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NOT FOR PUBLICATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MEGUMI HISAMATSU,

No. C 07-04371 JSW

Plaintiff,

**ORDER GRANTING
DEFENDANT BANK OF
HAWAII'S MOTION TO DISMISS
SECOND AMENDED
COMPLAINT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

v.

KAUSHAL NIROULA, et al.

Defendants.

I. INTRODUCTION

This matter comes before the Court upon consideration of the Motion to Dismiss Plaintiff's Second Amended Complaint filed by Defendant, Bank of Hawaii ("BOH"), and the Motion for Summary Judgment filed by Plaintiff, Megumi Hisamatsu ("Ms. Hisamatsu"). Having considered the parties' papers, relevant legal authority, and the record in this case, the Court HEREBY GRANTS BOH's motion to dismiss, without leave to amend. The Court HEREBY DENIES Ms. Hisamatsu's motion for summary judgment.

II. BACKGROUND

A. Procedural History.

On August 13, 2007, Ms. Hisamatsu filed a complaint in the Superior Court of the State of California for the County of San Francisco against Kaushal Niroula ("Mr. Niroula") and BOH.¹ On August 20, 2007, she filed her First Amended Complaint ("FAC"). On August 23, 2007, BOH removed the action to this Court and moved to dismiss the action. On January 10,

¹ Mr. Niroula has been served but has not yet answered the SAC. (See Docket No. 80.) Ms. Hisamatsu has not yet moved for entry of default against Mr. Niroula.

1 2008, the Court granted in part and denied in part BOH’s motion to dismiss or for a more
2 definite statement. (Docket No. 66 (“Jan. 10 Order”).) On April 9, 2008, Ms. Hisamatsu filed
3 the Second Amended Complaint (“SAC”).

4 In the SAC, Ms. Hisamatsu asserts claims for relief against BOH for: (1) Violations of
5 California Business and Professions Code § 17200 (“Section 17200”); (2) Rescission²; (3) Tort
6 in Essence; (4) Civil Conspiracy; (5) Fraud in the Inducement; (6) Intentional Infliction of
7 Emotional Distress; (7) Declaratory Relief; (8) Wrongful Withholding of Funds; (9) Unfair or
8 Deceptive Trade Practices in Violation of HRS § 480-1, *et seq.*; (10) Fraud With No Intention
9 to Perform; (11) Negligent Misrepresentation; (12) Conversion; (13) Equitable Lien; (14)
10 Constructive Trust; (15) Gross Negligence; (16) Negligence; (17) Negligent Infliction of
11 Emotional Distress; and (18) Negligence Per Se.

12 **B. Factual Background.**

13 This lawsuit arises out of a confidence scheme allegedly perpetrated by Mr. Niroula on
14 Ms. Hisamatsu, which she alleges occurred with the assistance and cooperation of BOH. The
15 following facts, taken from the SAC, are accepted as true solely for the purposes of evaluating
16 BOH’s motion to dismiss. Unless otherwise noted, the facts are undisputed and are viewed in
17 the light most favorable to BOH for purposes of evaluating Ms. Hisamatsu’s motion for
18 summary judgment.

19 On or about July 27, 2006, while on vacation in Hawaii, Ms. Hisamatsu met Mr.
20 Niroula. (SAC ¶ 6.) According to Ms. Hisamatsu, who is a Japanese citizen, Mr. Niroula
21 convinced her that he “headed an international consulting company,” “that his mother ... was a
22 Nepalese diplomat,” that his family was “very rich,” and that he was a friend of the Nepalese
23 royal family. (*Id.* ¶ 7.) Mr. Niroula was, however, “a criminal from San Francisco,” who
24 intended to victimize Ms. Hisamatsu through a combination of criminal hoaxes well known to”
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28 ² Ms. Hisamatsu asserts eleven claims for relief for rescission, which are based
on separate legal theories.

1 BOH. (*Id.* ¶¶ 8-12.)³ Ms. Hisamatsu was not aware of Mr. Niroula’s true identity. (*Id.* ¶¶ 8,
2 14.)

3 Mr. Niroula convinced Ms. Hisamatsu that he could assist her in obtaining an
4 investment visa so that she and her family could spend more time in the United States. (*Id.* ¶¶
5 7, 10, 15-16.) As part of the visa process, Mr. Niroula advised Ms. Hisamatsu to open a bank
6 account at an American bank. (*Id.* ¶¶ 16-17.) On August 16, 2006, she did so at BOH’s
7 Honolulu branch, with the “help” of Mr. Niroula and BOH staff. (*Id.* ¶¶ 18-19.) Ms. Hisamatsu
8 alleges that Mr. Niroula introduced her to a BOH employee, Lynn Bronios, “who seemed to be
9 extremely friendly with” Mr. Niroula. Mr. Niroula also represented that “he had several other
10 friends at BOH who would help with transfers of funds, and eventual verification for American
11 immigration officials.” (*Id.* ¶ 18.)

12 Ms. Hisamatsu executed a signature card, in which she stated: “I ... agree to all of the
13 terms and conditions of the deposit account agreement and disclosure statement, ... a copy of
14 which I acknowledge [BOH] has furnished to me.” (Docket No. 13 (Declaration of Scott I.
15 Takahashi (“Takahashi Decl.”), Ex. 2).) The deposit account agreement and disclosure
16 statement provide, in turn and in part, that:

17 If you discover a check forgery, alteration or other unauthorized transaction
18 involving your account, you must promptly notify your branch of account in
writing of the relevant facts. ...

19 You are in the best position to discover and report any unauthorized debit to
20 your account. If you fail to notify us within a reasonable time (not exceeding
21 21) days of an unauthorized signature, alteration, forgery, counterfeit check
22 or other unauthorized debit to your account, we will not be responsible for
23 subsequent unauthorized transactions by the same wrongdoer. Without
regard to care or lack of care of either you or us, if you do not discover and
report any such unauthorized transaction *within 60 days after your statement,*
transaction information or the item is made available to you, you are
precluded from asserting the unauthorized transaction against us.

24 If you claim a credit or refund because of an unauthorized transaction, you
25 agree to provide us with a declaration containing whatever reasonable
26 information we require regarding your account, the transaction and the
circumstances surrounding the claimed loss. You also agree to make a report
to the police and to provide us with a copy of the report, upon request.

27
28 ³ There are no facts alleged that demonstrate how BOH knew about these
hoaxes.

1 (Takahashi Decl., Ex. 1, Consumer Deposit Account Agreement and Disclosure Statement and
2 Bankoh Consumer Electronic Financial Services Agreement and Disclosure Statement (“the
3 Deposit Agreement”) at 18 (emphasis added).)

