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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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STARBUCKS CORPORATION, a  
corporation,  
  
                                Plaintiff,  
  
                                v.  
  
AMCOR PACKAGING DISTRIBUTION,  
et al.,  
  
                                Defendants.

CIV. NO. 2:13-1754 WBS CKD  
  
MEMORANDUM AND ORDER RE: MOTION  
TO DISMISS FIRST AMENDED CROSS-  
COMPLAINT

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                                This matter is again before the court on third-party  
defendant Ozburn-Hessey Logistics' ("OHL") motion to dismiss  
Pallets Unlimited's First Amended Third-Party Complaint ("FATC")  
(Docket No. 46) pursuant to Federal Rule of Civil Procedure  
12(b)(6) for failure to state a claim upon which relief can be  
granted, (Docket No. 48). The factual and procedural history is  
set forth in this court's Memorandum and Order of November 5,  
2014 (Docket No. 44) dismissing Pallets Unlimited's original  
third-party complaint with leave to amend.

1 Pallets Unlimited re-asserts its claims of equitable  
2 indemnification and negligence against OHL. Whereas its original  
3 Third-party Complaint was silent as to the ownership of the  
4 pallets after they were given to OHL, Pallets Unlimited now  
5 alleges that Starbucks owned the coffee bags, coffee beans, and  
6 wooden pallets while they were kept at OHL's warehouse. (FATC ¶  
7 14.) Pallets Unlimited also adds an allegation that OHL stored  
8 these items for Starbucks as a "warehouseman/bailee." (Id.) OHL  
9 allegedly kept the pallets in its warehouse until they were  
10 shipped to Starbucks, during which time Pallets Unlimited  
11 maintains that OHL bore sole responsibility for storing and  
12 maintaining the pallets such that they did not develop mold.  
13 (Id. ¶¶ 9-10.) The FATC also alleges that none of the wooden  
14 pallets made by Pallets Unlimited contained any mold or excessive  
15 moisture at the time they were delivered to OHL's warehouse.  
16 (Id. ¶ 8.)

17 In light of these new allegations, the court now  
18 addresses the sufficiency of the allegations of the FATC under  
19 the standards of Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570  
20 (2007); and Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

21 I. Equitable Indemnity Claim

22 As discussed at some length in this court's Order of  
23 November 5, 2014, California law requires that, "[w]ith limited  
24 exception, there must be some basis for tort liability against  
25 the proposed indemnitor . . . generally based on a duty owed to  
26 the underlying plaintiff." BFGC Architects Planners, Inc. v.  
27 Forcum/Mackey Constr., Inc., 119 Cal. App. 4th 848, 852-53 (4th  
28 Dist. 2004). Ordinary breach of contract, without something

1 more, will not support liability in tort. See Erlich v. Menezes,  
2 21 Cal. 4th 543, 551-52 (1999). However, "the same wrongful act  
3 may constitute both a breach of contract and an invasion of an  
4 interest protected by the law of torts." Id. at 551.

5 A. A Bailee's Duty with Regard to Bailed Goods

6 "California law generally defines a bailment as the  
7 delivery of a thing in trust for a purpose upon an implied or  
8 express contract." Whitcombe v. Stevedoring Servs. of Am., 2  
9 F.3d 312, 316 (9th Cir. 1993) (citing Greenberg Bros. v. Ernest  
10 W. Hahn, Inc., 246 Cal. App. 2d 529, 531 (2d Dist. 1966)).  
11 Generally, contract terms govern bailment relationships. See,  
12 e.g., George v. Bekins Van & Storage Co., 33 Cal. 2d 834, 848-49  
13 (1949).

14 Several California statutes also impose an obligation  
15 to exercise a certain degree of care with regard to bailed  
16 property on the bailee--called a "depository" by the California  
17 Civil Code.<sup>1</sup> Of relevance here, California Civil Code section  
18 1852 states that "[a] depository for hire must use at least  
19 ordinary care for the preservation of the thing deposited."<sup>2</sup>  
20 Cal. Civ. Code § 1852. The California Commercial Code also sets  
21 out an additional standard of care for a specific type of bailee  
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23 <sup>1</sup> See Whitcombe, 2 F.3d at 316 ("The California Civil  
24 Code uses the term depository and depositor in place of the  
25 common law terms bailee and bailor. . . . The terms mean the same  
things.").

