

CONCORDE EQUITY II, LLC, a
Delaware limited liability
company;

Plaintiff,

vs.

KENNETH ALFRED MILLER, an
individual; GEORGE CRESSON, an
individual; LOANVEST XIII, L.P., a
California Limited Partnership;
SENTINEL INVESTMENT MANAGEMENT
COMPANY, a California Corporation;
SOUTH BAY REAL ESTATE COMMERCE
GROUP, LLC, a California Limited
Liability Company; PETER SCOTT
CARTER, Jr., an individual; and
OLD REPUBLIC TITLE COMPANY, a
Vermont corporation,

Defendants.

Now before the Court are two motions to dismiss. Defendants Kenneth Alfred Miller ("Miller") and Sentinel Investment Management Company ("Sentinel") (collectively, the "Miller Defendants") filed a Motion to Dismiss. ECF No. 36 ("Miller MTD"). Plaintiff Concorde Equity II, LLC, ("Plaintiff") filed an Opposition, and the Miller Defendants submitted a Reply. ECF Nos. 41 ("Opp'n to Miller MTD"), 46 ("Miller Reply"). Defendants Loanvest XIII, L.P. ("Loanvest"), South Bay Real Estate Commerce Group ("South Bay"), Peter Scott Carter, Jr. ("Carter"), and George Cresson ("Cresson")

(collectively, the "Loanvest Defendants") filed a Motion to Dismiss. ECF No. 40 ("Loanvest MTD"). Plaintiff filed an Opposition, and the Loanvest Defendants submitted a Reply. ECF Nos. 48 ("Opp'n to Loanvest MTD"), 51 ("Loanvest Reply"). For the reasons stated herein, the Court GRANTS IN PART and DENIES IN PART the Miller MTD, and the Court GRANTS IN PART and DENIES IN PART the Loanvest MTD.

II. BACKGROUND

The following allegations are taken from Plaintiff's Second Amended Complaint ("SAC"). ECF No. 34. Plaintiff is a technology investment company. Id. ¶ 3. This case focuses on two loan transactions that Plaintiff refers to as "the Bretz Transaction," and "the Roem Transaction." Id. ¶¶ 17, 22.¹

In the Bretz transaction, Plaintiff loaned \$270,000 to non-party borrowers on or around May 5, 2009. Id. ¶¶ 17-18, 60. The Miller Defendants acted as real estate brokers for Plaintiff in the Bretz transaction. Id. ¶ 18. Plaintiff alleges that the Miller Defendants failed to adequately investigate the collateral used to secure the loan, and that they falsely represented they had incurred \$15,000 in underwriting and legal expenses. Id. ¶ 45. The borrowers in the Bretz transaction made a single loan payment to Plaintiff, never made any further payments, and defaulted on the loan. Id. ¶ 20. Plaintiff has been unable to recover the principal amount of the loan. Id. ¶ 21.

¹ It is not clear to the Court why the first transaction is labeled "the Bretz Transaction." The second transaction is called the "the Roem Transaction" because Plaintiff's money was used to fund a loan to Roem Builders and/or Roem Development Company. SAC ¶ 22.

1 In the Roem transaction, Plaintiff alleges that it wired
2 \$930,000 into an Old Republic Title Company ("Old Republic") escrow
3 account, and that the Miller Defendants and the Loanvest Defendants
4 took the money out of escrow and used it to fund a loan from
5 Loanvest to Roem Builders and/or Roem Development Company ("Roem"),
6 but that the Miller Defendants and the Loanvest Defendants have not
7 lived up to their representations to Plaintiff concerning its
8 interest or involvement in this loan to Roem. Id. ¶¶ 22-42.

9 More specifically, Plaintiff alleges that between September
10 and November 2009, Miller and Cresson had discussions with Rob
11 Fitzgerald ("Fitzgerald"), Plaintiff's managing partner, and they
12 represented that Plaintiff would be entitled to a return of
13 seventeen percent of its investment, as well as three points for
14 loan origination fees and one point on the total loan amount. Id.
15 ¶¶ 23, 27, 31. Both Miller and Cresson represented that Cresson
16 and possibly members of Cresson's family would be participating pro
17 rata with Plaintiff in the Roem loan. Id. ¶ 24. On September 16,
18 2009, Fitzgerald travelled to California to meet with Miller and
19 principals of Roem. Id. ¶ 25.