4 On August 22, 2006 and September 5, 2006, Ms. Hisamatsu wired \$256,179.29 and
5 \$299,988.00, respectively, to her BOH account and contends she did so in part because she was
6 “relying on the apparent confidence BOH employees had in Niroula.” (SAC ¶¶ 21, 25.) On the
7 day Ms. Hisamatsu opened the account, Mr. Niroula stole three temporary checks, forged them,
8 and deposited the funds into his own account at BOH. (*Id.* ¶¶ 20-24.) Mr. Niroula also
9 convinced Ms. Hisamatsu to send him additional checks “so that immigration could verify that
10 she had both the contacts with the United States and the banking relationship Niroula
11 misrepresented was required for the visa application.” (*Id.* ¶ 27.) Mr. Niroula used one of these
12 checks to draw funds from Ms. Hisamatsu’s account on September 18, 2006. (*Id.* ¶ 28.) Ms.
13 Hisamatsu contends that BOH neither verified her signature on any of the checks before
14 debiting them from her account nor contacted her about the transactions. (*Id.* ¶¶ 24, 28.)

15 On or about October 2, 2006, Ms. Hisamatsu learned of the forgeries, notified BOH, and
16 executed three affidavits (the “Claim Forms”) swearing that the checks were forged. (*Id.* ¶¶ 29,
17 31, Ex. A.) In the Claim Forms, BOH states “the Bank will investigate your Claim,” and states
18 that “[p]ayment is contingent upon the results of the Bank’s investigation.” (*Id.*, Ex. A.) BOH
19 also advises its customer that, by submitting a claim to BOH, he or she agrees to cooperate with
20 the Bank and law enforcement agencies with any investigation. (*Id.*) Ms. Hisamatsu contends
21 that BOH employees refused to contact the police or take any action to recover the funds,
22 required her to return to Hawaii if she wanted to pursue the matter and, at the time she signed
23 the Claim Forms, BOH “had decided not to pay the claim, but to deny it.” (*Id.* ¶¶ 30-32.) BOH
24 did, however, subsequently freeze the account in which Mr. Niroula had deposited the funds.
25 (*Id.* ¶ 33.) Ms. Hisamatsu alleges that, as of October 3, 2006, although “BOH had enough
26 information to retransfer all of Niroula’s account balance to [her] account,” which was slightly
27 over \$250,000, it did not do so and did not adequately investigate her claims. (*Id.* ¶¶ 33, 36.)
28

1 Ms. Hisamatsu contends that on or about October 4, 2006, Mr. Niroula informed BOH
2 employees that he would return Ms. Hisamatsu's money and assured her that he had sufficient
3 funds in San Francisco to return her money. (SAC ¶ 34.) Ms. Hisamatsu also contends that
4 Chester Dods, a BOH employee, told her Mr. Niroula was not a bad person, that Mr. Niroula
5 would return her money, and that there was a reasonable delay in wire transfers due to a bank
6 holiday in Nepal. (*Id.* ¶ 35.)

7 On or about October 17, 2006, Mr. Niroula contacted Ms. Hisamatsu and represented to
8 her that "his family had been placed in a very dangerous situation due to their planned departure
9 from Nepal, and the only way to save them from harm was to 'borrow'" her money. (*Id.* ¶ 37.)
10 Ms. Hisamatsu contends that Mr. Niroula made various other representations regarding the
11 delay in being able to reimburse her, including a representation that his sister had been
12 kidnapped. (*Id.* ¶¶ 37-38.) Mr. Niroula also convinced Ms. Hisamatsu that she needed to come
13 to San Francisco, California to complete the financial transactions. (*Id.* ¶ 37.)

14 "On October 20, 2006, as a direct result of BOH's statements in its claim forms and its
15 indulgent conciliatory attitude toward [Mr. Niroula, Ms. Hisamatsu] flew to San Francisco to
16 recover her money." (*Id.* ¶ 39.) Ms. Hisamatsu contends that, "[i]n the event ... Niroula
17 returned her family savings, [she] intended to withdraw her claims to BOH. ... If not, [she]
18 reasonably believed that she was still protected by her pending claims at BOH and the bank's
19 assurance of an investigation in its claim forms." (*Id.* ¶ 39.) Ms. Hisamatsu opened an account
20 with Citibank, into which Mr. Niroula deposited a check in the amount of \$899,000. Ms.
21 Hisamatsu was advised that the check would not clear for three days. (*Id.* ¶¶ 39-40.)

22 Ms. Hisamatsu also opened another account with Wells Fargo bank, and "as a further
23 direct result of Plaintiff's pending claims with BOH, Kashal Niroula's control and
24 representations, BOH's statements in the claim form, and BOH's vouching for [Mr. Niroula,
25 Ms. Hisamatsu] acted promptly to help" Mr. Niroula. (*Id.* ¶¶ 42-43.) As part of this effort to
26 help Mr. Niroula, Ms. Hisamatsu "called her BOH branch and asked the manager to wire
27 \$41,000 to her San Francisco Wells Fargo account. From those funds," Ms. Hisamatsu loaned
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1 Mr. Niroula the ransom payment for his sister. (*Id.* ¶ 43.) Ms. Hisamatsu contends that during
2 this time, Mr. Niroula convinced her that her life had been threatened. (*Id.* ¶ 41.)

3 Before BOH released its hold on the frozen funds, it drafted a form entitled
4 “Indemnification of Liability” (“the Indemnification Agreement”), which it gave to one of Ms.
5 Hisamatsu’s friends in Honolulu, who then sent the form to California. (*Id.* ¶¶ 44-45, Ex. B.)
6 Ms. Hisamatsu contends that she “reasonably believed ... that her claims to BOH were not
7 affected by this unofficial looking form, ... that BOH was still investigating,” and that the
8 Indemnification Agreement merely was a “temporary formality to facilitate the transfer of
9 Niroula’s family funds from Nepal” (*Id.* ¶¶ 45-46.) Ms. Hisamatsu contends that no one
10 from BOH explained the Indemnification Agreement to her or offered to translate it for her,
11 even though BOH knew she had difficulty with English. (*Id.* ¶ 46.) Ms. Hisamatsu does not
12 allege facts to show how BOH knew she had difficulty with English.

13 The Indemnification Agreement provides that, “for reasons known best to myself,” Ms.
14 Hisamatsu wished “to withdraw [her] forgery dispute regarding” the three checks allegedly
15 forged by Mr. Niroula. She also agreed “that funds (\$257,546.25) held in suspense from Bank
16 of Hawaii account #0002-933063, belonging to Kaushal Niroula, as a result of the forgery
17 dispute shall be released to Kaushal Niroula, upon signing this agreement.” (*Id.*, Ex. B.) The
18 Indemnification Agreement also provides that Ms. Hisamatsu agreed “to indemnify and hold
19 harmless [BOH,] ... from and against any and all losses, damages, costs and reasonable attorney
20 fees resulting from or related to claims, liabilities, suits, actions, or proceedings arising out of
21 [BOH] having paid the funds to Kaushal Niroula at” Ms. Hisamatsu’s request. (*Id.*)

22 On October 31, 2006, Ms. Hisamatsu learned that the check deposited in the Citibank
23 account had not cleared and that Mr. Niroula had not reimbursed the funds as promised.
24 “Nonetheless, [Ms. Hisamatsu] reasonably believed that BOH would still keep its promise of
25 10-3-06 to pay the claims since the investigation, by now, was complete.” (*Id.* ¶ 47.) Ms.
26 Hisamatsu called BOH during November 2006 to “specifically alert it that she wanted BOH to
27 pay her claims for the unauthorized transactions.” She alleges that Chester Dods refused to do
28 so. (*Id.* ¶ 48.)