26 <sup>2</sup> California Civil Code section 1851 defines a non-  
27 gratuitous deposit as "storage" and deems that "[t]he depository  
28 in such case is called a depository for hire." Cal. Civ. Code  
§ 1851.

1 called a "warehouse" or "warehouseman,"<sup>3</sup> stating in section 7204  
2 that "[a] warehouse is liable for damages for loss of or injury  
3 to the goods caused by its failure to exercise care with regard  
4 to the goods that a reasonably careful person would exercise  
5 under similar circumstances." Cal. Com. Code § 7204(a).

6           These statutory obligations bear a striking similarity  
7 to California's general negligence statute, California Civil Code  
8 section 1714(a), which provides a duty that sounds in tort. See  
9 Cal. Civ. Code § 1714(a) ("Everyone is responsible . . . for an  
10 injury occasioned to another by his or her want of ordinary care  
11 or skill . . ."); Cabral v. Ralphs Grocery Co., 51 Cal. 4th 764,  
12 771 (2011). In addition, California courts that discuss the duty  
13 a bailee or a warehouseman owes with respect to bailed property  
14 frequently describe a breach of that duty as "negligent" or  
15 "negligence,"<sup>4</sup> although they leave the source of that duty and  
16 the kind of remedies available ambiguous.

17           Several authorities support the conclusion that these  
18 statutory duties give rise to tort liability. In particular, the  
19 Uniform Commercial Code Comment included in California Commercial  
20 Code section 7101 notes that Article Seven "does not attempt to

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21           <sup>3</sup> The Civil Code defines a "warehouse" as "a person  
22 engaged in the business of storing goods for hire." Cal. Com.  
23 Code § 7102(a) (13).

24           <sup>4</sup> See, e.g., Greenberg Bros., 246 Cal. App. 2d at 533 ("A  
25 depositary or bailee for hire is liable only when he has been  
26 guilty of some negligence. He is chargeable only with ordinary  
27 care and diligence in safeguarding his bailor's property . . ."  
28 (quoting Baxter v. Shanley-Furness Co., 193 Cal. 558, 561  
(1924)); Scott's Val. Fruit Exch. v. Growers Refrigeration Co.,  
81 Cal. App. 2d 437, 440 (1st Dist. 1947) ("[A]n action will lie  
against a bailee for negligent destruction of or injury to  
deposited goods.").

1 define the tort liability of bailees, except to hold certain  
2 classes of bailees to a minimum standard of reasonable care."  
3 Cal. Com. Code § 7101 cmt. (emphasis added). This comment  
4 suggests that the California Commercial Code actually does define  
5 the tort liability of those classes of bailee in Division Seven  
6 (the California equivalent of UCC Article Seven), including the  
7 "warehouse" bailee. See Cal. Com. Code §§ 7102(a)(13), 7204(a).  
8 Additionally, at least one California Court of Appeal has allowed  
9 a bailor to maintain causes of action for both breach of bailment  
10 contract and negligence in tort after bailed property was  
11 damaged. See Gerbert v. Yank, 172 Cal. App. 3d 544, 549-50 (2d  
12 Dist. 1985).

13 OHL maintains that these statutes do not give rise to  
14 liability in tort but merely imply a duty of care into the terms  
15 of every bailment contract. (See OHL's Reply at 7 n.7.) It  
16 supports its argument primarily with the California Court of  
17 Appeal case of Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844  
18 (1st Dist. 1970). (See OHL's Reply at 7-9.) However, this court  
19 does not read Windeler as precluding the existence of an  
20 independent tort duty under either California Civil Code section  
21 1852 or California Commercial Code section 7204(a). The section  
22 of Windeler cited by OHL discusses damages for a plaintiff's  
23 mental suffering and emotional distress, not damages to her  
24 property. See Windeler, 8 Cal. App. 3d at 849-51. Both  
25 statutory provisions at issue here apply specifically to bailed  
26 property and impose liability only for damage to that property.  
27 See Cal. Com. Code § 7204(a) ("A warehouse is liable for damages  
28 for loss of or injury to the goods caused by its failure to