20 On October 7, 2009, Miller forwarded Fitzgerald an email
21 containing documents that would form the basis of the Roem loan,
22 including a promissory note, deed of trust, and stock pledge
23 agreements. Id. ¶ 26. On October 19, 2009, Miller represented in
24 writing to Plaintiff that "you will go direct on title for your
25 pro-rata percentage of the loan by way of an assignment at close.
26 You will be direct on title, with title insurance, when the loan
27 closes." Id. ¶ 27. On or about October 21, 2009, Plaintiff wired
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1 \$930,000 into an Old Republic escrow account, with the intent that
2 it would represent one-fourth of the total Roem loan. Id. ¶ 29.

3 On November 10, 2009, Cresson advised Fitzgerald that the
4 first disbursement of the Roem loan was being reduced from \$4
5 million to \$2 million. Id. ¶¶ 30-31. In response, Fitzgerald
6 wrote to Cresson, on November 11, 2009, confirming their
7 discussions regarding points, interest, collateral, and amounts.
8 Id. ¶ 32. Fitzgerald sought to have Plaintiff's participation in
9 the loan cut in half, and asked for the return of \$460,000. Id.
10 Cresson did not respond to Fitzgerald's email, and Fitzgerald wrote
11 to Miller on November 13, 2009. Id. ¶ 33. On November 14, 2009,
12 Fitzgerald wrote to both Miller and Cresson demanding the immediate
13 return of Plaintiff's money. Id. ¶ 35.

14 On November 14, 2009, Miller called Fitzgerald to express
15 concern about Fitzgerald's request for the money to be returned.
16 Id. ¶ 36. On November 16, 2009, Miller informed Fitzgerald that
17 Plaintiff's money was removed from the escrow account without
18 Fitzgerald's permission, and that the money was used to fund the
19 loan from Loanvest to Roem, which closed on November 13, 2009. Id.
20 ¶¶ 37-42. Carter signed the loan documentation, as manager of
21 South Bay, and as Managing General Partner of Loanvest. Id. ¶ 34.
22 Plaintiff alleges that Carter and South Bay participated in, and
23 took steps in furtherance of, removing Plaintiff's money from the
24 escrow account without Fitzgerald's permission. Id. ¶ 38. Miller
25 told Fitzgerald that Plaintiff did not have any interest in the
26 Roem loan, was not secured in any way, and was not going to be
27 direct on title, with title insurance. Id. ¶ 40. Miller told
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Fitzgerald, "Let's pretend it was a personal loan to me." Id.
¶ 37.

Plaintiff commenced this action in state court, and the case was removed to federal court on March 11, 2010. See Docket No. 1 ("Notice of Removal"). In the SAC, Plaintiff asserts fifteen causes of action against the Miller Defendants, the Loanvest Defendants, and the Old Republic Title Company, including fraud, negligent misrepresentation, violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), and breach of contract. SAC ¶¶ 43-135. The Miller Defendants and the Loanvest Defendants move to dismiss Plaintiff's SAC.

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "When there are well-

1 pleaded factual allegations, a court should assume their veracity
2 and then determine whether they plausibly give rise to an
3 entitlement to relief." Iqbal, 129 S.Ct. at 1950. A motion to
4 dismiss should be granted if the plaintiff fails to proffer "enough
5 facts to . . . nudge[] their claims across the line from
6 conceivable to plausible." Twombly, 550 U.S. at 570.

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8 **IV. DISCUSSION**

9 **A. Fraud**

10 Plaintiff accuses Miller, Sentinel, Cresson, Loanvest, Carter,
11 and South Bay of fraud. SAC ¶¶ 43-55. In California, the elements
12 of fraud are: (a) a misrepresentation by the defendant to the
13 plaintiff; (b) the defendant's knowledge of its falsity; (c) the
14 defendant's intent to defraud; (d) the plaintiff's justifiable
15 reliance; and (e) the plaintiff's resulting damage. Lazar v.
16 Super. Ct., 12 Cal. 4th 631, 638 (1996). Plaintiff "must state
17 with particularity the circumstances constituting fraud"
18 Fed. R. Civ. P. 9(b). Plaintiff must include "the who, what, when,
19 where, and how" of the fraud. Vess v. Ciba-Geigy Corp. USA, 317
20 F.3d 1097, 1106 (9th Cir. 2003) (citations omitted). "The
21 plaintiff must set forth what is false or misleading about a
22 statement, and why it is false." In re GlenFed, Inc. Sec. Litig.,
23 42 F.3d 1541, 1548 (9th Cir. 1994). While there is no requirement
24 that the complaint identify false statements made by each and every
25 defendant, the plaintiff must identify the role of each defendant
26 in the alleged fraudulent scheme. Swartz v. KPMG LLP, 476 F.3d
27 756, 764-65 (9th Cir. 2007).