1 **C. The January 10 Order.**

2 In its January 10 Order, the Court determined that, if the Indemnification Agreement
3 could be enforced against Ms. Hisamatsu, any claims premised upon asserting the forgeries
4 against BOH would be precluded, under Uniform Commercial Code Section 4-406(f), as
5 untimely (“the UCC Preclusion Argument”). (Jan 10 Order at 8:7-17.) The Court therefore
6 dismissed Ms. Hisamatsu’s claims for Conversion, Tort in Essence, Constructive Trust,
7 Equitable Lien, Wrongful Withholding of Funds, Gross Negligence, Negligence, Negligence
8 Per Se, Violations of Section 17200, Declaratory Relief, and Rescission with leave to amend to
9 address the validity of the Indemnification Agreement. (*Id.* at 9:11-11:16, 13:17-14:17.)

10 The Court also dismissed without leave to amend Ms. Hisamatsu’s claims that she was
11 fraudulently induced to sign the Indemnification Agreement based on BOH’s alleged failure to
12 disclose the legal consequences of signing that document and her claims for breach of fiduciary
13 duty. (*Id.* at 10:3-7, 13:9-15, 15:12-28, 18:23-19:16.) The Court also dismissed, with leave to
14 amend, Ms. Hisamatsu’s claims for conspiracy, violations of Hawaii’s unfair competition law,
15 negligent misrepresentation, intentional infliction of emotional distress and denied BOH’s
16 motion to dismiss claims premised upon promissory fraud. (*See id.* at 11:18-13:7, 14:19-18:21.)

17 **III. ANALYSIS**

18 The Court prefaces this Order with the statement that it appears evident from the face of
19 the SAC, that Ms. Hisamatsu was the unwitting, and unwilling, victim of Mr. Niroula’s
20 confidence schemes. The issue before this Court is whether BOH also is liable to Ms.
21 Hisamatsu. For the reasons set forth herein, the Court concludes that Ms. Hisamatsu has not set
22 alleged enough facts to state claims for relief that are plausible on their face. Because she has
23 had ample opportunities to set forth facts supporting her claims against BOH, the Court
24 concludes that it would be futile to grant her leave to amend. Accordingly, all claims against
25 BOH are hereby dismissed with prejudice.

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1 **A. Applicable Legal Standards.**

2 **1. Motion to Dismiss For Failure to State a Claim.**

3 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the
4 pleadings fail to state a claim upon which relief can be granted. The complaint is construed in
5 the light most favorable to the non-moving party and all material allegations in the complaint
6 are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court,
7 however, is not required to accept legal conclusions cast in the form of factual allegations, if
8 those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness*
9 *Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286
10 (1986)). Conclusory allegations without more are insufficient to defeat a motion to dismiss for
11 failure to state a claim upon which relief may be granted. *McGlinchy v. Shell Chemical Co.*,
12 845 F.2d 802, 810 (9th Cir. 1988). Even under the liberal pleading standard of Federal Rule of
13 Civil Procedure 8(a)(2), a plaintiff must do more than recite the elements of the claim and must
14 “provide the grounds of [its] entitlement to relief.” *Bell Atlantic Corporation v. Twombly*, 127
15 S. Ct. 1955, 1959 (2007) (citations omitted). The pleading must not merely allege conduct that
16 is conceivable. Rather, plaintiffs must allege “enough facts to state a claim to relief that is
17 plausible on its face.” *Id.* at 1974.

18 Documents whose contents are alleged in a complaint and whose authenticity no party
19 questions, but which are not physically attached to the pleading, may be considered in ruling on
20 a Rule 12(b)(6) motion to dismiss. Such consideration does not convert the motion to dismiss
21 into a motion for summary judgment. *See United States v. Ritchie*, 343 F.3d 903, 908 (9th Cir.
22 2003); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

23 **2. Motion for Summary Judgment or Adjudication of Issues.**

24 A principal purpose of the summary judgment procedure is to identify and dispose of
25 factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986).
26 Summary judgment is proper when the “pleadings, depositions, answers to interrogatories, and
27 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to
28 any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R.

1 Civ. P. 56(c). An issue is “genuine” only if there is sufficient evidence for a reasonable fact
2 finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
3 (1986). A fact is “material,” if the fact may affect the outcome of the case. *Id.* at 248. “In
4 considering a motion for summary judgment, the court may not weigh the evidence or make
5 credibility determinations, and is required to draw all inferences in a light most favorable to the
6 non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

7 The party moving for summary judgment bears the initial burden of identifying those
8 portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine
9 issue of material fact. *Celotex*, 477 U.S. at 323. Where the moving party will have the burden
10 of proof on an issue at trial, it must demonstrate affirmatively that no reasonable trier of fact
11 could find other than for the moving party. *Id.*; *see also Nissan Fire & Marine Ins. Co. v. Fritz*
12 *Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the non-moving party meets its initial burden, the
13 party opposing summary judgment must go beyond the pleadings and, by its own evidence, “set
14 forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).
15 Further, the non-moving party must “identify with reasonable particularity the evidence that
16 precludes summary judgment.” *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th 1996) (stating that it
17 is not a district court’s task to “scour the record in search of a genuine issue of triable fact”). If
18 the non-moving party fails to make this showing, the moving party is entitled to judgment as a
19 matter of law. *Celotex*, 477 U.S. at 323.

20 **B. Choice of Law.**

21 In its January 10 Order, the Court ruled that it would apply Hawaii law to claims
22 relating to the Deposit Agreement, to the Claim Forms signed in Hawaii, and to Ms.
23 Hisamatsu’s negligence based claims and would apply California law to Ms. Hisamatsu’s
24 independent tort claims against BOH. (Jan. 10 Order at 6:28-7:3.) The Court also applied
25 California law to interpret the Indemnification Agreement. BOH argues that the Court should
26 apply the law of Hawaii both to the interpretation of the Indemnification Agreement and to
27 determine whether it can be rescinded on the basis that the parties intended the Indemnification
28 Agreement to be performed there. *See* Cal. Civ. Code § 1646. The Court need not determine

1 whether California or Hawaii law applies, because BOH relies exclusively on California law to
2 uphold the validity of the Indemnification Agreement and has not shown there is a conflict
3 between the laws of these two jurisdictions. Accordingly, the Court again applies California
4 law to interpret the Indemnification Agreement and to determine its validity.