1 exercise care with regard to the goods . . ." (emphasis added));  
2 Cal. Civ. Code § 1852 ("A depositary for hire must use at least  
3 ordinary care for the preservation of the thing deposited."  
4 (emphasis added)). Nor did Windeler involve the kind of  
5 "warehouse" bailee that Pallets Unlimited alleges here. The  
6 court thus finds Windeler distinguishable from the instant case.

7 Accordingly, because OHL has not provided, and the  
8 court cannot find, any persuasive authority that precludes tort  
9 liability under California Civil Code section 1852 or California  
10 Commercial Code section 7204(a), the court concludes that a  
11 "warehouseman/bailee" relationship may provide a basis for  
12 liability sounding in tort as between OHL and Starbucks.

13 B. Pallets Unlimited States a Claim for Equitable  
14 Indemnity

15 Pallets Unlimited also plausibly alleges the remaining  
16 elements of equitable indemnity. It alleges that mold developed  
17 because of OHL's "lack of ordinary care in the management and  
18 maintenance of the OHL Warehouse, and its failure to exercise due  
19 diligence to ensure that [Starbucks's] bags, beans and pallets  
20 suffered no harm while stored at the OHL Warehouse." (FATC ¶¶ 9-  
21 10, 14-15.) As a result, Starbucks allegedly suffered  
22 \$4,932,115.76 in damages, which through this lawsuit, it has  
23 sought to recover from Amcor and Pallets Unlimited. (Id. ¶ 12.)  
24 Pallets Unlimited alleges that any liability it incurs to  
25 Starbucks is attributable to OHL's fault. (Id. ¶ 17.)

26 Accordingly, because Pallets Unlimited has alleged a  
27 duty in tort between OHL and Starbucks, fault on the part of OHL,  
28 and resulting damages to Pallets Unlimited for which OHL is

1 allegedly responsible, see Bailey v. Safeway, Inc., 199 Cal. App.  
2 4th 206, 217 (1st Dist. 2011) (listing elements), Pallets  
3 Unlimited has stated a plausible claim for equitable indemnity.  
4 The court must therefore deny OHL's motion to dismiss this claim.

5 II. Negligence Claim

6 In its November 5, 2014 Order, this court rejected  
7 Pallets Unlimited's argument that OHL owed a duty to protect it  
8 from the prospect of purely economic loss it now faces as a  
9 result of Starbucks's claims against it, noting that Pallets  
10 Unlimited did not allege any injury to its person or property,  
11 instead alleging only damages in the form of "potential  
12 liability" to Starbucks, as well as "damages relating to  
13 attorney's fees and costs of suit herein." After surveying  
14 California law, the court could not find any basis for such a  
15 duty. (See Nov. 5, 2014 Order at 12-16.)

16 The court sees no significant difference between the  
17 negligence claim it rejected in its prior Order and the  
18 negligence claim Pallets Unlimited re-asserts in its FATC.  
19 (Compare FATC ¶¶ 19-25, with Pallets's Compl. ¶¶ 15-18.) Again,  
20 Pallets Unlimited does not allege any injury to its person or  
21 property. Instead, it alleges that OHL breached its duty to  
22 Starbucks by failing to ensure that the bags, beans, and pallets  
23 owned by Starbucks were kept free of mold. (FATC ¶ 24.) Pallets  
24 Unlimited then asserts that, due to this breach, it has suffered  
25 damages in the form of "potential liability to [Starbucks],"  
26 "damages relating to attorneys' fees and costs of suit herein."  
27 (Id. ¶ 25.)