1 The Court finds that Plaintiff's SAC alleges a plausible fraud
2 claim against the Miller Defendants. With regard to the Bretz
3 transaction, the SAC alleges that Miller and Sentinel acted as real
4 estate brokers for Plaintiff in the transaction. SAC ¶ 18. Miller
5 is the sole owner of Sentinel. Id. ¶ 5. Plaintiff alleges that
6 they misrepresented that they adequately investigated the
7 collateral used to secure Plaintiff's loan, and they misrepresented
8 that they incurred \$15,000 in underwriting and legal expenses. Id.
9 ¶¶ 45-46. Plaintiff alleges the misrepresentations were made to
10 induce Plaintiff to lend \$270,000 to non-party borrowers, who
11 subsequently defaulted on the loans. SAC ¶¶ 20, 46, 60. Whether
12 there is evidence to support these allegations is another matter,
13 but the allegations are sufficient to survive a motion to dismiss.

14 With regard to the Roem transaction, Plaintiff alleges that it
15 wired \$930,000 into an escrow account based on misrepresentations
16 by Miller, including that Plaintiff would be entitled to a return
17 of seventeen percent on the investment. Id. ¶¶ 27, 29, 47, 48.
18 After the money was removed from escrow without Plaintiff's
19 permission, Miller told Plaintiff's managing partner that Plaintiff
20 had no interest in the loan from Loanvest to Roem, and Miller
21 stated "Let's pretend it was a personal loan to me." Id. ¶¶ 37,
22 40. The allegations in the SAC state with particularity the
23 circumstances constituting the alleged fraud, and they are
24 sufficient to state plausible fraud claims against Miller and
25 Sentinel with regard to the Roem transaction.

26 The SAC does not allege that the Loanvest Defendants were
27 involved in the Bretz transaction. As such, the Loanvest
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1 Defendants cannot be held liable for fraud related to the Bretz
2 transaction.

3 However, the SAC does allege a plausible fraud claim against
4 the Loanvest Defendants with respect to the Roem transaction.
5 Plaintiff alleges that Carter is the owner and operator of South
6 Bay, and the managing general partner of Loanvest. Id. ¶ 10.
7 Plaintiff alleges that Miller and Cresson are the alter egos of
8 Loanvest, the entity that loaned money to Roem. Id. ¶ 11, 22.
9 Plaintiff alleges that it wired \$930,000 into an escrow account
10 based on misrepresentations by Cresson, including that Plaintiff
11 would be entitled to a return of seventeen percent on the
12 investment. Id. ¶¶ 23, 24, 26, 29, 47, 49. It is alleged that
13 Carter and South Bay participated in removing Plaintiff's money
14 from the escrow account without Plaintiff's permission. Id. ¶ 38,
15 54. These allegations state with particularity the circumstances
16 constituting fraud, and they identify the role of each of the
17 Loanvest Defendants in the alleged fraudulent scheme.

18 The Loanvest Defendants contend that Plaintiff could not have
19 relied on any representations by Cresson when wiring the \$930,000
20 into the escrow account because Cresson's representations
21 concerning his family's participation in the Roem loan were not
22 material misrepresentations, and Cresson's November 10 email
23 confirming Plaintiff's participation in the Roem loan occurred
24 after Plaintiff had already wired the money. Loanvest MTD at 4-5.
25 However, the SAC alleges that "[d]uring the course of many
26 telephone conversations [between September and November 2009],
27 CRESSON and MILLER represented to Fitzgerald that CONCORDE EQUITY
28 II's participation in the ROEM LOAN would entitle it to a return of

1 seventeen percent on the contributed money, as well as three points
2 for loan origination fees plus one point on the total loan amount."
3 SAC ¶ 23. Construing this allegation in the light most favorable
4 to the nonmoving party, the Court infers that at least some of
5 these telephone conversations between Cresson and Fitzgerald
6 occurred before the money was wired into escrow and that Fitzgerald
7 relied on these conversations when wiring the money.

8 Without knowing more about the nature of the Roem loan, it is
9 too early for the Court to determine whether Cresson's alleged
10 representations concerning his family's participation in the Roem
11 loan were or were not material misrepresentations. Plaintiff's SAC
12 focuses on Cresson's representation that Plaintiff would receive a
13 return of seventeen percent, as well as points for participation in
14 the Roem loan, id. ¶ 49, and Plaintiff alleges he relied on these
15 representations when he wired the money into the escrow account,
16 id. ¶ 51. These allegations are sufficient to state a fraud claim
17 against Cresson, and Plaintiff's allegations that Carter and South
18 Bay participated in removing the money from the escrow account are
19 sufficient to identify their role in the alleged fraudulent scheme.
20 Whether there is evidence to support these allegations is a
21 question for another day, but they are sufficient to survive a
22 motion to dismiss. The Court DENIES the Loanvest Defendants'
23 motion to dismiss Plaintiff's first cause of action.