5 **C. The UCC Preclusion Argument.**

6 BOH renews the UCC Preclusion Argument in support of its motion to dismiss the SAC.
7 UCC § 4-406(f) provides that:

8 [w]ithout regard to care or lack of care of either the customer or the bank,
9 a customer who does not within one year⁴ after the statement or items are
10 made available to the customer (subsection (a)) discover and report the
11 customer's unauthorized signature on or any alteration on the item is
12 precluded from asserting against the bank the unauthorized signature or
13 alteration. If there is a preclusion under this subsection, the payor bank may
14 not recover for breach of warranty under Section 4-208 with respect to the
15 unauthorized signature or alteration to which the preclusion applies.⁵

16 Section 4-406(f) operates as an issue preclusion statute. Thus, if a customer does not
17 notify a bank of an alleged unauthorized signature within one year, or in this case, sixty days,
18 "if a customer must prove a forgery in order to establish a claim [against the bank] then the
19 customer will not be able to establish the claim because he or she is precluded from proving the
20 forgery. On the other hand, any claim that is not dependent upon proof of the forgery will not
21 be precluded, ... although the customer will still be precluded from asserting the forgery in
22 pursuing that claim." *Roy Supply v. Wells Fargo*, 39 Cal. App. 4th 1051, 1066 & n.16 (1995);
23 *see also id.*, 39 Cal. App. 4th at 1072.

24 It is undisputed that Ms. Hisamatsu initially notified BOH of the alleged forgeries within
25 the sixty days required by the Deposit Agreement. BOH argues, however, that when she signed
26 the Indemnification Agreement, she withdrew her contention that Mr. Niroula forged the three

25 ⁴ The parties agree that, in this case, the one year time frame contemplated by
26 section 4-406(f) has been shortened to sixty days because of the terms of the Deposit
27 Agreement. Haw. Rev. Stat. § 490:4-103(a); *see also* Cal. Comm. Code § 4103.

27 ⁵ Both Hawaii and California have adopted this provision of the UCC. *See*
28 Haw. Rev. Stat. § 490:4-406(f); Cal. Comm. Code § 4406(f). Once again, the Court could
not locate any Hawaiian cases applying or interpreting this provision of the UCC and the
parties have not cited any such cases. Accordingly, the Court again looks to California law
for guidance.

1 temporary checks. Thus, BOH argues that the first clause of the Indemnification Agreement
2 precludes any claims against BOH that are premised on the alleged forgeries. Ms. Hisamatsu
3 seeks to rescind the Indemnification Agreement on a number of legal theories. Therefore,
4 resolution of the UCC Preclusion Argument depends whether Ms. Hisamatsu can avoid the
5 effect of the Indemnification Agreement. The Court now turns to that question.

6 **D. The Indemnification Agreement Is Enforceable.**

7 Ms. Hisamatsu alleges that the Indemnification Agreement should be rescinded on the
8 basis that: (1) it was procured by undue influence, absent a confidential relationship (Count 9);
9 (2) it was procured by the improper conduct of Mr. Niroula (Count 10); (3) it is the product of
10 mutual mistake (Count 11); (4) there is a failure of consideration (Count 12); (5) there is a
11 failure of consideration through the fault of BOH (Count 13); (6) it is an unlawful agreement in
12 violation of California Civil Code § 1668 (Count 14); (7) the consideration for the agreement is
13 void (Count 15); (8) it was procured by undue influence based on a known vulnerability (Count
14 16); (9) it is the product of a unilateral mistake on Ms. Hisamatsu’s part through the fault of
15 BOH (Count 17); (10) it is the product of a unilateral mistake on Ms. Hisamatsu’s part (Count
16 18); and (11) Ms. Hisamatsu was fraudulently induced to sign it (Count 19). (SAC ¶¶ 96-146.)
17 BOH moves to dismiss each of these claims for failure to state a claim. Ms. Hisamatsu, in turn,
18 moves for summary judgment on Counts 9-10, 12, and 13-18.

19 **1. Counts 9, 10 and 16 Are Dismissed.**

20 “A party to a contract may rescind the contract ... [i]f the consent of the party rescinding
21 ... was ... obtained through ... undue influence, exercised by or with the connivance of the party
22 as to whom he rescinds, or of any other party to the contract jointly interested with such party.”
23 Cal. Civ. Code § 1689(b)(1). “Undue influence consists ... [of] taking an unfair advantage of
24 another’s weakness of mind; or ... [of] taking a grossly oppressive and unfair advantage of
25 another’s necessities or distress.” *Id.* § 1575.

26 Ms. Hisamatsu alleges that the Indemnification Agreement should be rescinded on this
27 basis because “BOH knew [she] would be ‘assisted’ by a party interested in, and conniving in
28 the execution of the agreement,” that is Mr. Niroula, and that she “had no time to retain

1 competent, trusted advisors.” (SAC ¶ 99.) Ms. Hisamatsu further alleges that her signature on
2 the Indemnification Agreement was procured by Mr. Niroula’s undue influence and that BOH
3 knew of this fact. (*Id.* ¶¶ 105-110.) Ms. Hisamatsu also that she “suffered from lack of full
4 vigor due to physical exhaustion and emotional anguish as a crime victim ... [and] [a]s such, she
5 had a lessened capacity to make a free contract with BOH,” and that BOH “applied its excessive
6 strength to her to secure her agreement, and took unfair advantage of [her] known
7 vulnerability.” (*Id.* ¶¶ 125-126)

8 “[U]ndue influence occurs whenever there results ‘that kind of influence or supremacy
9 of one mind over another by which that other is prevented from acting according to his own
10 wish or judgment, and whereby the will of the person is overborne and he is induced to do or
11 forbear to do an act which he would not do, or would do, if left to act freely.’” *Odorizzi v.*
12 *Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123, 132 (1966) (quoting *Webb v. Saunders*, 79 Cal.
13 App. 2d 863, 871 (1947)). In *Odorizzi*, the court set forth several factors that are indicative of
14 excessive pressure: “(1) discussion of the transaction at an unusual or inappropriate time, (2)
15 consummation of the transaction in an unusual place, (3) insistent demand that the business be
16 finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of
17 multiple persuaders by the dominant side against a single servient party, (6) absence of third-
18 party advisers to the servient party, [and] (7) statements that there is no time to consult financial
19 advisers or attorneys.” *Id.* at 133. Applying those factors, the court concluded that the plaintiff
20 had alleged sufficient facts to state a claim that his resignation had been procured by undue
21 influence, where he alleged that the defendants approached him after he had just completed “the
22 process of arrest, questioning, booking and release on bail and had been without sleep for forty
23 hours.” *Id.* at 131.

24 In contrast, in this case, although Ms. Hisamatsu contends that “she suffered from lack
25 of full vigor due to physical exhaustion,” she alleges no facts to support this statement.
26 Moreover, although she alleges in a conclusory fashion that BOH knew that Mr. Niroula had
27 threatened her, she does not allege facts to show how BOH had knowledge of this fact. Nor do
28 the facts alleged suggest that the circumstances surrounding the execution of the

1 Indemnification Agreement took place in an unusual place or at an inappropriate time. Further,
2 the friend who routed the Indemnification Agreement to Ms. Hisamatsu was an attorney. (SAC
3 ¶ 44.) Even if he did not represent her, it is not reasonable to infer that she had no time to
4 consult him about the consequences of her actions and Ms. Hisamatsu does not allege that BOH
5 denied her additional time to consider the Indemnification Agreement.

6 Finally, Ms. Hisamatsu alleges that she withdrew her forgery dispute and requested that
7 BOH release freeze on the account, because she believed Mr. Niroula was going to pay her
8 \$890,000, a sum that exceeded the funds he allegedly stole from her. (SAC ¶¶ 37-40.) These
9 allegations cannot be reasonably inferred to support a conclusion that BOH procured her
10 signature on the Indemnification Agreement by way of undue influence.

