algiu, allegedly acting on behalf of  
18 Defendant and co-defendants Huib Stroomberg, George Stroomberg,  
19 Angelic Stroomberg, Dick Stroomberg, Riemke Koolen, and  
20 Stroomwell attempted to extend the time for completion several  
21 times and add new terms to the sales agreement after the down  
22 payment was made, but Plaintiffs refused to add additional terms  
23 to the agreement. In Spring of 2012, Plaintiffs demanded a  
24 return of their deposit. Defendants allegedly refused on July  
25 31, 2012 to refund the deposit and threatened to sue to obtain  
26 specific performance of the sales contract. Plaintiffs then  
27 filed the present lawsuit.

28 Plaintiffs also allege that all defendants engaged in an

1 ongoing conspiracy to commit fraud. Plaintiffs' allegations are  
2 based on a 2009 case filed before this Court, Case No. 2:09-CV-  
3 00625-JAM-DAD (the "Minne/Lohman case"), wherein plaintiffs Edith  
4 Minne and Bonnie Lohman alleged that Defendant along with other  
5 co-conspirators misrepresented the state of the Cerbere property  
6 in order to elicit investment funds from them, funds Defendant  
7 allegedly conspired to convert to her own use. That case was  
8 voluntarily dismissed by the plaintiffs subject to a stipulation  
9 under which Defendant and her alleged co-conspirators were to  
10 complete and/or sell the Cerbere property.

11 For the purposes of the claims against Defendant, Plaintiffs  
12 do not allege any particular action taken by Defendant in this  
13 case. They only allege that she was at all relevant times the  
14 CEO and Secretary of co-defendant Stroomwell.

15 In this suit, Plaintiffs bring the following claims:

16 1) Civil Racketeer Influenced and Corrupt Organizations ("RICO"),  
17 18 U.S.C. § 1962(c); 2) Fraud; 3) Unlawful, Deceptive, and Unfair  
18 Business Practices, Cal. Bus. & Prof. Code § 17200, et seq.;  
19 4) Unfair, Deceptive and Misleading Advertising, Cal. Bus. &  
20 Prof. Code § 17500; 5) Breach of Fiduciary Duty; 6) Aiding and  
21 Abetting Breach of Fiduciary Duty; and 7) Unjust Enrichment and  
22 Imposition of Constructive Trust. The Court has jurisdiction  
23 over Plaintiffs' federal civil RICO claim pursuant to 28 U.S.C. §  
24 1331 and Plaintiffs' related state claims pursuant to 28 U.S.C. §  
25 1367.

1 II. OPINION

2 A. Legal Standard

3 "A judgment on the pleadings is properly granted when,  
4 taking all the allegations in the non-moving party's pleadings as  
5 true, the moving party is entitled to judgment as a matter of  
6 law." Ventress v. Japan Airlines, 603 F.3d 676, 681 (9th Cir.  
7 2010) (citations omitted). "For purposes of the motion, the  
8 allegations of the non-moving party must be accepted as true,  
9 while the allegations of the moving party which have been denied  
10 are assumed to be false." Hal Roach Studios, Inc. v. Richard  
11 Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1989).

12 A Rule 12(c) motion for judgment on the pleadings is the  
13 functional equivalent of a Rule 12(b)(6) motion, and the same  
14 legal standard applies to both. Cafasso, United States ex rel.  
15 v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n.4 (9th Cir.  
16 2011). In considering a Rule 12(c) motion, the Court must accept  
17 the allegations in the complaint as true and draw all reasonable  
18 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416  
19 U.S. 232, 236 (1974), overruled on other grounds by Davis v.  
20 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322  
21 (1972). Assertions that are mere "legal conclusions," however,  
22 are not entitled to the assumption of truth. Ashcroft v. Iqbal,  
23 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,  
24 550 U.S. 544, 555 (2007)). To survive a Rule 12(c) motion, a  
25 plaintiff needs to plead "enough facts to state a claim to relief  
26 that is plausible on its face." Twombly, 550 U.S. at 570.  
27 Judgment is appropriate where the plaintiff fails to state a  
28 claim supportable by a cognizable legal theory. Balistreri v.

1 Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

2 In considering a motion under Rule 12(c), a court must  
3 generally limit its review to the pleadings themselves. Hal  
4 Roach Studios, 896 F.2d at 1542. However, "documents attached to  
5 the complaint and incorporated by reference are treated as part  
6 of the complaint, not extrinsic evidence" and, thus, may be  
7 considered in a Rule 12(c) motion. Summit Media LLC v. City of  
8 L.A., CA, 530 F. Supp. 2d 1084, 1096 (C.D. Cal. 2008) (citing  
9 Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887,  
10 891 n.4 (5th Cir. 1998)). Extrinsic evidence that is subject to  
11 judicial notice may be properly considered in a Rule 12(c)  
12 motion. Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971,  
13 981 n.18 (9th Cir. 1999).

14 B. Discussion

15 Plaintiffs generally respond to Defendant's motion by  
16 arguing that they failed to comply with the local rules  
17 applicable to motions for summary judgment. This motion,  
18 however, is made under Federal Rule of Civil Procedure 12(c),  
19 which is only converted to a motion for summary judgment if the  
20 Court bases its decision on materials outside of the pleadings.  
21 The following analysis is limited to the pleadings, so the local  
22 rules related to motions for summary judgment do not apply.

23 1. Defendant's Vicarious Liability

24 Defendant moves for judgment on the pleadings by arguing  
25 that Plaintiffs' complaint does not meet the pleading standard  
26 for fraud, that Defendant is immune from liability under the  
27 facts alleged under the agent-immunity rule and the shareholder  
28 immunity rule, and that the allegations in the complaint are

1 internally inconsistent to the point that they are facially  
2 false. Plaintiffs do not allege in their complaint that  
3 Defendant took any action personally, so her personal liability  
4 can only arise from a vicarious liability theory such as through  
5 conspiracy liability. For this reason, Defendant's arguments  
6 regarding personal liability pursuant to the agent and  
7 shareholder immunity rules are potentially dispositive and they  
8 are addressed first.

9 a. The Agent Immunity Rule

10 In support of her motion, Defendant argues that the agent  
11 immunity rule precludes her individual liability based on the  
12 allegations in Plaintiffs' complaint. Defendant argues that she  
13 is not liable for the actions of Stroomwell or the other  
14 defendants because there is no allegation that she was acting  
15 outside the scope of her duties to Stroomwell. Plaintiffs  
16 respond by arguing that they have alleged and documented  
17 Defendant's fraudulent actions in the complaint and its exhibits.

18 "Agents and employees of a corporation cannot conspire with  
19 their corporate principal or employer where they act in their  
20 official capacities on behalf of the corporation and not as  
21 individuals for their individual advantage." Applied Equip.  
22 Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 525 (1994)  
23 (quoting Wise v. S. Pac. Co., 35 Cal. Rptr. 652, 665 (Ct. App.  
24 1963) and overruling it on other grounds). In this case, there  
25 is no allegation that Defendant took any particular action at all  
26 beyond being an officer of Stroomwell. There is accordingly no  
27 basis to find that she acted outside of her official capacity to  
28 her own advantage. The agent immunity rule therefore precludes

1 Defendant's liability.

2 b. Shareholder Liability

3 Defendant next argues that she cannot be liable as a  
4 shareholder for Stroomwell because the allegations do not support  
5 shareholder liability in this case. Plaintiffs again argue that  
6 the complaint and its exhibits support individual liability for  
7 Defendant.

8 The alter ego doctrine arises when a plaintiff comes  
9 into court claiming that an opposing party is using  
10 the corporate form unjustly and in derogation of the  
11 plaintiff's interests. In certain circumstances the  
12 court will disregard the corporate entity and will  
13 hold the individual shareholders liable for the  
14 actions of the corporation.

15 Cambridge Elecs. Corp. v. MGA Elecs., Inc., 227 F.R.D. 313, 325  
16 (C.D. Cal. 2004) (quoting Mesler v. Bragg Management Co., 39  
17 Cal.3d 290, 300 (1985)). The alter ego doctrine is one of equity  
18 that allows a shareholder of a corporation to be held liable for  
19 a corporation's actions, abrogating the usual rule of shareholder  
20 immunity. Id.

21 Before the doctrine may be invoked, two elements must  
22 be established: '(1) that there be such unity of  
23 interest and ownership that the separate personalities  
24 of the corporation and the individual no longer exist  
25 and (2) that, if the acts are treated as those of the  
26 corporation alone, an inequitable result will follow.'

27 Id. (quoting Mesler, 39 Cal. 3d at 300).

28 In this case, neither the complaint nor the attached  
exhibits contain any allegations to support a finding that  
Defendant and Stroomwell disregarded the corporate formalities  
such that Defendant can be held individually liable in her  
capacity as shareholder for Stroomwell's actions. Defendant is  
therefore not liable as a shareholder of Stroomwell as a matter

1 of law.

2 The complaint does not contain allegations related to  
3 Defendant's individual conduct, and the allegations are also  
4 insufficient to support a finding that she is vicariously liable  
5 for the actions of the other defendants in this case. Defendant  
6 is accordingly entitled to judgment on the pleadings and her  
7 motion is granted.

8 2. Particularity of Pleading

9 Defendant argues that Plaintiffs claims, insofar as they  
10 sound in fraud, can be dismissed because the complaint does not  
11 satisfy the fraud pleading standard in Federal Rule of Civil  
12 Procedure 9(b). Defendant also argues that heightened pleading  
13 applies to Plaintiffs' California Business and Professions Code  
14 §§ 17200 and 17500 because they also sound in fraud. Plaintiffs  
15 generally respond that the complaint and its exhibits meet the  
16 fraud pleading standard.

17 "The elements of a cause of action for fraud in California  
18 are: '(a) misrepresentation (false representation, concealment,  
19 or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)  
20 intent to defraud, i.e., to induce reliance; (d) justifiable  
21 reliance; and (e) resulting damage.'" Kearns v. Ford Motor Co.,  
22 567 F.3d 1120, 1126 (9th Cir. 2009) (quoting Engalla v.  
23 Permanente Med. Group, Inc., 15 Cal.4th 951, 974 (1997)). Under  
24 the heightened pleading standard in the federal rules, a  
25 plaintiff must also allege the specific circumstances  
26 constituting fraud such that the defendant has notice of the  
27 actual misconduct. Id. at 1124. "Averments of fraud must be  
28 accompanied by the who, what, when, where, and how of the



1 misconduct charged.” Id. (quoting Vess v. Ciba-Geigy Corp. USA,  
2 317 F.3d 1097, 1106 (9th Cir. 2003)). Where a cause of action  
3 relies on “a unified fraudulent course of conduct,” allegations  
4 supporting that cause of action must meet the heightened federal  
5 pleading standard. Kearns, 567 F.3d at 1127.

6 As discussed previously, the complaint contains no  
7 allegations particular to Defendant’s actions, and Plaintiffs’  
8 claims do not satisfy the heightened fraud pleading standard as a  
9 result. Plaintiffs’ claims are all based on a single alleged  
10 fraudulent real estate investment scheme, meaning that all of  
11 their claims against Defendant are inadequate. Defendant’s  
12 motion to dismiss is therefore granted for this reason well.

### 13 3. Fiduciary Duty

14 Defendant argues that the Fifth and Sixth causes of action  
15 are insufficiently pled because there is no basis for finding an  
16 agency relationship between Defendant and Plaintiffs and  
17 therefore no basis for finding the existence of a fiduciary duty  
18 to Plaintiffs from Defendant. Plaintiffs respond by pointing to  
19 allegations supporting an agency relationship between co-  
20 defendant Algiu and co-defendant Stroomwell.

21 A defendant is only liable for breach of fiduciary duty  
22 under California law if it owed a duty of care to the plaintiff.  
23 Maganallez v. Hilltop Lending Corp., 505 F. Supp. 2d 594, 608  
24 (N.D. Cal. 2007) (citing McCollum v. Friendly Hills Travel Ctr.,  
25 217 Cal. Rptr. 919, 923 (Ct. App. 1985)). “An agent owes a duty  
26 to its principal and must act in the interest of the principal .  
27 . . .” Id.

28 In this case, Plaintiffs’ complaint and their argument in

1 opposition to this motion are clearly anchored in the theory that  
2 Algiu was an agent for Stroomwell, not Plaintiffs. In the  
3 absence of an agency relationship between Defendant and  
4 Plaintiffs, either directly or through Algiu and Stroomwell,  
5 Plaintiffs' Fifth and Sixth causes of action are legally  
6 insufficient. Defendant's motion to dismiss these claims is  
7 therefore granted.

8 4. Unjust Enrichment

9 Finally, Defendant argues that Plaintiffs' last claim for  
10 relief for Unjust Enrichment and Constructive Trust must be  
11 dismissed because unjust enrichment is an equitable remedy and a  
12 constructive trust is the vehicle through which the remedy  
13 proceeds, but they are not a standalone cause of action.  
14 Plaintiffs respond generally that they are entitled to  
15 restitution based on the allegations in the complaint.

16 "Unjust enrichment is not a cause of action . . . or even a  
17 remedy, but rather a general principle, underlying various legal  
18 doctrines and remedies . . . . It is synonymous with  
19 restitution." McBride v. Boughton, 20 Cal. Rptr. 3d 115, 121  
20 (Ct. App. 2004).

21 Plaintiffs' complaint contains a cause of action for unjust  
22 enrichment, which is improper. Plaintiffs' prayer for relief  
23 also seeks restitution, unjust enrichment's equivalent.  
24 Plaintiffs' cause of action is dismissed with prejudice because  
25 it is duplicative of Plaintiffs' requested relief.

26 5. Leave to Amend

27 Like a motion made pursuant to 12(b)(6), a district court  
28 may in its discretion grant a motion for judgment on the

1 pleadings with leave to amend. Lonberg v. City of Riverside, 300  
2 F. Supp. 2d 942, 945 (C.D. Cal. 2004). In this case, it is not  
3 certain, as required by the Rule 12(c) standard, that Plaintiffs  
4 are unable to prove any set of facts sufficient to hold Defendant  
5 personally liable for the fraudulent scheme alleged in  
6 Plaintiffs' complaint. Dismissal of the claims against Defendant  
7 with leave to amend is therefore appropriate.

8  
9 III. ORDER

10 Defendant's Motion for Judgment on the Pleadings is GRANTED.  
11 All claims against her are dismissed. Plaintiffs are granted  
12 leave to amend their complaint within 20 days. Defendant is  
13 ordered to file a responsive pleading within 20 days of any  
14 amended complaint that contains claims against her, but if no  
15 such complaint is filed then she is dismissed from this lawsuit.

16 IT IS SO ORDERED.

17 Dated: August 21, 2013

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20 JOHN A. MENDEZ,  
21 UNITED STATES DISTRICT JUDGE  
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