24 **B. Negligent Misrepresentation**

25 Plaintiff's second cause of action asserts a claim for
26 negligent misrepresentation against Miller, Cresson, Loanvest and
27 Sentinel. The elements of negligent misrepresentation are: (1)
28 misrepresentation of a past or existing material fact, (2) without

1 reasonable grounds for believing it to be true, (3) with intent to
2 induce another's reliance on the misrepresentation, (4) ignorance
3 of the truth and justifiable reliance on the misrepresentation by
4 the party to whom it was directed, and (5) resulting damage. Glenn
5 K. Jackson Inc. v. Roe, 273 F.3d 1192, 1200 n.2 (9th Cir. 2001).

6 The SAC alleges that Miller and Cresson are the alter egos of
7 Loanvest, and the SAC also alleges that Miller is the sole owner of
8 Sentinel. SAC ¶¶ 5, 11. The SAC alleges misrepresentations by
9 Miller and Sentinel with respect to the Bretz transaction. Id.
10 ¶¶ 18-19. Plaintiff claims to have suffered losses as a result of
11 its reliance on Miller and Sentinel's representations concerning
12 the collateral used to secure the loan in the Bretz transaction.
13 Id. ¶¶ 19-20, 60. As explained above, the SAC also contains
14 numerous allegations that Miller and Cresson misrepresented the
15 terms of Plaintiff's participation in the Roem transaction, and
16 that Plaintiff relied on these misrepresentations when wiring
17 \$930,000 into the escrow account. See id. ¶¶ 22-42. Plaintiff
18 alleges it was deprived of its expected participatory interest in
19 the Roem loan, despite the use of its money, and despite Miller's
20 and Cresson's representations to the contrary. Id. These factual
21 allegations are sufficient to lend plausibility to Plaintiff's
22 claim for negligent misrepresentation against Miller, Cresson,
23 Loanvest and Sentinel. The Court DENIES the requests to dismiss
24 Plaintiff's second cause of action filed by the Miller Defendants
25 and the Loanvest Defendants.

26 **C. Violation of RICO**

27 Plaintiff's third cause of action alleges that Miller,
28 Cresson, South Bay and Carter violated RICO. The four elements of

1 a RICO violation are: (1) conduct (2) of an enterprise (3) through
2 a pattern (4) of racketeering activity. Jarvis v. Regan, 833 F.2d
3 149, 151 (9th Cir. 1987).

4 Here, Plaintiff fails to allege a pattern of racketeering
5 activity. There can be no pattern of racketeering under RICO
6 absent the perpetration of at least two predicate acts of
7 racketeering activity within a ten-year period. H.J. Inc. v.
8 Northwestern Bell Tel Co., 492 U.S. 229, 232 (1989). While
9 allegations of two or more predicate acts are a necessary condition
10 to the establishment of a pattern, they are not sufficient; "it
11 must also be shown that the predicates themselves amount to, or
12 that they otherwise constitute a threat of, *continuing* racketeering
13 activity." H.J. Inc., 492 U.S. at 240 (emphasis in original).

14 This continuity requirement may be satisfied by proof of
15 either "closed-ended" or "open-ended" continuity. Id. at. 241.
16 Closed-ended continuity involves "a closed period of repeated
17 conduct," while open-ended continuity involves "past conduct that
18 by its nature projects into the future with a threat of
19 repetition." Id. For open-ended continuity, "[t]he circumstances
20 of the case . . . must suggest that the predicate acts are
21 indicative of a threat of continuing activity." Medallion
22 Television Enters. v. SelectTV of Cal., 833 F.2d 1360, 1363 (9th
23 Cir. 1987).

24 Here, the predicate acts are "the acts in furtherance of the
25 fraud in the Bretz Transaction and the acts in furtherance of the
26 fraud in the ROEM Transaction." SAC ¶ 68. The SAC does not allege
27 that the Loanvest Defendants had any involvement in the Bretz
28 transaction. The allegations in the SAC against the Loanvest

1 Defendants are limited to the Roem transaction. As such, the SAC
2 does not even allege two predicate acts against the Loanvest
3 Defendants. The Court GRANTS the Loanvest Defendants' motion to
4 dismiss the RICO claim against them.

5 With regard to the Miller Defendants, although the SAC alleges
6 their involvement in both the Bretz and Roem transactions, there is
7 no indication of a threat of continuing activity. In Medallion,
8 the Ninth Circuit held that plaintiff, an entity which had entered
9 into a joint venture with defendant to acquire and exploit
10 television broadcasting rights to a boxing match, could not allege
11 a pattern of racketeering activity based on defendant's
12 misrepresentations about the number of licensing agreements it had
13 obtained. 833 F.2d at 1363-64. The Ninth Circuit stated that
14 "Medallion's allegations concern a single fraudulent inducement to
15 enter a contract. Once the joint venture had acquired the
16 broadcast rights, the fraud, if indeed it was a fraud, was complete
17 . . . Medallion was the single victim of the alleged fraud." Id.
18 Similarly, here, the acts in furtherance of the alleged fraud in
19 the Bretz transaction were complete when Plaintiff loaned the
20 \$270,000 to the non-party borrowers, and the acts in furtherance of
21 the alleged fraud in the Roem transaction were complete when
22 Plaintiff's \$930,000 was removed from the escrow account. In both
23 cases, Plaintiff was the single victim of the alleged fraud. As
24 Plaintiff has not alleged "past conduct that by its nature projects
25 into the future with a threat of repetition," H.J. Inc., 492 U.S.
26 at 242, Plaintiff has not alleged that the Miller Defendants
27 engaged in a pattern of racketeering activity.

1 In response, Plaintiff points to the following allegation:
2 "Defendants continue to engage in fraudulent acts and policies with
3 respect to the lending of money to borrowers. Insofar as these
4 Defendants continue to participate in the business of lending money
5 to borrowers, their criminal conduct is specifically threatened to
6 be repeated or to extend indefinitely into the future." SAC ¶ 68.
7 This statement is a mere legal conclusion, unsupported by factual
8 allegations, and the Court does not accept its truth. See Iqbal,
9 129 S.Ct. at 1949 (2009).

10 Plaintiff also contends that the fraud associated with the
11 Roem transaction continues to this day because Defendants receive
12 regular loan repayments from Roem, and they have failed to deliver
13 any portion of that money to Plaintiff. Opp'n to Miller MTD at 5-
14 6; Opp'n to Loanvest MTD at 5. However, "the fact that Defendants
15 continue to reap the benefits of their alleged illegal activity
16 and/or that . . . [Plaintiff] continues to suffer the effects
17 thereof, is of no import to the Court's 'continuity'
18 determination." Streamcast Networks, Inc. v. Skype Techs., S.A.,
19 No. 06-391, 2006 U.S. Dist. LEXIS 97392, at *22 (C.D. Cal. Sept.
20 14, 2006); see also Pier Connection v. Lakhani, 907 F. Supp. 72, 76
21 (S.D.N.Y. 1995) (recognizing that defendants' "continuing to reap
22 such benefits [of a fraudulent scheme] is not itself a predicate
23 act; it is only an effect of the alleged acts"). Having
24 failed to allege a pattern of racketeering activity, the Court
25 GRANTS the Miller Defendants' motion to dismiss the RICO claim
26 against them.

27 It is clear to the Court that Plaintiff's RICO claim cannot be
28 saved by amendment. The Court's discretion to dismiss a claim

1 without leave to amend is particularly broad where the plaintiff
2 has previously filed an amended complaint. Miller v. Yokohama Tire
3 Corp., 358 F.3d 616, 622 (9th Cir. 2004). Here, the complaint has
4 been amended twice, and Plaintiff's alleged injury is exclusively
5 focused on the loss of money it provided in the Bretz transaction
6 and the Roem transaction. See SAC ¶¶ 17-42. The alleged fraud
7 associated with these transactions is complete, and there are no
8 allegations that Plaintiff entered into any other transactions with
9 the Miller Defendants and/or the Loanvest Defendants. Therefore,
10 the Court dismisses the RICO claim WITHOUT LEAVE TO AMEND.

11 **D. California's Business and Professions Code, Breach of**
12 **Fiduciary Duty, and Claim for Money Had and Received**

13 Plaintiffs' fourth cause of action alleges that the Miller
14 Defendants and the Loanvest Defendants violated California's
15 Business and Professions Code. SAC ¶¶ 70-76. The fifth cause of
16 action alleges that the Miller Defendants breached their fiduciary
17 duty to Plaintiff, id. ¶¶ 77-80, and the sixth cause of action is a
18 claim for money had and received against the Miller Defendants and
19 the Loanvest Defendants, id. ¶¶ 81-84.

20 The Miller Defendants contend these three causes of action
21 should fail because Plaintiff's fraud claim fails. Miller MTD at
22 9. Similarly, the Loanvest Defendants contend that the fourth and
23 sixth causes of action fail because Plaintiff's fraud claim fails.
24 Loanvest MTD at 9. The Court has denied the motions to dismiss
25 Plaintiff's fraud claim, see Part IV.A, supra, and hence the Court
26 must also DENY the Miller Defendants' request to dismiss
27 Plaintiff's fourth, fifth and sixth causes of action, and the
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1 Loanvest Defendants' request to dismiss the fourth and sixth causes
2 of action.

3 Furthermore, an action for money had and received aims to
4 recover money paid on a contract whose consideration has failed,
5 Bank of Am. Nat'l Turst and Saving Ass'n v. Hayden, 231 F.2d 595,
6 601 (9th Cir. 1956). As explained below, see Part IV.E, Plaintiff
7 adequately states a claim for breach of contract, and therefore the
8 Court finds that the claim for money had and received remains
9 viable at this early stage of the proceedings.

10 **E. Breach of Written and/or Oral Contract and Implied**
11 **Covenant of Good Faith**

12 Plaintiff's seventh and eighth causes of action allege that
13 Miller, Sentinel, Cresson, and Loanvest breached a written and/or
14 oral contract with Plaintiff. SAC ¶¶ 85-98. "A cause of action
15 for breach of contract is comprised of the following elements: (1)
16 the contract, (2) plaintiff's performance or excuse for
17 nonperformance, (3) defendant's breach, and (4) the resulting
18 damages to plaintiff." Careau & Co. v. Sec. Pac. Bus. Credit,
19 Inc., 272 Cal. Rptr. 387, 395 (Ct. App. 1990).

20 The SAC alleges as follows:

21 On or about October 19, 2009, Defendant MILLER, on behalf
22 of himself and LOANVEST XIII and his and its alter egos,
23 made the written offer set forth in his e-mail of that
24 date. The terms of the written offer were that in
25 exchange for CONCORDE'S delivery of money into an escrow
26 account . . . these Defendants and each of them would pay
27 CONCORDE 17% return on the money delivered, plus 4 points
28 at close. Additionally, each of the Defendants agreed
that although the loan document reflected only Loanvest
as the lender, CONCORDE would "go direct on title" for
its pro-rata share of the ROEM loan by way of assignment
at close of the loan. The offer confirmed that each of
these Defendants would provide title insurance for
CONCORDE's position when the loan closed.

1 SAC ¶ 86. Plaintiff alleges this offer was made in relation to a
2 \$4 million loan, but the amount was later modified by mutual
3 agreement and confirmed in writing. Id. ¶ 87. Plaintiff alleges
4 it accepted the offer, wired \$930,000 into the escrow account, but
5 that Miller, Sentinel, Cresson, and Loanvest failed to perform
6 their obligations by "failing to ensure that CONCORDE's interest in
7 the loan was properly documented, failing to ensure that CONCORDE's
8 interest was placed directly on title, failure to ensure that
9 CONCORDE received title insurance at close of the loan, and failure
10 to deliver any form of written confirmation of CONCORDE's position
11 in the completed ROEM transaction." Id. ¶¶ 88-89.

12 These allegations are clearly sufficient to state a claim for
13 breach of contract against the Miller Defendants. It is alleged
14 that the October 19, 2009 email set forth specific contract terms,
15 and that Plaintiff accepted the offer and performed under the
16 contract by wiring the money into the escrow account. Id. ¶¶ 86-
17 88. It is alleged that the Miller Defendants breached the contract
18 by not living up to its terms, and that Plaintiff has been harmed
19 as a result. Id. ¶¶ 89-91. As such, the Court DENIES the Miller
20 Defendants' motion to dismiss Plaintiff's seventh and eighth causes
21 of action.

22 Whether these allegations are sufficient to state claims for
23 breach of written and oral contract against Cresson and Loanvest is
24 a closer call. Plaintiff's claim for breach of written contract is
25 based on an October 19, 2009 email sent from Miller to Fitzgerald.
26 See SAC ¶¶ 27, 86. Plaintiff ties this claim to Cresson and
27 Loanvest by alleging that Miller was acting "on behalf of himself
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1 and LOANVEST XIII and his and its alter egos." Id. ¶ 86.