11 In sum, Ms. Hisamatsu fails to allege facts that suggest BOH applied any, let alone
12 excessive, pressure to obtain her signature on the Indemnification Agreement. BOH's motion
13 to dismiss these claims is granted, and Ms. Hisamatsu's motion for summary judgment on these
14 claims is denied.

15 **2. Counts 11, 17 and 18 Are Dismissed.**

16 "A contract may be rescinded ... [i]f the consent of the party rescinding, or of any party
17 jointly contracting with him, was given by mistake[.]" Cal. Civ. Code § 1689(b)(1). "Mistake
18 of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making
19 the mistake, and consisting [of] ... [a]n unconscious ignorance or forgetfulness of a fact past or
20 present, material to the contract; or, [b]elief in the presence of a thing material to the contract,
21 which does not exist" *Id.* § 1577. "Ordinary negligence does not constitute the neglect of a
22 legal duty as that term is used in section 1577." *Architects & Contractors Estimating Servs.,*
23 *Inc. v. Smith*, 164 Cal. App. 3d 1001, 1008 (1985).

24 In Count 11, Ms. Hisamatsu alleges that she and BOH "made basically the same mistake
25 as to a material part of the contract; that is, they mistakenly believed that" Mr. Niroula would
26 repay Ms. Hisamatsu "upon BOH's receipt of her signature on BOH's release form." (SAC ¶¶
27 111-112). However, Ms. Hisamatsu does not allege that Mr. Niroula's payment to Ms.
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1 Hisamatsu was material to BOH’s decision to enter into the Indemnification Agreement or to
2 release the freeze on his account. Accordingly, this claim is dismissed.

3 In Counts 17 and 18, Ms. Hisamatsu alleges that the Indemnification Agreement should
4 be rescinded, because: (1) she did not know that Mr. Niroula did not intend to reimburse her for
5 the money he is alleged to have stolen; (2) she did not know that “the object of the agreement
6 was to exempt BOH of all liability to [her];” (3) she did not know BOH “had no intention to pay
7 her claims.”⁶ (*Id.* ¶¶ 128, 133.) To the extent Ms. Hisamatsu contends that BOH had a duty to
8 explain the legal consequences of the Indemnification Agreement, that claim fails for the
9 reasons previously stated by the Court. (Jan. 10 Order at 8:18-9:10.) Ms. Hisamatsu also has
10 failed to allege facts to support an inference that BOH knew Mr. Niroula did not intend to
11 reimburse her. The Court concludes that facts alleged do not show that BOH had reason to
12 know that Mr. Niroula’s failed to reimburse Ms. Hisamatsu. It also cannot reasonably be
13 inferred that BOH caused that event. Thus, in order to rescind the Indemnification Agreement
14 on the basis of unilateral mistake of fact, Ms. Hisamatsu must demonstrate that: (1) she made a
15 mistake regarding a basic assumption upon which she entered the Indemnification Agreement;
16 (2) that the mistake had a material effect upon the agreed exchange of performances that is
17 adverse to her; (3) that she does not bear the risk of the mistake; and (4) that the effect of the
18 mistake is such that enforcement of the Indemnification Agreement would be unconscionable.
19 *Donovan v. RJL Corp.*, 26 Cal. 4th 261, 282 (2001).

20 If the Court accepts as true the facts that Ms. Hisamatsu entered into the Indemnification
21 Agreement because she believed that Mr. Niroula had paid her \$890,000 when he had not, those
22 facts would be sufficient to state facts supporting the first two elements. However, the Court
23 concludes that Ms. Hisamatsu has not alleged facts to demonstrate that she does not bear the
24 risk of this mistake. As the *Donovan* court stated, “[a] party bears the risk of a mistake when
25 ... he is aware at the time the contract is made, that he has only limited knowledge with respect
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28 ⁶ This last allegation is more properly addressed in the context of whether BOH
fraudulently induced Ms. Hisamatsu to enter into the Indemnification Agreement and shall
be addressed in the Court’s analysis of those claims.

1 to the facts to which the mistake relates but treats his limited knowledge as sufficient.”

2 *Donovan*, 26 Cal. 4th at 283.

3 Ms. Hisamatsu parrots this language from *Donovan*, when she alleges that “she did not
4 have limited knowledge of the facts,” and that she “was not aware that her knowledge was, or
5 could be, limited with respect to the facts to which the mistake related.” (SAC ¶¶ 134-135.)
6 Those conclusory allegations, however, are contradicted by her factual allegations that she was
7 informed by Citibank that the proceeds from Mr. Niroula’s check would not be available for
8 three days. (SAC ¶ 40.) Thus, at the time she signed the Indemnification Agreement, Ms.
9 Hisamatsu was operating with limited knowledge of the facts, *i.e.* she knew a check had been
10 deposited but she did not know with certainty that Mr. Niroula’s check had cleared.

11 The Court concludes that Ms. Hisamatsu has not alleged facts sufficient to establish that
12 she did not bear the risk of her mistake, and she cannot avoid the effect of the Indemnification
13 Agreement on this basis. BOH’s motion to dismiss Counts 17 and 18 is granted, and Ms.
14 Hisamatsu’s motion for summary judgment on these claims is denied.

15 **3. Counts 12 and 13 Are Dismissed.**

16 “A party to a contract may rescind the contract ... [i]f the consideration for the obligation
17 of the rescinding party fails, in whole or in part, through the fault of the party as to whom he
18 rescinds[,] [i]f the consideration of the obligation of the rescinding party becomes entirely void
19 from any cause[, or,] [i]f the consideration for the obligation of the rescinding party, before it is
20 rendered to him, fails in a material respect from any cause.” Cal. Civ. Code § 1689(b)(2), (4).

21 In Count 12, Ms. Hisamatsu alleges that she did not receive what was promised and the
22 consideration for the Indemnification Agreement “failed on a material matter; that is, payment
23 by a third party to [her] of over \$508,000, in exchange for BOH’s release of funds to that third-
24 party, Mr. Niroula.” (SAC ¶ 115.) However, there are no facts alleged to suggest the payment
25 from Mr. Niroula was the consideration for the Indemnification Agreement.⁷

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27 ⁷ In addition, Ms. Hisamatsu’s opposition to BOH’s motion suggests that she is
28 attempting to premise this claim upon a theory that BOH failed to disclose to her the legal
consequences of the Indemnification Agreement. (*See Opp. Br.* at 21:5-20.) This Court has
determined that theory cannot support a claim for relief.