28 What changes Pallets Unlimited does make to its

1 negligence claim only strengthen the court's conclusion that this  
2 negligence claim essentially duplicates Pallets Unlimited's  
3 indemnification claim. (See Nov. 5, 2014 Order at 15 n.7  
4 (suggesting that Pallets Unlimited's negligence claim might be  
5 construed as an attempt to salvage its indemnity claim).) This  
6 time, Pallets Unlimited explicitly alleges that OHL should  
7 compensate it for any liability it incurs to Starbucks because  
8 "such liability would be solely, directly, and legally due to the  
9 primary and active fault . . . of Cross-Defendant OHL." (FATC ¶  
10 24.)

11           This new allegation repeats verbatim Pallets  
12 Unlimited's allegation under its equitable indemnity claim. (Id.  
13 ¶ 17 (" . . . such liability would be solely, directly and legally  
14 due to the primary and active fault . . . of Cross-Defendant  
15 OHL").) Both Pallets Unlimited's indemnity claim and its  
16 negligence claim attempt to provide Pallets Unlimited with the  
17 same relief: compensation for the damages and costs it incurs in  
18 its suit against Starbucks. (Compare FATC ¶ 18 (stating that  
19 Pallets Unlimited is entitled to be indemnified for "damages,  
20 judgments, attorneys' fees, and related costs or expenses  
21 incurred in defending the principal action"), with id. ¶ 25  
22 (stating that Pallets Unlimited has suffered damages including  
23 "potential liability to [Starbucks] based on [Starbucks's]  
24 Complaint, damages relating to attorneys' fees, and costs of suit  
25 herein").)

26           Nonetheless, Pallets Unlimited urges this court to  
27 recognize a new duty based on the "special relationship" between  
28 it and OHL by applying the factors enumerated by the California

1 Supreme Court in J'Aire Corp. v. Gregory, 24 Cal. 3d 799 (1979).

2 These factors include

3 (1) the extent to which the transaction was intended  
4 to affect the plaintiff, (2) the foreseeability of  
5 harm to the plaintiff, (3) the degree of certainty  
6 that the plaintiff suffered injury, (4) the closeness  
7 of the connection between the defendant's conduct and  
8 the injury suffered, (5) the moral blame attached to  
9 the defendant's conduct and (6) the policy of  
10 preventing future harm.

11 Id. at 804.

12 A California Court of Appeal's recent rejection of this  
13 argument is instructive. See Mega RV Corp. v. HWH Corp., 225  
14 Cal. App. 4th 1318, 1340-42 (4th Dist. 2014). The manufacturer  
15 in that case also argued that the court should recognize a new  
16 duty of care under J'Aire. Id. at 1340-41. Faced with analogous  
17 facts, the court in Mega RV applied the six J'Aire factors and  
18 concluded that none of them supported the recognition of such a  
19 duty. Id. at 1341-42.

20 Pallets Unlimited makes no attempt to distinguish Mega  
21 RV and fails to address the six J'Aire factors. It argues only  
22 that, because OHL and it were involved in a "chain of supply" for  
23 the wooden pallets at issue, and "[i]n the litigious world we  
24 live in," it was "foreseeable" that Starbucks would seek  
25 compensation from Pallets Unlimited for damages caused to its  
26 property, OHL owed it a duty of care. (See FATC ¶ 22; Pallets's  
27 Opp'n at 13-16.) However, foreseeability alone cannot give rise  
28 to a duty under California law, see Erlich, 21 Cal. 4th at 552,  
and Pallets Unlimited provides no other reason for imposing a  
duty in this case.

1           Accordingly, because no authority supports the  
2 existence of a duty of care between OHL and Pallets Unlimited and  
3 the court declines to recognize one under J'Aire, see Mega RV,  
4 225 Cal. App. 4th at 1338-42, the court must grant OHL's motion  
5 to dismiss this claim.

6           IT IS THEREFORE ORDERED that third-party defendant  
7 Ozburn-Hessey Logistics's motion to dismiss be, and the same  
8 hereby is, GRANTED without leave to amend with respect to third-  
9 party plaintiff Pallets Unlimited's negligence claim and DENIED  
10 in all other respects.

11 Dated: January 15, 2015

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WILLIAM B. SHUBB  
14 UNITED STATES DISTRICT JUDGE  
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