2 Plaintiff alleges that both Miller and Cresson are the alter egos
3 of Loanvest, id. ¶ 11. Based on these allegations concerning the
4 relationship between Miller, Cresson, and Loanvest, the Court finds
5 it is premature to dismiss Plaintiff's claim for breach of written
6 contract against Cresson and Loanvest.

7 The SAC also alleges that Cresson engaged in telephone
8 conversations with Plaintiff concerning the terms of Plaintiff's
9 participation in the Roem loan. Id. ¶ 23. This factual allegation,
10 coupled with the allegation that Loanvest and Cresson are one and
11 the same, supports Plaintiff's claim for breach of oral contract
12 against Cresson and Loanvest. If discovery reveals that the nature
13 of the relationship between Miller, Cresson, and Loanvest is other
14 than as alleged, then the Court can revisit the question of whether
15 Cresson and Loanvest breached a written and/or oral contract with
16 Plaintiff at a later stage of these proceedings. The Court DENIES
17 the Loanvest Defendants' motion to dismiss the seventh and eighth
18 causes of action.

19 As the SAC states a claim for breach of written and/or oral
20 contract against the Loanvest Defendants, the Court also DENIES
21 their request for the Court to dismiss Plaintiff's ninth cause of
22 action for breach of the implied covenant of good faith and fair
23 dealing. This is also an issue that the Court can revisit once the
24 parties have had an opportunity to conduct discovery.

25 **F. Unjust Enrichment/Quasi-Contract**

26 The Miller Defendants contend that Plaintiff's claim for
27 unjust enrichment is a remedy, and as such, the tenth cause of
28 action should be dismissed. Miller MTD at 10. There is a split of

1 authority in California as to whether a claim for unjust enrichment
2 is recognized as an independent cause of action. Some courts have
3 affirmatively stated that "unjust enrichment is not a cause of
4 action." Jogani v. Super. Ct., 165 Cal. App. 4th 901, 911 (Ct.
5 App. 2008) (citing Melchior v. New Line Prods., Inc., 106 Cal. App.
6 4th 779, 793 (Ct. App. 2003)). Other courts allow an independent
7 claim of unjust enrichment. See, e.g., Lectodryer v. Seoulbank, 77
8 Cal. App. 4th 723, 726 (Ct. App. 2000) (to state claim for unjust
9 enrichment, Plaintiff must plead "receipt of a benefit and the
10 unjust retention of the benefit at the expense of another.")
11 However, California courts agree that "unjust enrichment" is an
12 effect, "the result of a failure to make restitution under
13 circumstances where it is equitable to do so." Melchior, 106 Cal.
14 App. 4th at 793; see also McBride v. Boughton, 123 Cal. App. 4th
15 379, 388 (Ct. App. 2004) (construing purported cause of action for
16 unjust enrichment as attempt to plead cause of action giving rise
17 to right to restitution).

18 Here, Plaintiff's tenth cause of action is labeled "Quasi-
19 Contract," and Plaintiff alleges that the Miller Defendants and the
20 Loanvest Defendants are benefiting from money that Plaintiff placed
21 in escrow because they used that money to fund a loan but, contrary
22 to their representations to Plaintiff, they have denied Plaintiff
23 any participatory interest in that loan. SAC ¶¶ 22-42, 105-07.
24 Under these circumstances, Plaintiff is entitled to seek
25 restitution of its money, and hence the Court will not dismiss
26 Plaintiff's quasi-contract claim.

27 The Loanvest Defendants' only argument against the tenth cause
28 of action is that an unjust enrichment claim must fail if the

1 underlying fraud claim fails. Loanvest MTD at 9. Having denied
2 the motions to dismiss Plaintiff's fraud claim, see Part IV.A,
3 supra, the Court is not persuaded by this argument.

4 **G. Resulting Trust**

5 Plaintiff's twelfth cause of action is entitled "Resulting
6 Trust." Both the Miller Defendants and the Loanvest Defendants
7 contend that a resulting trust is a remedy, not a cause of action.
8 Miller MTD at 10; Loanvest MTD at 11. While the court in
9 Stansfield v. Starkey stated that a resulting trust as a remedy,
10 not a cause of action, 220 Cal. App. 3d 59, 76 (Ct. App. 1990),
11 other California courts have entertained causes of action that seek
12 to impose a resulting trust. See, e.g., Fidelity Nat'l Title Ins.
13 Co. v. Schroeder, 179 Cal. App. 4th 834, 850 (Ct. App. 2009)
14 (allowing judgment creditor to maintain resulting trust cause of
15 action). "A resulting trust arises by operation of law from a
16 transfer of property under circumstances showing that the
17 transferee was not intended to take the beneficial interest."
18 Lloyds Bank California v. Wells Fargo Bank, 187 Cal. App. 3d 1038,
19 1042 (Ct. App. 1986). Whether labeled as a cause of action, or a
20 remedy, the Court's focus is the gravamen of Plaintiff's complaint
21 based on the alleged facts. If the Miller Defendants and the
22 Loanvest Defendants took Plaintiff's money out of the escrow
23 account and used that money to fund a loan from Loanvest to Roem,
24 then Plaintiff may have an equitable or beneficial interest in the
25 property used to secure that loan. The Court DENIES the request to
26 dismiss Plaintiff's twelfth cause of action.

27 **H. Quia Timet**

28 Plaintiff's fifteenth cause of action is labeled "Quia Timet."

"Quia timet (literal translation, 'because he fears'), is an action for equitable relief against an anticipated injury." Escrow Agents' Fidelity Corp. v. Super. Ct., 4 Cal. App. 4th 491, 494 (Ct. App. 1992). Bills quia timet are ordinarily applied to prevent anticipated mischief, not to redress wrongs after they have occurred. Id. Bills quia timet are most often filed in surety cases, where a surety, after the debt for which he is liable has become due, seeks to compel the principal to pay the debt. Id.

In this case, the Court has already denied Plaintiff's request for injunctive relief seeking to compel Defendants to cooperate with a receiver. See Docket No. 39 ("June 9, 2010 Order"). Plaintiff primarily seeks redress for alleged wrongs that have already occurred associated with the Bretz transaction and the Roem transaction. The allegations in this case do not support Plaintiff's statement that it "has no adequate remedy at law for the injury that would be caused by the defendants' sale of their beneficial interests in the ROEM Transaction." SAC ¶ 133. As noted in the Court's previous order, there is nothing to suggest that any of the Defendants in this case are of doubtful financial standing, and nothing to suggest that Defendants would not be able to satisfy a monetary judgment against them. June 9, 2010 Order at 5-7. Because Plaintiff seeks the return of its money, the Court DISMISSES Plaintiff's quia timet cause of action WITHOUT LEAVE TO AMEND.

I. Declaratory Relief

Plaintiff's eleventh cause of action seeks a judicial determination of the rights and liabilities of the parties with regard to the Roem transaction. SAC ¶¶ 108-111. This cause of

1 action is ultimately a request for relief. Weiner v. Klais and
2 Co., Inc., 108 F.3d 86, 92 (6th Cir. 1997). Declaratory relief may
3 be unnecessary where an adequate remedy exists under some other
4 cause of action. Mangindin v. Wash. Mut. Bank, 637 F. Supp. 2d
5 700, 707 (N.D. Cal. 2009). Likewise, "[d]eclaratory relief should
6 be denied when it will neither serve a useful purpose in clarifying
7 and settling the legal relations in issue nor terminate the
8 proceedings and afford relief from the uncertainty and controversy
9 faced by the parties." United States v. Washington, 759 F.2d 1353,
10 1356-57 (9th Cir. 1985) (en banc) (per curiam) (citations omitted).

11 In the present case, Plaintiff's request for declaratory
12 relief is redundant and duplicative of Plaintiff's other claims.
13 Plaintiff's request is identical to the relief sought in the other
14 viable causes of action, and the resolution of those causes of
15 action would afford Plaintiff the exact relief sought in the cause
16 of action for declaratory relief. Accordingly, the Court DISMISSES
17 the eleventh cause of action for declaratory relief WITHOUT LEAVE
18 TO AMEND.

19
20 **V. CONCLUSION**

21 For the reasons stated above, the Court GRANTS IN PART and
22 DENIES IN PART the motions to dismiss filed by Defendants Kenneth
23 Alfred Miller, Sentinel Investment Management Company, Loanvest
24 XIII, L.P., South Bay Real Estate Commerce Group, Peter Scott
25 Carter, Jr., and George Cresson. The Court DISMISSES WITH
26 PREJUDICE Plaintiff's claim that there was a violation of the
27 Racketeer Influenced and Corrupt Organization Act. The Court
28 DISMISSES WITH PREJUDICE Plaintiff's claims for declaratory relief

1 and quia timet. In all other respects, the Court DENIES the
2 motions to dismiss filed by Kenneth Alfred Miller, Sentinel
3 Investment Management Company, Loanvest XIII, L.P., South Bay Real
4 Estate Commerce Group, Peter Scott Carter, Jr., and George Cresson.

5
6 IT IS SO ORDERED.

7
8 Dated: August 10, 2010

9 
UNITED STATES DISTRICT JUDGE