1 In Count 13, Ms. Hisamatsu alleges that “[a]t the time ... BOH offered the agreement to
2 [her], BOH had reason to know that the consideration-to [sic] pay a third-party funds
3 ‘belonging’ to him had failed, and that the funds actually belonged to” Ms. Hisamatsu. (*Id.* ¶
4 118.) Again, there are no facts to suggest that the payment from Ms. Niroula was consideration
5 for the Indemnification Agreement, and the Court concludes that it cannot reasonably be
6 interpreted to imply that BOH was releasing funds “belonging to” Mr. Niroula. *See* Section
7 III.D.5, *infra*. Rather, a reading of the Indemnification Agreement demonstrates that in return
8 for releasing its hold on funds that Ms. Hisamatsu claimed Mr. Niroula had stolen from her, Ms.
9 Hisamatsu would agree to hold BOH harmless from any third-party claims that might arise.
10 That Mr. Niroula did not live up to his promises does not equate to a failure of consideration
11 between BOH and Ms. Hisamatsu.

12 BOH’s motion to dismiss Counts 12 and 13 is granted, and Ms. Hisamatsu’s motion for
13 summary judgment is denied.

14 **4. Counts 14 and 15 Are Dismissed.**

15 “All contracts which have for their object, directly or indirectly, to exempt anyone from
16 responsibility for his own fraud, or willful injury to the person or property of another, or
17 violation of law, whether willful or negligent, are against the policy of the law.” Cal. Civ. Code
18 § 1668. “An agreement to indemnify a person against an act thereafter to be done, is void, if the
19 act be known by such person at the time of doing it to be unlawful.” *Id.* § 2773. In Counts 14
20 and 15, Ms. Hisamatsu alleges that the Indemnification Agreement should not be enforced,
21 because it violates Sections 1668 and 2773.

22 The Indemnification Agreement contains three clauses. In the first clause, Ms.
23 Hisamatsu states that “for reasons best known to [herself],” she “wish[ed] to withdraw [her]
24 forgery dispute regarding the following checks[.]” (SAC, Ex. B.) Nothing in this clause
25 purports to exonerate BOH from any wrongful conduct. Moreover, this language clearly states
26 that Ms. Hisamatsu advised BOH that “for reasons known best to herself,” she was withdrawing
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1 the forgery dispute she had lodged with BOH over the three unauthorized checks.⁸ In the
2 second clause, Ms. Hisamatsu stated that she also “agreed that funds (\$257,546.25) held in
3 suspense from Bank of Hawaii account ..., belonging to Kaushal Niroula, as a result of the
4 forgery dispute shall be released to Kaushal Niroula[.]” (SAC, Ex. B.) This clause also does
5 not purport to exonerate BOH from any wrongful conduct.

6 In the third clause, Ms. Hisamatsu “agree[d] to indemnify and hold harmless [BOH] ...
7 from and against any and all losses, damages, costs and reasonable attorneys fees resulting from
8 or related to claims, liabilities, suits, actions, or proceedings arising out of [BOH] having paid
9 the funds to Kaushal Niroula at” Ms. Hisamatsu’s request. (SAC, Ex. B.) Ms. Hisamatsu
10 argues that this clause amounts to a release of liability for “an event to be done by BOH in the
11 future; that is the release of money ‘belonging to Kaushal Niroula’ to Mr. Niroula.” (MSJ at
12 20:1-2.) BOH counters that it is not asserting this section against Ms. Hisamatsu “at this time,”
13 and that the section cannot be interpreted to be “a release of liability nor a release of BOH’s
14 willful misconduct.” (Mot. at 28:24-25.) The Court concurs with BOH.

15 First, BOH has not asserted the third section of the Indemnification Agreement against
16 Ms. Hisamatsu. Further, as noted, BOH relies on the first clause to argue that Ms. Hisamatsu
17 withdrew her claims regarding the unauthorized signatures and, thus, interposes that clause as a
18 defense to her negligence based claims. Second, the third section is a general indemnification
19 provision and cannot be construed to exculpate BOH from liability to Ms. Hisamatsu for future
20 wrongs. *See, e.g., Varco-Pruden, Inc. v. Hampshire Const. Co.*, 50 Cal. App. 3d 654, 660
21 (1975). Accordingly, BOH’s motion to dismiss these claims is granted, without leave to amend,
22 and Ms. Hisamatsu’s motion for summary judgment is denied.

23 **5. Count 19 Is Dismissed Without Leave to Amend.**

24 In Count 19, Ms. Hisamatsu alleges that she was fraudulently induced to sign the
25 Indemnification Agreement because BOH misrepresented that the funds it was releasing
26 belonged to Mr. Niroula. Ms. Hisamatsu has alleged that the \$ 267,546.25 was her money. In
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28 ⁸ The Court’s opinion in this regard pertains solely to BOH’s liability to Ms. Hisamatsu and is not intended to extend to any liability Mr. Niroula may have to her.

1 light of the context surrounding the execution of this document, the Court finds that her
2 interpretation of second clause of the Indemnification Agreement is not reasonable and cannot
3 be read to suggest that BOH was releasing “funds ... belonging to Mr. Niroula.” Ms. Hisamatsu
4 also contends that she was fraudulently induced to sign the Indemnification Agreement, because
5 she signed it “under the misapprehension that it was something other than a release; and, that it
6 was merely to allow a transfer of Mr. Niroula’s money back to him.” (SAC ¶ 145.) This
7 allegation is a variation on Ms. Hisamatsu’s argument that BOH should have apprised her of the
8 consequences of signing the document. However, the Court previously rejected that argument.
9 (Jan. 10 Order at 8:18-9:10.) As set forth earlier in this Order, Ms. Hisamatsu also appears to
10 contend that she was fraudulently induced to sign this document on the basis that BOH never
11 intended to pay her claims. However, Ms. Hisamatsu expressly alleges that she signed the
12 document because she believed that Mr. Niroula had paid her \$890,000, a sum well in excess of
13 the amount allegedly stolen in the first instance.

14 Accordingly, BOH’s motion to dismiss this claim is granted.

15 **6. The Declaratory Relief Claim (Count 24) Is Dismissed Without Leave to**
16 **Amend.**

17 Ms. Hisamatsu’s Declaratory Relief claim is premised upon the dispute over whether the
18 Indemnification Agreement can be enforced against her. (SAC ¶¶ 185-190.) Having
19 determined that it can be enforced, this claim is dismissed, and Ms. Hisamatsu’s motion for
20 summary judgment is denied.

21 **E. The Remaining Claims.**

22 **1. The Section 17200 Claim (Count 8) Is Dismissed, Without Leave to Amend.**

23 Pursuant Section 17200, “there are three varieties of unfair competition: practices which
24 are unlawful, unfair or fraudulent.” *See Daugherty v. American Honda Motor Co., Inc.*, 144
25 Cal. App. 4th 824, 837 (2006); *Albillo v. Intermodal Container Services, Inc.*, 114 Cal. App. 4th
26 190, 206 (2003) (to state a UCL claim, a “plaintiff must establish that the practice is either
27 unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or
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1 fraudulent (i.e., is likely to deceive members of the public”). Ms. Hisamatsu premises her
2 Section 17200 claim on all three prongs. (*See id.* at ¶¶ 86-95.)

