

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 10-1993 CW

JUST FILM, INC.; RAINBOW BUSINESS SOLUTIONS, doing business as PRECISION TUNE AUTO CARE; BURLINGAME MOTORS, INC.; DIETZ TOWING, INC.; THE ROSE DRESS, INC.; VOLKER VON GLASENAPP; JERRY SU; VERENA BAUMGARTNER; TERRY JORDAN; LEWIS BAE; and ERIN CAMPBELL, on behalf of themselves, the general public and those similarly situated,

ORDER ON DEFENDANTS' MOTIONS (Docket Nos. 221, 246, 247, 248 and 249)

Plaintiffs,

v.

MERCHANT SERVICES, INC.; NATIONAL PAYMENT PROCESSING; UNIVERSAL MERCHANT SERVICES, LLC; UNIVERSAL CARD, INC.; JASON MOORE; NATHAN JURCZYK; ROBERT PARISI; ERIC MADURA; FIONA WALSHE; ALICYN ROY; MBF LEASING, LLC; NORTHERN FUNDING, LLC; NORTHERN LEASING SYSTEMS, INC.; GOLDEN EAGLE LEASING, LLC; LEASE SOURCE-LSI, LLC; LEASE FINANCE GROUP, LLC; JAY COHEN; LEONARD MEZEI; SARA KRIEGER; BRIAN FITZGERALD; SAM BUONO; MBF MERCHANT CAPITAL, LLC; RBL CAPITAL GROUP, LLC; WILLIAM HEALY; JOSEPH I. SUSSMAN; JOSEPH I. SUSSMAN, PC; and SKS ASSOCIATES, LLC,

Defendants.

AND ALL RELATED CROSS-CLAIMS

Plaintiffs Just Film, Inc., and its owner Volker von Glasenapp; Rainbow Business Solutions, doing business as Precision Tune Auto Care, and its owner Jerry Su; Burlingame Motors, Inc., and its owner Verena Baumgartner; Dietz Towing, Inc., and its owner Terry Jordan; The Rose Dress, Inc., and its owner Lewis Bae; and

1 Erin Campbell allege that twenty-eight Defendants defrauded them in
2 a scheme involving credit and debit card processing services and
3 equipment. Defendants Merchant Services, Inc. (MSI); Universal
4 Card, Inc.; Universal Merchant Services LLC; National Payment
5 Processing; Jason Moore; Nathan Jurczyk; Eric Madura; Robert
6 Parisi; and Alicyn Roy (collectively, MSI Defendants) move to
7 dismiss certain claims against them for failure to state a claim.
8 Separately, Universal Card, National Payment Processing and Moore
9 move to compel arbitration of the claims of Just Film, Rainbow
10 Business Solutions, Burlingame Motors, Dietz Towing and their
11 respective owners. Defendants William Healy and MBF Merchant
12 Capital, LLC, move to dismiss Plaintiffs' claims against them for
13 lack of personal jurisdiction and failure to state a claim.
14 Defendants Northern Leasing Systems, Inc.; Northern Funding, LLC;
15 MBF Leasing, LLC; Golden Eagle Leasing, LLC; Lease Source-LSI, LLC;
16 Lease Finance Group, LLC; RBL Capital Group and Joseph I. Sussman,
17 PC (collectively, Leasing Defendant Entities) move to dismiss
18 certain claims against them for failure to state a claim and
19 improper venue, and to compel arbitration of Campbell's claims.
20 Defendants Jay Cohen; Leonard Mezei; Sara Krieger; Sam Buono;
21 Joseph I. Sussman; and Brian Fitzgerald (collectively, Leasing
22 Defendant Control Persons) move to dismiss Plaintiffs' claims
23 against them for lack of personal jurisdiction, improper venue and
24 failure to state a claim. These individual Defendants also move to
25 compel arbitration of Campbell's claims. Finally, Defendant Fiona
26 Walshe joins portions of the MSI Defendants' motion to dismiss and
27 offers additional arguments why Plaintiffs' first cause of action
28 against her must be dismissed. Universal Card, et al.'s motion to

1 compel arbitration was heard on June 2, 2011; the remaining motions
2 were taken under submission on the papers. Having considered oral
3 argument and the papers submitted by the parties, the Court GRANTS
4 in part and DENIES in part MSI Defendants' motion to dismiss;
5 DENIES Universal Card, et al.'s motion to compel; GRANTS Healy and
6 MBF Merchant Capital's motion to dismiss; GRANTS in part and DENIES
7 in part Leasing Defendant Entities and Leasing Defendant Control
8 Persons' motions to dismiss and to compel arbitration; and GRANTS
9 in part and DENIES in part Walshe's motion to dismiss.

10 BACKGROUND

11 Plaintiffs are six individuals and five businesses. Below,
12 for brevity, each individual Plaintiff's last name is used to refer
13 to both that Plaintiff and his or her business. Plaintiffs divide
14 the twenty-eight Defendants into two categories: Merchant Services
15 Defendants and Leasing Defendants.

16 Merchant Services Defendants are California-based entities and
17 individuals. Plaintiffs allege that MSI operates under the names
18 Universal Card, Inc.; National Payment Processing; and Universal
19 Merchant Services LLC. Plaintiffs collectively refer to these
20 entities as the Merchant Services Companies, each of which is
21 allegedly the alter ego of the others. Plaintiffs allege the
22 following about the individual Merchant Services Defendants: Moore
23 is MSI's chief executive officer (CEO) and the majority shareholder
24 of each of the Merchant Services Companies; Jurczyk is Vice
25 President of Operations for National Payment Processing and a
26 shareholder of an unspecified Merchant Services Company; Parisi is
27 National Payment Processing's Senior Vice President and a
28 shareholder of an unspecified Merchant Services Company; Madura is

1 National Payment Processing's Manager of Corporate Operations;
2 Walshe was a regional sales manager for the Merchant Services
3 Companies; and Roy was a senior account executive for the Merchant
4 Services Companies. Plaintiffs contend that the Merchant Services
5 Companies are alter egos of Moore, Jurczyk and Parisi.

6 Leasing Defendants are entities and individuals based outside
7 of California. Plaintiffs allege that Northern Leasing has a
8 principal place of business in New York and owns MBF Leasing,
9 Golden Eagle Leasing, Lease Source-LSI, Lease Finance Group, and
10 Defendant SKS Associates, LLC. Plaintiffs collectively refer to
11 these entities as the Northern Leasing Companies, each of which is
12 allegedly the alter ego of the others. The following individuals
13 allegedly directed and controlled the Northern Leasing Companies:
14 Cohen, Northern Leasing's president and CEO; Mezei, Northern
15 Leasing's chairman of the board; Krieger, Northern Leasing's Vice
16 President for Operations; Fitzgerald, MBF Leasing's former
17 Executive Vice President for Business Development; Buono, Northern
18 Leasing's and MBF Leasing's former Vice President of Collections
19 and Customer Service; and Sussman, an attorney. These individuals
20 allegedly invest profits obtained through the alleged fraud in
21 shell companies, such as Northern Funding.

22 Plaintiffs also include as Leasing Defendants MBF Merchant
23 Capital, which has a principal place of business in Illinois, and
24 RBL Capital Group, LLC, which has a principal place of business in
25 New York. Plaintiffs allege that Healy is MBF Merchant Capital's
26 president and sole shareholder and RBL Capital Group's former
27 president.

28 Plaintiffs explain the alleged fraud as follows. Credit and

1 debit card transactions are processed through financial networks,
2 called interchanges, run by entities like Visa and Mastercard.
3 Financial institutions, as members of these interchanges, can sell
4 card processing services directly to merchants, or indirectly
5 through companies and individuals known as Independent Sales
6 Organizations and Merchant Service Providers (ISOs/MSPs). These
7 ISOs/MSPs must be licensed and registered with the financial
8 institutions.

9 Merchants pay a fee for each credit and debit card
10 transaction. The fee is "shared among (1) the bank that issued the
11 credit or debit card to the customer, (2) the interchange, (3) the
12 bank through whom the merchant is accepting the card,
13 (4) the ISO/MSP that solicited the merchant and/or provides
14 customer service to the merchant (if any) and (5) the third
15 party-processor (if any)." 2AC ¶ 69. Merchants may also be
16 required to pay for credit and debit card processing equipment,
17 such as card terminals.

18 In this case, Merchant Services Defendants are ISO/MSPs, and
19 Leasing Defendants provided card processing equipment. In or about
20 2003, Healy and Moore executed a contract involving the Merchant
21 Services Companies, Moore and Leasing Defendants. 2AC ¶ 139.
22 Under the arrangement, Merchant Services Defendants marketed
23 equipment leases to merchants on behalf of MBF Leasing. Id. ¶ 133.

24 When marketing card processing services, the Merchant Services
25 Companies' independent sales agents, such as Walshe, misled
26 merchants about card transaction rates. In particular, these sales
27 agents used a so-called Rate Sheet, which suggested that the
28 merchants would be charged a fixed rate of 1.79 percent for each

1 card transaction plus a flat monthly service fee. In fact,
2 however, the rates for each transaction varied based on the type of
3 credit card a consumer used. Further, not all of the charges
4 associated with card processing services were reflected on the Rate
5 Sheet, even though sales agents represented they were. The Rate
6 Sheet had a signature line for a merchant to affirm that "all fees
7 have been sufficiently explained to my satisfaction." 2AC ¶ 212.
8 If a merchant decided to seek card processing services through
9 Merchant Services Defendants, the merchant generally was asked to
10 sign an Application for Merchant Agreement. Sales agents were
11 instructed to represent that the Application reflected "the entire
12 arrangement with the Merchant Services Defendants." Id. ¶ 257.
13 However, sales agents did not provide the merchant with the
14 Merchant Card Processing Agreement (MCPA), which provided the terms
15 for card processing services. The Application referred to the MCPA
16 and instructed the merchant "to review the terms and conditions of
17 a 'Merchant Card Processing Agreement included with this
18 application.'" Id. ¶ 258.

19 The sales agents also misrepresented the need for and value of
20 leasing card processing equipment from MBF Leasing. Equipment
21 Finance Leases (EFLs) governed merchants' use of this equipment.

22 Von Glasenapp, Su, Baumgartner, Jordan and Bae sought card
23 processing services through Merchant Services Defendants, relying
24 on misrepresentations by sales agents or on the Rate Sheet. These
25 Plaintiffs' circumstances differed. Su and Baumgartner signed the
26 Rate Sheet, but there are no allegations that Von Glasenapp, Jordan
27 or Bae also did so. Su signed the Application for Merchant
28 Agreement, Jordan initialed the first page, and Bae was presented

1 with the first page but does not appear to have signed it. Von
2 Glasenapp allegedly never saw an Application for Merchant
3 Agreement, and Baumgartner contends that someone forged her
4 signature on the Application attributed to her. Von Glasenapp's,
5 Su's, Baumgartner's and Jordan's MCPAs, which they contend they
6 never received, were contracts between them and non-parties
7 TransFirst and Columbus Bank & Trust (CB&T),¹ which performed card
8 processing services. These Plaintiffs' MCPAs contained arbitration
9 and forum selection clauses, requiring arbitration in Colorado of
10 any dispute arising from the MCPA. Bae's MCPA, which he contends
11 he never received, was between him and non-party Fifth Third Bank,²
12 another card processor. His MCPA designated Cincinnati or Hamilton
13 County, Ohio as the proper forum for any lawsuit arising from the
14 contract, but did not require arbitration. According to
15 Plaintiffs, although the MCPAs may have signatures acknowledging
16 their terms, this is because "Merchant Services Defendants create a
17 signed version using scanners and computer programs to copy the
18 signature . . . onto the document." 2AC ¶ 264.

19 Von Glasenapp signed a one-page EFL; Su "signed the personal
20 guaranty portion" of the EFL, 2AC ¶ 388; and Jordan was presented
21 with only the first page of the EFL and signed it. Although sales
22 agents offered Baumgartner and Bae an equipment lease, they

24 ¹ Plaintiffs originally named TransFirst Holdings, Inc.;
25 TransFirst, LLC; TransFirst Third Party Sales, LLC; and Columbus
26 Bank and Trust as Defendants in this action. However, Plaintiffs
voluntarily dismissed their claims against these entities on

27 ² Although Plaintiffs originally named Fifth Third Bank as a
28 Defendant, they dismissed their claims against it on December 30,
2010. (Docket No. 180.)

1 declined. Nevertheless, EFLs were executed for Baumgartner and
2 Bae, and they contend that the signatures on the EFLs attributed to
3 them are forged.

4 Campbell did not have any interactions with Merchant Services
5 Defendants and did not enter into an MCPA. However, in 2002, she
6 executed an EFL with Lease Finance Group for a forty-eight-month
7 lease. The EFL required monthly payments of \$79.95 per month and
8 included an arbitration clause, providing,

9 Any claim or controversy including any contract or tort
10 claim, between or among us, you or any Guarantor related
11 to this Lease, shall be determined by binding arbitration
12 in accordance with Title 9 of the U.S. Code and the
13 Commercial Arbitration Rules of the American Arbitration
14 Association. All statutes otherwise applicable shall
15 apply. Judgment upon the arbitration award may be
16 entered in any court having jurisdiction. In event you
17 or Guarantor Defaults, these provisions regarding
18 arbitration shall not apply to our right to repossess the
19 Equipment. This Lease is made in interstate commerce.
20 Any arbitration shall take place in Chicago, Illinois.

21 Krieger Decl. in Support of Mot. to Compel Arbitration (Krieger
22 Arbitration Decl.), Ex. 1, at 3.³

23 Plaintiffs complain about various fees they were charged. By
24 using "different bill formats to confuse customers and hide false
25 charges," Merchant Services Defendants billed merchants "for fees
26 purportedly incurred when processing transactions." 2AC ¶ 282.

27 ³ Although courts generally cannot consider documentary
28 evidence on a motion to dismiss, doing so is appropriate when the
pleadings refer to the documents, their authenticity is not in
question and there are no disputes over their relevance. Coto
Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010);
Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (holding that
courts may properly consider documents "whose contents are alleged
in a complaint and whose authenticity no party questions, but which
are not physically attached to the [plaintiff's] pleadings").
Although Plaintiffs dispute the authenticity of portions of the
MCPAs, they do not challenge the sections that name these
Defendants as parties to the agreements.

1 The billing statements were not itemized, but instead contained
2 lump sums that included "fraudulent charges." 2AC ¶ 282.

3 Von Glasenapp, Jordan and other merchants also received
4 "letters a couple times a year informing them of their obligation
5 to pay a personal property tax on the equipment they" leased. 2AC
6 ¶ 274. Leasing Defendants determined the amount of this tax and
7 debited it, along with a processing fee, from Von Glasenapp's,
8 Jordan's and other merchants' bank accounts. However, the
9 collected taxes "are not actually due to, nor are they remitted to,
10 any taxing authority." Id. ¶ 277. Instead, the funds were
11 transferred to shell companies owned by Leasing Defendants.

12 To collect on delinquent bills, Sussman, on behalf of Leasing
13 Defendants, filed lawsuits in New York, with the intention to
14 "obtain default judgments which can be sold to collection agencies
15 and also to extort payment from Class members who wish to preserve
16 their good credit ratings." 2AC ¶ 295. Sussman and Sussman PC
17 (hereinafter, the Sussman Law Firm) "routinely violate" provisions
18 of New York Civil Practice Law and Rules. Id. ¶ 307. Sussman
19 allegedly filed lawsuits against Bae on July 27, 2006 and March 22,
20 2010.

21 Finally, certain Defendants engaged in unlawful conduct with
22 respect to Von Glasenapp's and Bae's consumer credit reports. In
23 particular, without a permissible purpose, MBF Leasing inquired
24 into Von Glasenapp's consumer credit report on February 20, 2009
25 and placed a negative notation on it in April 2009. Also without a
26 permissible purpose, Universal Merchant Services inquired into Von
27 Glasenapp's consumer credit report on March 20, 2009. Northern
28 Leasing placed a negative notation on Bae's consumer credit report

1 sometime after Sussman filed the July 2006 lawsuit on its behalf.
2 On September 25, 2008, December 11, 2009, and February 22, 2010,
3 without a permissible purpose, MBF Leasing inquired into Bae's
4 credit report.

5 Unless otherwise stated, the following claims are asserted by
6 all Plaintiffs except Campbell and are against all Defendants:⁴
7 (1) by all Plaintiffs, violation of the federal Racketeer
8 Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.
9 § 1962(c); (2) by all Plaintiffs, conspiracy to commit a RICO
10 violation, in violation of 18 U.S.C. § 1962(d); (3) intentional
11 misrepresentation, against all Defendants except Healy and MBF
12 Merchant Capital; (4) negligent misrepresentation, against all
13 Defendants except Healy and MBF Merchant Capital; (5) violation of
14 California's False Advertising Law, Cal. & Bus Prof. Code §§ 17500,
15 et seq., against all Defendants except Healy and MBF Merchant
16 Capital; (6) breach of contract, against Merchant Services
17 Defendants, the Northern Leasing Companies and Leasing Defendant
18 Control Persons; (7) breach of the implied covenant of good faith
19 and fair dealing, against all Defendants except Healy and MBF
20 Merchant Capital; (8) by Von Glasenapp and Bae, violation of the
21 Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, against the
22 Merchant Services Companies and the Northern Leasing Companies;
23 (9) abuse of process, against Leasing Defendants except Healy and

24
25 ⁴ Plaintiffs state that Campbell is a named Plaintiff with
26 respect to only "the two counts under Racketeer Influenced and
27 Corrupt Organizations Act." Pls.' Reply in Support of Mot. for
28 Prelim. Injunction at 2:24-25. Also, Plaintiffs have clarified
 that their "remaining claims" against Healy and MBF Merchant
 Capital are their claims under the Racketeer Influenced and Corrupt
 Organizations Act and California's Unfair Competition Law. Pls.'
 Notice of May 6, 2011 at 1 n.1.

1 MBF Merchant Capital; (10) conversion, against all Defendants
2 except Healy and MBF Merchant Capital; and (11) violation of
3 California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code
4 §§ 17200, et seq.

5 On November 29, 2010, pursuant to Defendants' motions, the
6 Court dismissed with leave to amend several of Plaintiffs' claims.
7 However, Von Glasenapp's, Su's, Baumgartner's and Jordan's
8 section 1962(c) claims against the Merchant Services Companies,
9 Moore and Roy were deemed cognizable. Common law fraud, section
10 17500 and UCL claims were found to be stated against the Merchant
11 Services Companies, Moore, Roy and Walshe. The Court afforded
12 Plaintiffs leave to conduct discovery to establish facts supporting
13 the exercise of personal jurisdiction over the individual Leasing
14 Defendants.

15 Plaintiffs filed their 2AC on March 18, 2011. On June 13,
16 2011, the Court issued a preliminary injunction against SKS
17 Associates and denied its motion to compel arbitration of
18 Campbell's claims. SKS Associates has not moved to dismiss
19 Plaintiffs' claims and did not join any of the current motions.

20 DISCUSSION

21 I. Motions to Compel Arbitration

22 The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq.,
23 reflects a "liberal federal policy favoring arbitration
24 agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20,
25 25 (1991) (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr.
26 Corp., 460 U.S. 1, 24 (1983)). However, the FAA "imposes certain
27 rules of fundamental importance, including the basic precept that
28 arbitration 'is a matter of consent, not coercion.'" Stolt-Nielsen

1 S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1773 (2010)
2 (quoting Volt Information Sciences, Inc. v. Bd. of Trustees of
3 Leland Stanford Univ., 489 U.S. 468, 479 (1989)). "The right to
4 compel arbitration stems from a contractual right," which generally
5 "may not be invoked by one who is not a party to the agreement and
6 does not otherwise possess the right to compel arbitration."
7 Britton v. Co-op Banking Group, 4 F.3d 742, 744 (9th Cir. 1993)
8 (citation omitted). When a question arises as to whether "a
9 particular party is bound by the arbitration agreement," "the
10 liberal federal policy regarding the scope of arbitrable issues is
11 inapposite." Comer v. Micor, Inc., 436 F.3d 1098, 1104 n.11 (9th
12 Cir. 2006) (emphasis in original; citation omitted).

13 There are limited exceptions under which an arbitration
14 agreement may be enforced by or against non-signatories. See,
15 e.g., Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1045 (9th
16 Cir. 2009); Ross v. Am. Express Co., 547 F.3d 137, 143 (2d Cir.
17 2008). Among these exceptions is the doctrine of equitable
18 estoppel, which "precludes a party from claiming the benefits of a
19 contract while simultaneously attempting to avoid the burdens that
20 contract imposes." Mundi, 555 F.3d at 1045-46 (citation and
21 internal quotation marks omitted).

22 Non-signatories have been permitted to enforce an arbitration
23 clause against a signatory when it would be "'unfair to allow the
24 party opposing arbitration to avoid its commitment to arbitrate on
25 the ground that the non-signatory was not the very entity with
26 which the party opposing arbitration had a contract.'" Ross, 547
27 F.3d at 145-46 (quoting Sokol Holdings, Inc. v. BMB Mumbai, Inc.,
28 542 F.3d 354, 361 (2d Cir. 2008)) (internal editing marks by Ross

1 court omitted). Such unfairness may arise when two circumstances
2 exist: (1) the disputed issues are "intertwined with the contract
3 providing for arbitration" and (2) there is "a relationship among
4 the parties of a nature that justifies a conclusion that the party
5 which agreed to arbitrate with another entity should be estopped
6 from denying an obligation to arbitrate a similar dispute with the
7 adversary which is not a party to the arbitration agreement."
8 Sokol, 542 F.3d at 359, 361; see also Mundi, 555 F.3d at 1046
9 (noting the holding in Sokol).⁵ The Ross observed that the cases
10 in which the Second Circuit has permitted a non-signatory to compel
11 arbitration against a signatory "have tended to share a common
12 feature in that the non-signatory party asserting estoppel has had
13 some sort of corporate relationship to a signatory party." 547
14 F.3d at 144. These cases, the court noted, were those "involving
15 subsidiaries, affiliates, agents, and other related business
16 entities." Id.

17 A. Universal Card, National Payment Processing and Moore's
18 Motion to Compel Arbitration

19 Universal Card, National Payment Processing and Moore move to
20 compel arbitration of Von Glasenapp's, Su's, Baumgartner's and
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23
24 ⁵ Citing MS Dealer Services Corporation v. Franklin, 177 F.3d
25 942 (11th Cir. 1999), Universal Card, National Payment Processing
26 and Moore argue that the relationship between a non-signatory
27 seeking to assert an absent signatory's right to arbitration is not
28 a requirement, but instead only a factor a court may consider in
deciding whether to apply equitable estoppel. In Mundi, however,
the Ninth Circuit noted that other courts have found this
relationship to be a requirement. 555 F.3d at 1046. Further, Ross
and the cases on which it relies were decided after MS Dealer and
persuasively establish the necessity of a close relationship.

1 Jordan's claims against them.⁶ Although they were not signatories
2 to these Plaintiffs' MCPAs, which contained a disputed arbitration
3 clause, Universal Card, National Payment Processing and Moore
4 assert that they are entitled to pursue arbitration under them
5 based on the doctrine of equitable estoppel.

6 Even if Von Glasenapp's, Su's, Baumgartner's and Jordan's
7 claims were intertwined with their MCPAs, Universal Card, National
8 Payment Processing and Moore are not entitled to compel arbitration
9 of their claims. These Defendants fail to establish a sufficiently
10 proximate relationship with TransFirst and CB&T, the signatories to
11 the MCPAs. Moore and Jurczyk state that National Payment
12 Processing is under contract with TransFirst and CB&T to market and
13 sell TransFirst's and CB&T's products and services. In turn,
14 according to Moore and Jurczyk, National Payment Processing has
15 subcontracted its marketing and sales duties to Universal Card.
16 However, none of this establishes that Universal Card, National
17 Payment Processing or Moore have "some sort of corporate
18 relationship to a signatory party." Ross, 547 F.3d at 144.

19 Universal Card, National Payment Processing and Moore point to
20 allegations in the First Amended Complaint (1AC) that they were
21 engaged in a conspiracy with TransFirst and CB&T to accept
22 fraudulent MCPAs, worked in concert with TransFirst and CB&T to
23 issue deceptive billing statements and shared with TransFirst and
24 CB&T proceeds fraudulently obtained from Plaintiffs. That
25 Plaintiffs previously plead these facts, which do not appear in

26
27 ⁶ As noted above, Campbell did not enter into an MCPA at issue
28 in this litigation and Bae's MCPA was with Fifth Third Bank.
Universal Card, National Payment Processing and Moore do not
contend that they have a relationship with Fifth Third.

1 their 2AC, does not suffice for equitable estoppel purposes.
2 Universal Card, National Payment Processing and Moore, as the
3 parties seeking to invoke estoppel, have the burden to show that it
4 applies. See Crestline Mobile Homes Mfg. Co. v. Pac. Fin. Corp.,
5 54 Cal. 2d 773, 778 (1960) (stating that, under California law,
6 party relying on equitable estoppel doctrine has burden to show it
7 applies); see also Bridge Fund Capital Corp. v. Fastbucks Franchise
8 Corp., 622 F.3d 996, 1005 (9th Cir. 2010) (noting that party
9 seeking arbitration has burden of proving existence of arbitration
10 agreement). They do not satisfy their burden. Notably, Moore and
11 Jurczyk do not assert in their declarations that Universal Card and
12 National Payment Processing have an agency or corporate
13 relationship with TransFirst and CB&T.

14 In Mundi, the Ninth Circuit suggested that, "in light of the
15 general principle that only those who have agreed to arbitrate are
16 obliged to do so," courts should be cautious in extending the
17 bounds of the doctrine of equitable estoppel. 555 F.3d at 1046.
18 In Stolt-Nielsen, the Supreme Court reiterated that "it is . . .
19 clear from our precedents and the contractual nature of arbitration
20 that parties may specify with whom they choose to arbitrate their
21 disputes." 130 S. Ct. at 1774 (emphasis in original). Based on
22 these teachings, Universal Card, National Payment Processing and
23 Moore cannot avail themselves of the disputed arbitration clause in
24 Von Glasenapp's, Su's, Baumgartner's and Jordan's MCPAs.

25 B. Leasing Defendant Entities and Leasing Defendant Control
26 Persons' Motion to Compel Arbitration

27 Leasing Defendant Entities and Leasing Defendant Control
28 Persons move to compel arbitration of Campbell's claims against

1 them. They point to Campbell's EFL, which was between her and
2 Lease Finance Group. Krieger Decl. in Support of Mot. to Compel
3 Arbitration, Ex. 1.

4 The Leasing Defendant Entities other than Lease Finance Group,
5 and Leasing Defendant Control Persons, acknowledge they were not
6 signatories to Campbell's lease, but assert that they may invoke
7 the doctrine of equitable estoppel to compel arbitration of her
8 claims. However, these Defendants do not meet their burden to show
9 that they have a sufficiently close relationship with Lease Finance
10 Group. They point only to Plaintiffs' allegations that they are
11 associated with Lease Finance Group. As explained above, this is
12 inadequate.

13 Furthermore, as explained in the Court's Court's June 13, 2011
14 Order denying SKS Associates's motion to compel arbitration,
15 arbitration of Campbell's claims is not appropriate. The record
16 indicates that Campbell's lease, which contained the arbitration
17 clause at issue, has expired. Even if the lease were operative,
18 there is no evidence that Campbell's claims arise under it.

19 Accordingly, Leasing Defendant Entities and Leasing Defendant
20 Control Persons' motion to compel arbitration is denied.

21 II. Leasing Defendant Entities and Leasing Defendant Control
22 Persons' Motion to Dismiss for Improper Venue Von Glasenapp's,
Su's, Baumgartner's, Jordan's and Bae's Claims

23 Pursuant to Federal Rule of Civil Procedure 12(b)(3), Leasing
24 Defendant Entities and Leasing Defendant Control Persons move to
25 dismiss for improper venue Von Glasenapp's, Su's, Baumgartner's
26 Jordan's and Bae's claims against them. These Defendants assert
27 that the forum selection clause in these Plaintiffs' EFLs requires
28 litigation of their claims in the state courts of New York County

1 in New York State.

2 In July and August 2010, Leasing Defendant Entities and
3 Leasing Defendant Control Persons moved to dismiss these
4 Plaintiffs' claims pursuant to various Rule 12(b) defenses. At
5 that time, however, they did not assert a defense of improper
6 venue, even though they could have. Accordingly, these Defendants
7 have waived their defense of improper venue, and their Rule
8 12(b)(3) motion to dismiss must be denied. See Fed. R. Civ. P.
9 12(g)(2) and (h)(1)(A).

10 III. Motions to Dismiss for Failure to State a Claim

11 A complaint must contain a "short and plain statement of the
12 claim showing that the pleader is entitled to relief." Fed. R.
13 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
14 claim is appropriate only when the complaint does not give the
15 defendant fair notice of a legally cognizable claim and the grounds
16 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
17 (2007). In considering whether the complaint is sufficient to
18 state a claim, the court will take all material allegations as true
19 and construe them in the light most favorable to the plaintiff. NL
20 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

21 However, this principle is inapplicable to legal conclusions;
22 "threadbare recitals of the elements of a cause of action,
23 supported by mere conclusory statements," are not taken as true.
24 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly,
25 550 U.S. at 555).

26 A. Relevant Limitations Periods

27 Various Defendants assert that certain claims are barred by
28 the statute of limitations. These arguments are considered below.

1 1. Bae's Claims

2 MSI Defendants argue that Bae's claims against them for
3 intentional misrepresentation, negligent misrepresentation,
4 violation of section 17500, breach of contract, breach of the
5 implied covenant of good faith and fair dealing, conversion and
6 violation of the UCL are time-barred. Bae did not respond to this
7 argument. Accordingly, these claims are dismissed without leave to
8 amend. His claims against Walshe for the same are likewise
9 dismissed without leave to amend because she stands in a position
10 similar to that of the MSI Defendants. See Abagninin v. AMVAC
11 Chem. Corp., 545 F.3d 733, 742-43 (9th Cir. 2008); Silverton v.
12 Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) ("A District
13 Court may properly on its own motion dismiss an action as to
14 defendants who have not moved to dismiss where such defendants are
15 in a position similar to that of moving defendants or where claims
16 against such defendants are integrally related.").

17 MSI Defendants, Leasing Defendant Entities and Leasing
18 Defendant Control Persons contend that Bae's RICO claims are barred
19 by the statute of limitations.

20 RICO actions are subject to a four-year statute of
21 limitations. Pincay v. Andrews, 238 F.3d 1106, 1108 (9th Cir.
22 2001) (citation omitted).

23 Plaintiffs do not respond to MSI Defendants' arguments that
24 Bae's RICO claims against them are time-barred. Accordingly, Bae's
25 RICO claims against the MSI Defendants are dismissed without leave
26 to amend. His claims against Walshe are likewise dismissed without
27 leave to amend because she stands in a position similar to that of
28 the MSI Defendants.

1 Plaintiffs argue that the separate accrual rule saves Bae's
2 claims against the Leasing Defendant Entities and Leasing Defendant
3 Control Persons. Under the Ninth Circuit's "separate accrual
4 rule," the limitations period can be reset by an overt act with two
5 characteristics: (1) it must be "a new and independent act that is
6 not merely a reaffirmation of a previous act;" and (2) it must
7 inflict "new and accumulating injury on the plaintiff." Grimmett
8 v. Brown, 75 F.3d 506, 513 (9th Cir. 1996) (emphasis in original);
9 see also Tanaka v. First Hawaiian Bank, 104 F. Supp. 2d 1243, 1246,
10 1250-52 (D. Haw. 2000). Plaintiffs point to Northern Leasing's
11 lawsuit against Bae, filed on July 17, 2006; the negative notation
12 Northern Leasing placed on Bae's credit report after its lawsuit
13 was filed; and MBF Leasing's lawsuit against Bae, filed on March
14 22, 2010. However, Plaintiffs do not show how these acts inflicted
15 injury independent from the injury Bae allegedly suffered when he
16 signed the May 2005 EFL that was allegedly procured by fraud and
17 forms the basis of his RICO claims. Plaintiffs acknowledge that
18 Bae's EFL could be used to "undertake collections
19 activities . . . and file a lawsuit in the event of default."
20 Opp'n at 44:18-19. Plaintiffs nevertheless contend that Bae's RICO
21 claims against the Leasing Defendant Entities and Leasing Defendant
22 Control Persons remain viable because his injuries are based on the
23 fact that Northern Leasing attempted to collect fees from him, even
24 though his EFL was with MBF Leasing. This argument is not
25 persuasive. Bae does not identify any new and accumulating injury
26 he suffered arising specifically from the fact that Northern
27 Leasing, and not MBF Leasing, took action against him.

28 Accordingly, Bae's RICO claims are time-barred and are

1 dismissed without leave to amend.

2 2. Su's and Campbell's Claims

3 Leasing Defendant Entities and Leasing Defendant Control
4 Persons assert that Su's and Campbell's claims against them are
5 time-barred to the extent they seek relief for conduct before March
6 19, 2010. These Defendants point to a provision in Su's and
7 Campbell's EFLs, which states that any action arising from their
8 EFLs must be brought within one year of the date it accrues.

9 Although contractual provisions limiting statutory periods can
10 be enforceable, they may be subject to general contract defenses,
11 such as unconscionability. See, e.g., Soltani v. W. & S. Life Ins.
12 Co., 258 F.3d 1038, 1042 (9th Cir. 2001). However, many
13 "California cases have upheld contractual shortening of statutes of
14 limitations in different types of contracts." Id. "California
15 case law strongly indicates that [a] six-month limitation provision
16 is not substantively unconscionable." Id. at 1043.

17 Plaintiffs assert that the provision imposing a shorter
18 limitations period is unenforceable because it is unconscionable.
19 Plaintiffs argue that the relevant provision was on pages not shown
20 to Su or Campbell.

21 The Court declines to limit Su's and Campbell's claims at this
22 time. It is not apparent, on the current record, that the
23 contractual limitations period is not unconscionable. After
24 discovery, Leasing Defendant Entities and Leasing Defendant Control
25 Persons may seek summary adjudication based on the shortened
26 limitations period imposed by these Plaintiffs' EFLs.

27 B. RICO Claims

28 "To state a claim under § 1962(c), a plaintiff must allege

1 '(1) conduct (2) of an enterprise (3) through a pattern (4) of
2 racketeering activity.'" Odom v. Microsoft Corp., 486 F.3d 541,
3 547 (9th Cir. 2007) (quoting Sedima, S.P.R.L. v. Imrex Co., 473
4 U.S. 479, 496 (1985)). Stating a section 1962(c) claim is
5 necessary to assert a claim under section 1962(d) for a RICO
6 conspiracy; thus, the failure to state the former requires
7 dismissal of the latter. See Howard v. Am. Online Inc., 208 F.3d
8 741, 751 (9th Cir. 2000).

9 As noted above, Von Glasenapp, Su, Baumgartner and Jordan have
10 stated section 1962(c) claims against the Merchant Services
11 Companies, Moore and Roy. Because Plaintiffs do not oppose MSI
12 Defendants' motion to dismiss Campbell's RICO claims against them,
13 these claims are dismissed without leave to amend. Campbell's RICO
14 claims against Walshe are likewise dismissed without leave to amend
15 because there are no allegations that Campbell had any interactions
16 with Walshe.

17 Defendants' arguments concerning the remaining RICO claims are
18 considered below.

19 1. "Conduct" of a RICO Enterprise

20 Walshe contends that the RICO claims brought against her fail
21 because Plaintiffs' pleadings do not suggest that she asserted
22 sufficient control over the alleged RICO enterprise.

23 To be liable under section 1962(c), one must have
24 "participated in the operation or management of the enterprise
25 itself." Reves v. Ernst & Young, 507 U.S. 170, 183 (1993). To do
26 so, one must demonstrate "some degree of direction." Id. at 179.
27 "RICO liability is not limited to those with primary responsibility
28 for the enterprise's affairs," nor is it limited to "those with a

1 formal position in the enterprise.” Id. However, one must have
2 “some part in directing the enterprise’s affairs.” Id. (emphasis
3 in original). “Simply performing services for the enterprise does
4 not rise to the level of direction.” Walter v. Drayson, 538 F.3d
5 1244, 1249 (9th Cir. 2008).

6 Walshe allegedly entered into an agreement with Moore that
7 required her to relocate from Southern California to San Jose to
8 perpetrate the alleged fraud in a new location. She then allegedly
9 employed Moore’s “sales tactics and training programs” and hired
10 “independent contractors” to advance the fraudulent scheme. 2AC
11 ¶ 176. These allegations sufficiently suggest that Walshe
12 exercised some degree of direction over the purported RICO
13 enterprise.

14 2. Racketeering Activity

15 Leasing Defendant Entities, Leasing Defendant Control Persons,
16 Healy and MBF Merchant Capital argue that Plaintiffs fail to plead
17 that they participated in racketeering activity. Parisi, Jurczyk
18 and Madura contend that the claims against them must be dismissed
19 because Plaintiffs do not allege their roles in any fraud.

20 Plaintiffs’ RICO claims are based on alleged instances of wire
21 and mail fraud, which constitute predicate acts for a pattern of
22 racketeering activity. 18 U.S.C. § 1961(1). “A wire fraud
23 violation consists of (1) the formation of a scheme or artifice to
24 defraud; (2) use of the United States wires or causing a use of the
25 United States wires in furtherance of the scheme; and (3) specific
26 intent to deceive or defraud.” Odom, 486 F.3d at 554 (internal
27 quotation marks omitted); 18 U.S.C. § 1343. The elements of mail
28 fraud differ only in that they involve the use of the United States

1 mail rather than wires. See 18 U.S.C. § 1341.

2 Federal Rule of Civil Procedure 9(b) requires that wire and
3 mail fraud be plead with particularity. See Odom, 486 F.3d at 553-
4 54. The allegations must be "specific enough to give defendants
5 notice of the particular misconduct which is alleged to constitute
6 the fraud charged so that they can defend against the charge and
7 not just deny that they have done anything wrong." Semegen v.
8 Weidner, 780 F.2d 727, 731 (9th Cir. 1985). Statements of the
9 time, place and nature of the alleged fraudulent activities are
10 sufficient, id. at 735, provided the plaintiff sets forth "what is
11 false or misleading about a statement, and why it is false." In re
12 GlenFed, Inc., Secs. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994).
13 Scienter may be averred generally, simply by saying that it
14 existed. Id. at 1547; see Fed. R. Civ. Proc. 9(b) ("Malice,
15 intent, knowledge, and other condition of mind of a person may be
16 averred generally."). Based on this heightened pleading standard,
17 the only elements of wire and mail fraud "that require
18 particularized allegations are the factual circumstances of the
19 fraud itself." Odom, 486 F.3d at 554.

20 In Swartz v. KPMG LLP, the Ninth Circuit addressed the effect
21 of Rule 9(b) in cases involving allegations of a fraudulent scheme
22 perpetuated by multiple defendants. 476 F.3d 756, 764 (9th Cir.
23 2007). The court stated that

24 there is no absolute requirement that where several
25 defendants are sued in connection with an alleged
26 fraudulent scheme, the complaint must identify false
27 statements made by each and every defendant.
28 Participation by each conspirator in every detail in the
execution of the conspiracy is unnecessary to establish
liability, for each conspirator may be performing
different tasks to bring about the desired result. On
the other hand, Rule 9(b) does not allow a complaint to

1 merely lump multiple defendants together but requires
2 plaintiffs to differentiate their allegations when suing
3 more than one defendant and inform each defendant
4 separately of the allegations surrounding his alleged
5 participation in the fraud. In the context of a fraud
6 suit involving multiple defendants, a plaintiff must, at
7 a minimum, identify the role of each defendant in the
8 alleged fraudulent scheme.

9 Id. (citations and internal quotation and editing marks omitted;
10 emphasis in original); see also Moore v. Kayport Package Express,
11 Inc., 885 F.2d 531, 541 (9th Cir. 1989) ("Allegations of fraud
12 under section 1962(c) must identify the time, place, and manner of
13 each fraud plus the role of each defendant in each scheme.")
14 (citation and internal quotation marks omitted).

15 Here, Plaintiffs allege a fraudulent scheme perpetrated
16 through the wires and mail. They plead with specificity the
17 Merchant Services Companies' sales agents' misrepresentations about
18 card processing fees and the need to obtain equipment from Leasing
19 Defendants. Parisi and Jurczyk, among other things, allegedly
20 trained sales agents to complete the misleading Rate Sheet. The
21 sales agents' alleged deceptions led merchants to complete
22 applications for card processing services and enter into EFLs,
23 which required Krieger's approval. Krieger allegedly approved the
24 EFLs with knowledge of the sales agents' deceptions. Madura
25 allegedly forged signatures on merchants' applications. MBF
26 Leasing used the EFLs to make electronic debits from merchants'
27 bank accounts and send allegedly false letters asserting that
28 property tax was owed on card processing equipment. Cohen, Mezei
and Krieger allegedly caused these letters to be sent, knowing that
"no such taxes and fees were due." 2AC ¶ 154. Based on the EFLs,
Buono allegedly undertook collection efforts against merchants,

1 which entailed phone calls and letters. Funds obtained based on
2 the EFLs are allegedly invested in Northern Funding. These
3 allegations, among others, are sufficient to suggest that Parisi,
4 Jurczyk, Madura, MBF Leasing, Northern Funding, Cohen, Mezei,
5 Krieger, and Buono participated in racketeering activity.

6 However, Plaintiffs' allegations against Northern Leasing,
7 Golden Eagle Leasing, Lease Finance Group and Lease Source-LSI are
8 deficient. Plaintiffs allege that Northern Leasing acquired Golden
9 Eagle Leasing, Lease Finance Group and Lease Source-LSI, and
10 individuals associated with Northern Leasing represent that they
11 are also connected with Golden Eagle Leasing, Lease Finance Group
12 and Lease Source-LSI. None of these representations, however, were
13 allegedly made to Plaintiffs. Plaintiffs also allege that Golden
14 Eagle Leasing, Lease Finance Group and Lease Source-LSI share with
15 Northern Leasing an address, "a common switchboard, staff, postage
16 meter, computer network, and server." 2AC ¶ 85. These allegations
17 do not suggest that Northern Leasing, Golden Eagle Leasing, Lease
18 Finance Group or Lease Source-LSI participated in the alleged wire
19 and mail fraud.

20 Likewise, Plaintiffs' allegations pertaining specifically to
21 MBF Merchant Capital, RBL Capital Group, Fitzgerald and Healy do
22 not suggest they engaged in racketeering activity. These
23 Defendants allegedly were involved in the recruitment of ISOs/MSPs
24 that Plaintiffs contend were "unscrupulous." MBF Merchant Capital
25 and RBL Capital Group allegedly provided loans to sales agents.
26 These allegations do not suggest that these Defendants participated
27 in wire or mail fraud.

28 Finally, there are no allegations that Sussman or the Sussman

1 Law Firm took any action against Plaintiffs whose claims are not
2 barred by the statute of limitations.

3 The RICO claims against Parisi, Jurczyk, Madura, MBF Leasing,
4 Northern Funding, Cohen, Mezei, Krieger and Buono will not be
5 dismissed for a failure to plead racketeering activity. However,
6 Plaintiffs' section 1962(c) and section 1962(d) claims against
7 Northern Leasing, Golden Eagle Leasing, Lease Finance Group, Lease
8 Source-LSI, MBF Merchant Capital, RBL Capital Group, Fitzgerald,
9 Healy, Sussman and the Sussman Law Firm are dismissed. Because
10 Plaintiffs have been unable to state these claims, notwithstanding
11 the Court's previous instructions, this dismissal is without leave
12 to amend. See, e.g., McHenry v. Renne, 84 F.3d 1172, 1177 (9th
13 Cir. 1996).

14 3. Conspiracy to Commit RICO Violations

15 MSI Defendants argue that Plaintiffs do not allege a RICO
16 conspiracy in violation of section 1962(d). Walshe joins this
17 argument.⁷

18 As noted above, in 2006, Moore and Walshe allegedly agreed
19 that Walshe would relocate to San Jose to open an office to
20 perpetuate the fraudulent scheme on behalf of the Merchant Services
21 Companies. Walshe then allegedly misrepresented to merchants,
22 including Von Glasenapp, the contracts associated with card
23 processing services and equipment. These allegations, among

24
25 ⁷ MBF Leasing, Northern Funding, Cohen, Mezei, Krieger and
26 Buono moved to dismiss Plaintiffs' section 1962(d) claims only on
27 the ground that such claims cannot be stated if Plaintiffs did not
28 state section 1962(c) claims. However, as noted above, Plaintiffs
state their section 1962(c) claims against these Defendants. Thus,
these Defendants' motion to dismiss Plaintiffs' section 1962(d)
claims must be denied.

1 others, "raise a reasonable expectation that discovery will reveal
2 evidence of illegal agreement." Twombly, 550 U.S. at 556. Thus,
3 the section 1962(d) claims against the MSI Defendants and Walshe
4 will not be dismissed for insufficient pleading.

5 C. Common Law Fraud Claims

6 Plaintiffs bring common law claims for intentional and
7 negligent misrepresentation (collectively, common law fraud
8 claims), which are subject to the heightened pleading requirements
9 of Federal Rule of Civil Procedure 9(b). As noted above, common
10 law fraud claims against the Merchant Services Companies, Moore,
11 Roy and Walshe have been stated. Parisi, Jurczyk, Madura, Leasing
12 Defendant Entities and Leasing Defendant Control Persons move to
13 dismiss the common law fraud claims brought against them.

14 Plaintiffs state common law fraud claims against Parisi,
15 Jurczyk, Madura, MBF Leasing, Northern Funding, Cohen, Mezei,
16 Krieger and Buono for the reasons they adequately plead that these
17 Defendants participated in racketeering activity. The common law
18 fraud claims against Northern Leasing, Golden Eagle Leasing, Lease
19 Finance Group, Lease Source-LSI, RBL Capital Group, Fitzgerald,
20 Sussman and the Sussman Law Firm fail are dismissed for the reasons
21 stated above. Because Plaintiffs have been unable to state these
22 claims, notwithstanding the Court's previous instructions, this
23 dismissal is without leave to amend. See, e.g., McHenry, 84 F.3d
24 at 1177.

25 D. Claims for Breach of Contract and Breach of the Implied
26 Covenant of Good Faith and Fair Dealing

27 To assert a cause of action for breach of contract, a
28 plaintiff must plead: (1) the existence of a contract; (2) the

1 plaintiff's performance or excuse for non-performance; (3) the
2 defendant's breach; and (4) damages to the plaintiff as a result of
3 the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas Co.,
4 116 Cal. App. 4th 1375, 1391 n.6 (2004). The existence of a
5 contract is necessary for any claim for breach of the implied
6 covenant of good faith and fair dealing. Spinks v. Equity
7 Residential Briarwood Apartments, 171 Cal. App. 4th 1004, 1033
8 (2009) (citation and internal quotation marks omitted). Unless
9 otherwise distinguished below, the Court refers collectively to
10 claims for breach of contract and breach of the implied covenant of
11 good faith and fair dealing as "contract claims."

12 1. Claims Against Merchant Services Defendants

13 MSI Defendants and Walshe argue that Plaintiffs' contract
14 claims based on the Rate Sheet fail because it is not a contract.
15 However, Plaintiffs allege sufficient facts to suggest that sales
16 agents represented that the Rate Sheet listed all the fees for
17 processing card transactions. Contractual terms can be established
18 "by such words or conduct 'as justifies the promisee in
19 understanding that the promisor intended to make a promise.'" Horacek v. Smith, 33 Cal. 2d 186, 194 (1948). Thus, Plaintiffs'
20 contract claims based on the Rate Sheet do not fail as a matter of
21 law.
22

23 MSI Defendants and Walshe argue that Plaintiffs do not state
24 contract claims based on an alleged oral contract that the
25 "merchants could cancel electronic payment services at any time
26 without penalty." 2AC ¶ 641. In particular, these Defendants note
27 that Plaintiffs do not allege that anyone made such a
28 representation. Plaintiffs did not respond to this argument, and

1 no such allegation appears in the 2AC. Accordingly, Plaintiffs'
2 contract claims are dismissed without leave to amend to the extent
3 they are based on this purported oral contract.

4 Finally, MSI Defendants and Walshe assert that they cannot be
5 held liable for breaches of the EFLs. Because Plaintiffs plead no
6 facts to suggest that MSI Defendants and Walshe were parties to the
7 EFLs, their contract claims based on this theory are dismissed.
8 This dismissal is without leave to amend because the Court's
9 previous instructions put Plaintiffs on notice as to what is
10 necessary to state their contract claims. See, e.g., McHenry, 84
11 F.3d at 1177.

12 2. Claims Against Leasing Defendant Entities and
13 Leasing Defendant Control Persons

14 Leasing Defendant Entities and Leasing Defendant Control
15 Persons contend that Plaintiffs' contract claims against them must
16 be dismissed because Plaintiffs do not plead a contractual
17 relationship with them.

18 Plaintiffs do not allege that Leasing Defendant Control
19 Persons, Northern Funding, RBL Capital Group or the Sussman Law
20 Firm were parties to the EFLs. Thus, the contract claims against
21 Leasing Defendant Control Persons and the claims for breach of the
22 implied covenant of good faith and fair dealing against Northern
23 Funding, RBL Capital Group and the Sussman Law Firm must be
24 dismissed.

25 Plaintiffs allege that all Northern Leasing Companies were
26 parties to the EFLs. However, the EFLs state that they were with
27 MBF Leasing. Thus, Plaintiffs' allegation must be rejected.
28 Courts "need not accept as true allegations contradicting documents

1 that are referenced in the complaint." Lazy Y Ranch Ltd. v.
2 Behrens, 546 F.3d 580, 588 (9th Cir. 2008). Plaintiffs insist that
3 the Northern Leasing Companies other than MBF Leasing may be held
4 liable based on an alter ego theory of liability. However,
5 Plaintiffs' boilerplate alter ego allegations are not sufficient.
6 Indeed, Plaintiffs do not allege that it would be inequitable if
7 only MBF Leasing were held liable on their contract claims. See
8 Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 538
9 (2000).

10 Plaintiffs state contract claims against MBF Leasing.
11 However, the Court dismisses without leave to amend Plaintiffs'
12 contract claims against Leasing Defendant Control Persons, Northern
13 Leasing, MBF Leasing, Golden Eagle Leasing, Lease Source-LSI and
14 Lease Finance Group. Plaintiffs' claims for breach of the implied
15 covenant of good faith and fair dealing against Northern Funding,
16 RBL Capital Group and the Sussman Law Firm are also dismissed.
17 Because Plaintiffs have been unable to state contract claims
18 against these Defendants, notwithstanding the Court's previous
19 instructions, these dismissals are without leave to amend. See,
20 e.g., McHenry, 84 F.3d at 1177.

21 E. False Advertising Claims

22 As noted above, claims under section 17500 against the
23 Merchant Services Companies, Moore, Roy and Walshe have been found
24 sufficient. Parisi, Jurczyk, Madura, Leasing Defendant Entities
25 and Leasing Defendant Control Persons move to dismiss Plaintiffs'
26
27
28

1 section 17500 claims against them.⁸

2 Section 17500 prohibits "any unlawful, unfair or fraudulent
3 business act or practice and unfair, deceptive, untrue or
4 misleading advertising." A false advertising claim under this
5 section may be brought "where the advertising complained of is not
6 actually false, but thought likely to mislead or deceive, or is in
7 fact false." Day v. AT&T Corp., 63 Cal. App. 4th 325, 332 (1998).
8 Section 17500 proscribes "not only those advertisements which have
9 deceived or misled because they are untrue, but also those which
10 may be accurate on some level, but will nonetheless tend to mislead
11 or deceive." Id. A "defendant's liability must be based on his
12 personal participation in the unlawful practices and unbridled
13 control over the practices that are found to violate" section
14 17500. Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th 952, 961
15 (2002) (citation and internal quotation marks omitted).

16 A section 17500 claim is not stated against Madura.
17 Plaintiffs do not contend that he engaged in deceptive advertising
18 or that he exercised unbridled control over those who did.
19 However, section 17500 claims are stated against Parisi and Jurczyk
20 for the reasons that Plaintiffs have plead cognizable RICO and
21 common law fraud claims against them. Parisi and Jurczyk allegedly
22 participated in training sales agents to make deceptive
23 representations.

24 Plaintiffs' section 17500 claims against Leasing Defendant
25 Entities and Leasing Defendant Control Persons fail because

27 ⁸ Plaintiffs incorrectly assert that Parisi, Jurczyk and
28 Madura do not seek dismissal of the section 17500 claims against
them. See MSI Defs.' Mot. at 16.

1 Plaintiffs do not identify the roles each entity or individual
2 Defendant had in disseminating deceptive advertising. Instead,
3 they point to allegations concerning "Leasing Defendants." See 2AC
4 ¶¶ 214-21. As explained above, such categorical pleading does not
5 satisfy Rule 9(b), which applies to Plaintiffs' section 17500
6 claims. Because Plaintiffs have already been warned that non-
7 specific allegations do not comply with Rule 9(b), their section
8 17500 claims against Leasing Defendant Entities and Leasing
9 Defendant Control Persons are dismissed without leave to amend.
10 See, e.g., McHenry, 84 F.3d at 1177.

11 F. FCRA

12 As noted above, Von Glasenapp and Bae bring claims under FCRA
13 against the Merchant Services Companies and Northern Leasing
14 Companies. MSI Defendants and Leasing Defendant Entities move to
15 dismiss these claims.

16 The FCRA limits the purposes for which consumer reporting
17 agencies may disclose credit reports. 15 U.S.C. § 1681b. For
18 willful violations of the statute, prevailing consumers may recover
19 actual or statutory damages, punitive damages and reasonable
20 attorneys' fees. 15 U.S.C. § 1681n(a).

21 Von Glasenapp and Bae state FCRA claims against Universal
22 Merchant Services, Northern Leasing and MBF Leasing. However,
23 their FCRA claims against the Merchant Services Companies, other
24 than Universal Merchant Services; Golden Eagle Leasing; Lease
25 Source-LSI; and Lease Finance Group are dismissed because they are
26 based on Plaintiffs' rejected alter ego theory of liability. This
27 dismissal is without leave to amend because, despite the Court's
28 warnings regarding their boilerplate alter ego allegations,

1 Plaintiffs have failed to allege sufficient facts. See, e.g.,
2 McHenry, 84 F.3d at 1177.

3 G. Abuse of Process

4 Bae brings a claim under New York law against Leasing
5 Defendants for abuse of process. A claim for abuse of process has
6 three elements: "(1) regularly issued process, either civil or
7 criminal, (2) an intent to do harm without excuse or justification,
8 and (3) use of the process in a perverted manner to obtain a
9 collateral objective." Curiano v. Suozzi, 63 N.Y.2d 113, 116
10 (1984) (citation omitted). The "process used must involve an
11 unlawful interference with one's person or property." Id.
12 (citation and internal quotation marks omitted). The "institution
13 of a civil action by summons and complaint is not legally
14 considered process capable of being abused." Id.

15 Bae's abuse of process claim is based on MBF Leasing's lawsuit
16 against him, filed on March 22, 2010.⁹ Under Curiano, Bae's claim
17 cannot rest on the summons issued in conjunction with the
18 institution of MBF Leasing's lawsuit. To claim that he can,
19 Plaintiffs cite State v. Cohen, 473 N.Y.S.2d 98 (1983); however,
20 Cohen did not concern the tort of abuse of process or address its
21 elements. Even if it did, Cohen preceded Curiano. See PSI Metals,
22 Inc. v. Firemen's Ins. Co. of Newark, NJ, 839 F.2d 42, 43-44 (2d
23 Cir. 1988) (noting change in law based on Curiano). Plaintiffs
24 identify no other regularly issued process that interfered with
25 Bae's person or property.

26
27 ⁹ Plaintiffs do not dispute that abuse of process claims are
28 subject to a one-year limitations period and, therefore, Bae cannot
bring a claim based on Northern Leasing's alleged 2006 lawsuit
against him.

1 Plaintiffs do not suggest that Bae's claim is based on process
2 other than the summons associated with the March 2010 lawsuit.
3 Accordingly, his abuse of process claim is futile and is dismissed
4 without leave to amend. See, e.g., Cook, Perkiss and Liehe, Inc.
5 v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir.
6 1990).

7 H. Conversion

8 Under California law, a claim for conversion requires a
9 plaintiff to allege (1) "ownership or right to possession of
10 property;" (2) a defendant's wrongful act toward the property,
11 causing interference with the plaintiff's possession; and
12 (3) damage to the plaintiff. PCO, Inc. v. Christensen, Miller,
13 Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal. App. 4th 384,
14 394 (2007).

15 Plaintiffs state a claim for conversion against MSI and MBF
16 Leasing. However, their conversion claims against the Merchant
17 Services Companies, other than MSI, and the individual Merchant
18 Services Defendants are based on their rejected alter ego theory of
19 liability. As explained above, Plaintiffs have failed to allege
20 facts supporting this theory, notwithstanding the Court's warning;
21 thus, this dismissal is without leave to amend. See, e.g.,
22 McHenry, 84 F.3d at 1177. Plaintiffs' conversion claims against
23 the Leasing Defendant Entities, other than MBF Leasing, and the
24 Leasing Defendant Control Persons are dismissed without leave to
25 amend because they do not allege that these Defendants converted
26
27
28

1 their funds within the limitations period.¹⁰ See, e.g., Cook,
2 Perkiss and Liehe, Inc., 911 F.2d at 247.

3 I. UCL Claims

4 The UCL prohibits any "unlawful, unfair or fraudulent business
5 act or practice." Cal. Bus. & Prof. Code § 17200. The UCL
6 incorporates other laws and treats violations of those laws as
7 unlawful business practices independently actionable under state
8 law. Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048
9 (9th Cir. 2000). Violation of almost any federal, state or local
10 law may serve as the basis for a UCL claim. Saunders v. Superior
11 Court, 27 Cal. App. 4th 832, 838-39 (1994). In addition, a
12 business practice may be "unfair or fraudulent in violation of the
13 UCL even if the practice does not violate any law." Olszewski v.
14 Scripps Health, 30 Cal. 4th 798, 827 (2003).

15 As noted above, Plaintiffs' 1AC contained cognizable UCL
16 claims against Merchant Services Companies, Moore, Roy and Walshe.
17 And because Plaintiffs state claims for violations of federal and
18 state law against Parisi, Jurczyk, Madura, MBF Leasing, Northern
19 Funding, Cohen, Mezei, Krieger and Buono, they state UCL claims
20 against these Defendants. However, because Plaintiffs do not state
21 claims against Northern Leasing, Golden Eagle Leasing, Lease
22 Finance Group, Lease Source-LSI, RBL Capital Group, MBF Merchant
23 Capital, Fitzgerald, Healy, Sussman and the Sussman Law Firm, their
24 UCL claims against these Defendants are dismissed. Because
25 Plaintiffs have been unable to state UCL claims against these

26
27 ¹⁰ Plaintiffs do not dispute that Lease Finance Group's debits
28 of Campbell's bank account fall outside the three-year limitations
period.

1 Defendants, despite the Court's previous instructions, this
2 dismissal is without leave to amend. See, e.g., McHenry, 84 F.3d
3 at 1177.

4 IV. Leasing Defendant Control Persons', MBF Merchant Capital's and
5 Healy's Motions to Dismiss for Lack of Personal Jurisdiction

6 Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, a
7 defendant may move to dismiss for lack of personal jurisdiction.

8 The plaintiff then bears the burden of demonstrating that the court
9 has jurisdiction. Schwarzenegger v. Fred Martin Motor Co., 374

10 F.3d 797, 800 (9th Cir. 2004). The plaintiff "need only
11 demonstrate facts that if true would support jurisdiction over the
12 defendant." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995).

13 Uncontroverted allegations in the complaint must be taken as true.

14 AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir.

15 1996). However, the court may not assume the truth of such

16 allegations if they are contradicted by affidavit. Data Disc, Inc.

17 v. Systems Technology Assocs., Inc., 557 F.2d 1280, 1284 (9th Cir.

18 1977). If the plaintiff also submits admissible evidence,

19 conflicts in the evidence must be resolved in the plaintiff's

20 favor. AT&T, 94 F.3d at 588.

21 Because Plaintiffs fail to state claims against MBF Merchant
22 Capital, Fitzgerald, Healy and Sussman, the Court need not consider
23 whether it has personal jurisdiction over them. With respect to
24 Cohen, Mezei, Krieger and Buono, Plaintiffs assert that the Court
25 may exercise specific jurisdiction or RICO jurisdiction over them.

26 A court has specific jurisdiction over a defendant when the
27 cause of action arises out of or relates to the defendant's
28 activities within the forum. Data Disc, Inc., 557 F.2d at 1286.

1 The "minimum contacts" required to assert specific jurisdiction are
2 analyzed using a three-prong test: (1) the non-resident defendant
3 must purposefully direct its activities towards, or consummate some
4 transaction with, the forum or a resident thereof; (2) the claim
5 must be one which arises out of or results from the defendant's
6 forum-related activities; and (3) the exercise of jurisdiction must
7 be reasonable. Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987).
8 Each of these conditions is required for asserting jurisdiction.
9 Ins. Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th
10 Cir. 1981).

11 For a defendant's conduct to demonstrate purposeful direction,
12 the defendant must "allegedly have (1) committed an intentional
13 act, (2) expressly aimed at the forum state, (3) causing harm that
14 the defendant knows is likely to be suffered in the forum state."
15 Schwarzenegger, 374 F.3d at 802 (quoting Dole Food Co., Inc. v.
16 Watts, 303 F.3d 1104, 1111 (9th Cir. 2002)).

17 As noted above, Cohen and Mezei, among other things, allegedly
18 caused letters to be sent to merchants to California, such as
19 Campbell, indicating that property taxes were due even though they
20 were not. Cohen and Mezei allegedly knew that such taxes were not
21 due. Krieger, among other things, approved EFLs of California
22 merchants, even though she allegedly knew that they were based on
23 misrepresentations. Buono directed employees to engage in
24 collection activities against California merchants, including Von
25 Glasenapp, based on the EFLs he allegedly knew to be procured by
26 fraud. These allegations satisfy the purposeful direction prong.

27 Plaintiffs' claims are based in part on these allegations and
28 there is no evidence that the exercise of jurisdiction over Cohen,

1 Mezei, Krieger and Buono would be unreasonable. Accordingly, the
2 Court denies these Defendants' motion to dismiss for lack of
3 personal jurisdiction.

4 CONCLUSION

5 For the foregoing reasons, the Court GRANTS in part and DENIES
6 in part MSI Defendants' motion to dismiss (Docket No. 247); DENIES
7 Universal Card, et al.'s motion to compel (Docket No. 221); GRANTS
8 Healy and MBF Merchant Capital's motion to dismiss (Docket No.
9 246); GRANTS in part and DENIES in part Leasing Defendant Entities
10 and Leasing Defendant Control Persons' motions to dismiss and to
11 compel arbitration (Docket No. 249); and GRANTS in part and DENIES
12 in part Walshe's motion to dismiss (Docket No. 248). Defendants'
13 motions are granted as follows:

14 1. The following claims of Bae are dismissed without leave
15 to amend as time-barred: (1) claims under section 1962(c)
16 and (d); (2) claims for intentional and negligent
17 misrepresentation against MSI Defendants and Walshe;
18 (3) claims for breach of contract and breach of the
19 implied covenant of good faith and fair dealing against
20 MSI Defendants and Walshe; (4) claims under section 17500
21 against MSI Defendants and Walshe; and (5) claims for
22 conversion against MSI Defendants and Walshe.

23 2. Plaintiffs assert claims for violations of sections
24 1962(c) and (d) of title 18 of the U.S. Code against
25 Defendants. The claims under section 1962(c) and (d)
26 against Northern Leasing, Golden Eagle Leasing, Lease
27 Finance Group, Lease Source-LSI, MBF Merchant Capital,
28 RBL Capital Group, Fitzgerald, Healy, Sussman, and the

1 Sussman Law Firm are dismissed without leave to amend.

2 3. All Plaintiffs except Campbell assert claims for
3 intentional and negligent misrepresentation against all
4 Defendants except Healy and MBF Merchant Capital. The
5 intentional and negligent misrepresentation claims
6 against Northern Leasing, Golden Eagle Leasing, Lease
7 Finance Group, Lease Source-LSI, RBL Capital Group,
8 Fitzgerald, Sussman and the Sussman Law Firm are
9 dismissed without leave to amend, for failure to plead
10 actionable misrepresentations or participation in the
11 making of actionable misrepresentations.

12 4. All Plaintiffs except Campbell assert claims for breach
13 of contract against Merchant Services Defendants, the
14 Northern Leasing Companies and Leasing Defendant Control
15 Persons. All Plaintiffs except Campbell assert claims
16 for breach of the implied covenant of good faith and fair
17 dealing against all Defendants except Healy and MBF
18 Merchant Capital. The claims for breach of contract and
19 breach of the implied covenant against MSI Defendants and
20 Walshe based on any alleged oral contract or the EFLs are
21 dismissed without leave to amend. The claims for breach
22 of contract and breach of the implied covenant against
23 Leasing Defendant Control Persons, Northern Leasing,
24 Golden Eagle Leasing, Lease Source-LSI and Lease Finance
25 Group are dismissed without leave to amend. The claims
26 for breach of the implied covenant of good faith and fair
27 dealing against Northern Funding, RBL Capital Group and
28 the Sussman Law Firm are also dismissed without leave to

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amend.

5. All Plaintiffs except Campbell assert claims for violations of California Business and Professions Code section 17500 against all Defendants except Healy and MBF Merchant Capital. The claims under section 17500 against Madura are dismissed without leave to amend. The section 17500 claims against Leasing Defendant Entities and Leasing Defendant Control Persons are dismissed without leave to amend because Plaintiffs do not identify these Defendants' roles in disseminating deceptive advertising.
6. Von Glasenapp and Bae assert claims for violations of the FCRA against the Merchant Services Companies and the Northern Leasing Companies. Von Glasenapp's and Bae's FCRA claims against the Merchant Services Companies, other than Universal Merchant Services; Northern Leasing, Golden Eagle Leasing, Lease Source-LSI and Lease Finance Group are dismissed without leave to amend because their alter ego theory of liability is unavailing.
7. Bae asserts a claim for abuse of process against all Leasing Defendants except Healy and MBF Merchant Capital. This claim is dismissed without leave to amend. Plaintiffs do not suggest that his claim is based on process other than the summons associated with the March 2010 lawsuit filed against him.
8. All Plaintiffs except Campbell assert claims for conversion against all Defendants except Healy and MBF Merchant Capital. The conversion claims against the Merchant Services Companies, other than MSI; the

1 individual Merchant Services Defendants; Leasing
2 Defendant Entities, other than MBF Leasing; and Leasing
3 Defendant Control Persons are dismissed without leave to
4 amend because these Defendants did not allegedly convert
5 any property owned by Plaintiffs and because these claims
6 are based on Plaintiffs' rejected alter ego theory of
7 liability.

8 9. All Plaintiffs except Campbell bring claims for
9 violations of the UCL against all Defendants. The UCL
10 claims against Golden Eagle Leasing, Lease Finance Group,
11 Lease Source-LSI, RBL Capital Group, MBF Merchant
12 Capital, Fitzgerald, Healy, Sussman and the Sussman Law
13 Firm are dismissed without leave to amend because
14 Plaintiffs do not allege that these Defendants engaged in
15 unlawful, unfair or fraudulent conduct.

16 Based on these rulings, all claims against Golden Eagle Leasing,
17 Lease Source-LSI, Lease Finance Group, RBL Capital Group, MBF
18 Merchant Capital, Fitzgerald, Healy, Sussman and the Sussman Law
19 Firm are dismissed without leave to amend. In all other respects,
20 Defendants' motions are DENIED.

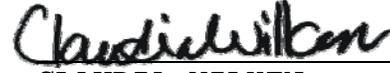
21 As explained above, to the extent that the Court denies leave
22 to amend, it does so because Plaintiffs have failed to state
23 claims, notwithstanding the Court's previous instructions, or
24 because they do not suggest that the claims are not futile.
25 However, if Plaintiffs obtain evidence over the course of discovery
26 supporting any claim dismissed by the Court, they may move for
27 leave to amend their complaint.

28 Merchant Services Defendants, Northern Leasing, MBF Leasing,

1 Northern Funding, Cohen, Mezei, Krieger and Buono shall answer
2 within fourteen days of the date of this Order. Fed. R. Civ. P.
3 12(a)(4)(A).

4 IT IS SO ORDERED.

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6 Dated: 8/29/2011



CLAUDIA WILKEN
United States District Judge

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