3 In Count 8, Ms. Hisamatsu alleges that BOH crafted the Indemnification Agreement for
4 “[t]he sole, undisclosed purpose” of destroying her claims against BOH. (SAC ¶ 81.) Ms.
5 Hisamatsu also alleges that BOH “knew [she] was in San Francisco ... and, with the assistance,
6 encouragement and delay by BOH ... was under the control of a criminal,” and “refused to pay a
7 valid unauthorized transaction claim; and instead maneuvered [Ms. Hisamatsu] into a sham
8 investigation which included direct contact with a known forger and thief.” (*Id.* ¶¶ 82, 89.) Ms.
9 Hisamatsu also argues that the Indemnification Agreement is unlawful in that it purports to
10 exculpate BOH from its own tortious acts. (SAC ¶¶ 95.)

11 BOH argues that Ms. Hisamatsu fails to allege facts sufficient to state a claim under
12 Section 17200.⁹ Ms. Hisamatsu moves for summary judgment on this claim on the basis that
13 the undisputed facts demonstrate that BOH’s use of the Indemnification Agreement violated all
14 three prongs of Section 17200. In its January 10 Order, the Court dismissed this claim with
15 leave to amend to permit Ms. Hisamatsu to allege facts to support a showing that “BOH and Mr.
16 Niroula worked in concert to defraud, or otherwise, injure” her and to state more clearly the
17 bases on which she contended BOH’s use of the Indemnification Agreement violated Section
18 17200.

19 The Court has carefully reviewed the SAC and concludes that the allegations are not
20 sufficient to infer that BOH schemed with Mr. Niroula to steal Ms. Hisamatsu savings. Further,
21 for the reasons set forth in Section III.D, the Court concludes that the Indemnification
22 Agreement is not unlawful and does not violate public policy and also concludes that it cannot
23 be interpreted to suggest that BOH was releasing funds that belonged to Mr. Niroula.

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26 _____
27 ⁹ BOH moves to dismiss this claim because “section 17200 does not support
28 claims by non-California residents where none of the alleged misconduct or injuries occurred
in California.” *Churchill Village, LLC v. General Elec Co.*, 169 F. Supp. 2d 1119, 1126
(N.D. Cal. 2000) (citing *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222
(1999)), *aff’d on other grounds*, 361 F.3d 566 (9th Cir. 2004)). In light of the Court’s ruling
on this claim, it does not reach this argument.

1 The Court concludes that Ms. Hisamatsu has not alleged facts sufficient to state a claim,
2 and because it previously provided her with an opportunity to amend her claims, grants BOH's
3 motion to dismiss without leave to amend. Ms. Hisamatsu's motion for summary judgment is
4 denied.

5 **2. The Tort In Essence and Negligence Per Se Claims (Counts 20 and 35) Are**
6 **Dismissed, Without Leave to Amend.**

7 A claim for "tort in essence" essentially is a claim for negligence per se, which in turn is
8 a claim for negligence in which a plaintiff relies on a violation of a statute or regulation to
9 establish either a duty of care or the requisite standard of care. *See, e.g., Elsner v. Uveges*, 34
10 Cal. 4th 915, 927 & ns. 7, 8 (2004); *South Bay Bldg. Enters., Inc. v. Riviera Lend-Lease, Inc.*,
11 72 Cal. App. 4th 1111, 1123 (1999) (concluding that plaintiff had established a "tort in essence"
12 based on proof that defendants had engaged in conduct that, pursuant to statute in question,
13 could give rise to criminal liability); *see also Ono v. Applegate*, 62 Haw. 131, 137 (1980)
14 (standard of conduct in negligence case may be determined by statute).

15 In Count 20, Ms. Hisamatsu alleges that BOH "tortiously violated" California Civil
16 Code §§ 1572, 1668, 2773, and 3513. These claims are based in part upon Ms. Hisamatsu's
17 allegations that the Indemnification Agreement "has as its object to exempt BOH from
18 responsibility for 'its own fraud or willful injury' to her, and that the statements therein were
19 fraudulent. (*Id.* ¶¶ 153, 157, 241.) For the reasons set forth above, those allegations fail to state
20 a claim against BOH.

21 Ms. Hisamatsu also alleges that BOH "tortiously violated" several criminal statutes
22 including California Penal Code §§ 470, 476a, and 518, and 18 U.S.C. §§ 371, 1343. (SAC ¶
23 149.) In Count 35, Ms. Hisamatsu claims that BOH violated standards of care by violating the
24 foregoing statutes, as well as California Uniform Commercial Code § 4101, Hawaii Revised
25 Statutes § 490:4-401(a), and 18 U.S.C. §§ 1344, 1956(a)(2)(A). (*Id.* ¶ 240.) These claims are
26 premised upon Ms. Hisamatsu's allegations that BOH aided and abetted Mr. Niroula in "the
27 criminal deposit" of the \$890,000 check into Ms. Hisamatsu's Citibank account and aided and
28 abetted him between October 20, 2006 and October 29, 2006, when Mr. Niroula allegedly was

1 threatening Ms. Hisamatsu. (*Id.* ¶¶ 155-156, 241) However, the Court concludes that Ms.
2 Hisamatsu has not alleged facts sufficient to show that BOH acted in concert with Mr. Niroula
3 and there are no allegations that it forged any checks or engaged in bank fraud or money
4 laundering.

5 Finally, in Count 35, Ms. Hisamatsu also premises this claim on allegations that BOH
6 “failed to conform to the standard of care required in handling claims for unauthorized
7 transactions based on forgery.” (*Id.* ¶ 241.) Because the Indemnification Agreement can be
8 enforced, this claim is precluded.

9 Because Ms. Hisamatsu has had ample opportunity to set forth facts supporting her
10 claims, these claims are dismissed without leave to amend.

11 **3. The Civil Conspiracy Claim (Count 21) Is Dismissed, Without Leave to**
12 **Amend.**

13 “Conspiracy is not a cause of action, but a legal doctrine that imposes liability on
14 persons who, although not actually committing a tort themselves, share with the immediate
15 tortfeasors a common plan or design in its perpetration.” *Applied Equipment Corp. v. Litton*
16 *Saudi Arabia, Inc.*, 7 Cal. 4th 503, 510-11 (1994). As the California Supreme Court explained
17 in *Applied Equipment*, “[b]y participation in a civil conspiracy, a coconspirator effectively
18 adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy.
19 [Citation] In this way, a coconspirator incurs tort liability co-equal with the immediate
20 tortfeasors.” *Id.* at 511. In order to plead a claim for civil conspiracy, a plaintiff must plead
21 facts that show the formation and operation of the conspiracy and damage done to the plaintiff
22 from an act or acts done in furtherance of the common design. *Id.* at 511.

23 Ms. Hisamatsu alleges that BOH conspired with Mr. Niroula to release Ms. Hisamatsu’s
24 stolen funds, which BOH had frozen in Mr. Niroula’s account, to Mr. Niroula. (*See* SAC ¶
25 163.) Ms. Hisamatsu also contends that BOH knew Mr. Niroula wanted its help to get these
26 funds released, however she does not allege how BOH knew of this fact. (*Id.* ¶ 162.) At best,
27 the new allegations set forth in the SAC demonstrate that BOH knew Mr. Niroula and BOH
28 staff were “friendly” with him. However, there are no facts alleged that suggest that BOH knew

1 Mr. Niroula was, as Ms. Hisamatsu alleges, a dangerous criminal or that it agreed with him to
2 steal her funds. Accordingly, the Court concludes that Ms. Hisamatsu has failed to allege facts
3 sufficient to state a claim for conspiracy against BOH. Because Ms. Hisamatsu has had ample
4 opportunity to set forth facts to show an agreement, this claim is dismissed without leave to
5 amend.

6 **4. The Claim for Fraud in the Inducement (Count 22) Is Dismissed, Without**
7 **Leave to Amend.**

8 In Count 22, Ms. Hisamatsu alleges that BOH fraudulently induced her to sign the
9 Indemnification Agreement by misrepresenting that the funds held in the account belonged to
10 Mr. Niroula and “that BOH was merely seeking indemnification from releasing the funds to Mr.
11 Niroula.” (SAC ¶ 168 & Ex. B.) With respect to the first alleged misrepresentation, as set forth
12 above in Section III.D.5, those facts are insufficient to state a claim. With respect to the second
13 alleged misrepresentation, the Court previously held BOH was not obligated to explain to Ms.
14 Hisamatsu all of the legal consequences that would have been associated with signing the
15 Indemnification Agreement. (Order at 8:18-9:10.) Because Ms. Hisamatsu has had ample
16 opportunity to amend her claims, this claim is dismissed without leave to amend.

17 **5. The Claims for Intentional Infliction of Emotional Distress (Count 23) and**
18 **Negligent Infliction of Emotional Distress (Count 34) Are Dismissed,**
19 **Without Leave to Amend.**

20 The elements of a claim for intentional infliction of emotional distress are: “(1)
21 outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the
22 probability of causing emotional distress, (3) severe emotional suffering and (4) actual and
23 proximate causation of the emotional distress.” *Cole v. Fair Oaks Fire Dept.*, 43 Cal. 3d 148,
24 155 n.7 (1987); *see also Lee v. Aiu*, 85 Haw. 19, 34 & n.12 (1997). As the court noted in *Cole*,
25 this tort imposes liability for “conduct exceeding all bounds usually tolerated by a decent
26 society, of a nature which is especially calculated to cause, and does cause, mental distress.” *Id.*

27 In contrast, “[t]he law of negligent infliction of emotional distress in California is
28 typically analyzed ... by reference to two ‘theories’ of recovery: the ‘bystander’ theory and the
‘direct victim’ theory.” *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1071 (1992). In this case, it

1 is clear that Ms. Hisamatsu is a direct victim, as she alleges that BOH's conduct was directed at
2 her. In such cases, California courts view negligent infliction of emotional distress not as an
3 independent tort but, rather, as the tort of negligence to which the traditional elements of a
4 negligence claim apply. *Id.* at 1072 (citing *Marlene F. v. Affiliated Psychiatric Medical Clinic,*
5 *Inc.*, 48 Cal. 3d 583, 588 (1989)).

6 BOH moves to dismiss these claims for relief on the ground that the facts alleged do not
7 state a claim. Ms. Hisamatsu premises these claims, in part, on the theory that BOH conspired
8 with Mr. Niroula to obtain access to the stolen funds. For the reasons set forth above in Section
9 III.E.3, these claims are dismissed, without leave to amend.

10 **6. The Claims for Wrongful Withholding of Funds, Equitable Lien,**
11 **Constructive Trust, Negligence and Gross Negligence (Counts 25, 30, 31, 32**
12 **and 33) Are Dismissed, Without Leave to Amend.**

13 These claims all pertain to Mr. Hisamatsu's argument that BOH failed to exercise an
14 appropriate standard of care when it debited the allegedly forged checks in the first instance and
15 thereafter failed to reimburse her. Because the Court has determined that the Indemnification
16 Agreement can be enforced, these claims are precluded on the basis of BOH's UCC Preclusion
17 Argument. Accordingly, they are dismissed, without leave to amend.

18 **7. The Claim for Violations of HRS §§ 480-1 (Count 26), et seq., is Dismissed**
19 **Without Leave to Amend.**

20 BOH argues that Ms. Hisamatsu fails to allege facts sufficient to state a claim.
21 Assuming *arguendo* that Ms. Hisamatsu has standing to assert this claim,¹⁰ it is premised upon
22 the allegations in the previous 193 paragraphs and contends that "the foregoing [unspecified]
23 practices" were "unfair or deceptive acts or practices." (SAC ¶ 197.) Because the Court has
24 concluded that none of the facts alleged or claims asserted in those paragraphs are sufficient to
25 state a claim against BOH, the Court concludes Ms. Hisamatsu has not alleged facts sufficient
26 to state a claim for violations of Hawaii's unfair competition law. Because Ms. Hisamatsu has

27 ¹⁰ BOH also argues that Ms. Hisamatsu lacks standing to assert this claim.
28 However, in light of the Court's ruling on the merits of the claim, the Court does not reach
this issue.

1 had ample opportunity to set forth the facts supporting each of her claims, this claim is
2 dismissed without leave to amend.

3 **8. The Claim for Promissory Fraud (Count 27) is Dismissed, Without Leave to**
4 **Amend.**

5 Under Hawaii law a promise made without the intent to perform is considered actionable
6 fraud. *See Touche Ross Ltd. v. Filipek*, 7 Haw. App. 473, 480 (1989); *Eastern Star Inc. v.*
7 *Union Building Materials Corp.*, 6 Haw. App. 125, 140 (1985). In Count 27, Ms. Hisamatsu
8 alleges that BOH, in its Claim Forms, represented that it would investigate her claims and that
9 the decision about whether or not to pay the claims was contingent upon the results of that
10 investigation. (SAC ¶ 202.) Ms. Hisamatsu alleges that when BOH made those promises “it
11 had no intention of performing them, and had already decided to deny the claims,” and that it
12 made these promises with the intent to induce Ms. Hisamatsu to take no action against BOH to
13 recover the funds Mr. Niroula had taken without her authorization. (*Id.* ¶¶ 203-209.) Upon
14 further consideration of this claim, and considering the allegations in the SAC, the Court
15 concludes that Ms. Hisamatsu has not alleged facts to show that she reasonably relied on the
16 promises set forth in the Claim Forms to her detriment. Rather, in the hopes of obtaining a
17 premium from Mr. Niroula, she withdrew the forgery claims. Accordingly, this claim is
18 dismissed without leave to amend.

19 **9. The Claim for Negligent Misrepresentation (Count 28) is Dismissed Without**
20 **Leave to Amend.**

21 In Count 28, Ms. Hisamatsu contends that “[f]alse information was supplied to [her] as
22 alleged in Counts 19, 22, and 26, as incorporated by reference.” (SAC ¶ 211.) For the reasons
23 the Court has dismissed those claims, this claim is dismissed with prejudice as well.

24 **CONCLUSION**

25 For the foregoing reasons, BOH’s motion is GRANTED, and Ms. Hisamatsu’s motion
26 for summary judgment is DENIED. Because the Court concludes that there is no just reason for

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delay under Federal Rule of Civil Procedure 54(b), the Court shall enter a separate final judgment against BOH.

IT IS SO ORDERED.

Dated: March 31, 2009



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE