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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

COMERCIALIZADORA RECMAQ )  
LIMITADA, )  
 )  
Plaintiff, )  
v. )  
HOLLYWOOD AUTO MALL, LLC, a )  
California limited liability company )  
dba HOLLYWOOD MOTORS; )  
MOHAMAD REZA GHASEMI, an )  
individual; and JAIME )  
SOTOMAYOR, an individual )  
 )  
Defendants. )

Civil No.12cv0945 AJB (MDD)  
  
ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
MOHAMAD REZA GHASEMI'S  
MOTION TO DISMISS  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT  
  
(Doc. No. 38)

Presently before the Court is Defendant Mohamed Ghasemi's ("Ghasemi") motion to dismiss, (Doc. No. 38), Plaintiff Comercializadora Recmaq Limitada's ("Recmaq") first amended complaint ("FAC"), (Doc. No. 35). Recmaq filed an opposition on May 1, 2013. (Doc. No. 41.) As of the date of this order, Ghasemi, who is proceeding pro se, has not filed a reply. Pursuant to Civil Local Rule 7.1.d.1, the Court finds the motion suitable for determination on the papers and without oral argument. Accordingly, the motion hearing set for June 6, 2013, is hereby vacated. For the reasons set forth below, Ghasemi's motion to dismiss the FAC is GRANTED IN PART AND DENIED IN PART. Recmaq is granted limited leave to amend the FAC in compliance with this order. No new claims or parties may be added without leave of court.

## BACKGROUND

### **I. Factual Background**

This case involves an alleged oral contract entered into in 2002, by and between Recmaq and Defendants Hollywood Auto Mall, LLC (“Hollywood Auto Mall”), Ghasemi, and Jamie Sotomayor (“Sotomayor”) (collectively, “Defendants”).<sup>1</sup> (FAC ¶11.) Pursuant to the oral contract, Defendants agreed to locate heavy machinery for sale at auctions in the United States, and advise Recmaq of the availability, condition, and specifications of the machinery. (*Id.* at ¶ 11.) Upon further instruction by Recmaq, Defendants, through Sotomayor and Ghasemi, would then purchase the machinery for the benefit and on behalf of Recmaq. (*Id.* at ¶¶ 19, 20.)

The FAC further alleges that pursuant to the oral contract, when Sotomayor and Ghasemi located a piece of machinery for Recmaq, Sotomayor was instructed to contact Recmaq to determine if Recmaq wished to submit a bid for the machinery at the auction. (*Id.* at ¶20.) In the event Recmaq wished to bid on the machinery, the FAC alleges that Sotomayor represented that Recmaq was required to deposit earnest money with the auctioneers in order to prove that Recmaq was capable of purchasing the machinery. (*Id.* at ¶ 21.) If the machinery was successfully purchased, the earnest money was subtracted from the purchase price. (*Id.*) Sotomayor would then transmit an invoice to Recmaq for the remaining balance owed to the auctioneer or seller, whereby Recmaq would then transfer the appropriate funds via wire transfer to Sotomayor and Ghasemi, who would then pay the balance due the auctioneer. (*Id.* at 22.) If the machinery was not purchased,

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<sup>1</sup> Recmaq is a company organized under the law of Chile and is in the business of refurbishing and reselling heavy machinery used primarily for construction, agriculture, and mining. (FAC ¶ 5.) The FAC makes the following allegations with respect to the Defendants: (1) Hollywood Motors is a California limited liability company and is in the business of buying and selling used automobiles and heavy machinery, (*Id.* at ¶ 6); (2) Sotomayor is an owner, corporate officer, director, and/or registered agent of Hollywood Motors, (*Id.* at ¶ 7); and (3) Ghasemi is an owner, partner, and/or former employee of Hollywood Motors, (*Id.* at ¶ 8). The FAC also alleges that Sotomayor represented to Recmaq’s owner, Drago Gluscevic (“Gluscevic”), that Ghasemi was an integral part of Hollywood Motors’ business, and that Sotomayor and Hollywood Motors could not run the business without Ghasemi. (*Id.* at ¶ 13.)

1 the earnest money was returned to Sotomayor and Ghasemi and held on account for  
2 Recmaq. (*Id.*) The FAC also alleges that for each piece of equipment purchased by  
3 Recmaq, Sotomayor and Ghasemi received an undisclosed commission. (*Id.* at 25.)

4 In or around August 2005, the FAC alleges that Drago Gluscevic (“Gluscevic”),  
5 Recmaq’s owner, visited both Sotomayor and Ghasemi at a location Ghasemi described  
6 as his personal residence. (*Id.* at 27.) At these meetings, Recmaq alleges that Gluscevic  
7 spoke with both Sotomayor and Ghasemi about bidding on machinery at auctions and  
8 future business opportunities between the parties. (*Id.*) At one or both of these meetings,  
9 the FAC alleges that Ghasemi showed Gluscevic how Ghasemi specifically bid on the  
10 machinery at auctions. (*Id.*) After the August 2005 meetings, the FAC alleges that  
11 Gluscevic spoke directly with Ghasemi over the telephone regarding their business  
12 relationship. (*Id.* at 28.)

13 The FAC then alleges that there were multiple occasions in which Recmaq  
14 transferred money to Sotomayor and Ghasemi for the purchase of machinery, but that  
15 Recmaq never received the machinery or a return of the previously transferred funds. (*Id.*  
16 at ¶¶ 29-36.) For example, the FAC alleges that on or around December 31, 2009,  
17 Recmaq transferred \$338,400.00 to Sotomayor and Ghasemi for the purchase of eight  
18 Caterpillar “backhoe loaders,” but that Defendants have neither delivered the machinery  
19 or returned the transferred funds. (*Id.* at ¶ 29.) Thereafter, on or around March 3, 2010,  
20 the FAC alleges that Recmaq transferred an additional \$139,500.00 to Sotomayor and  
21 Ghasemi for the future purchase of three Caterpillar “420 E 2008,” but that Defendants  
22 have neither delivered the machinery or returned the transferred funds. (*Id.* at ¶ 30.) The  
23 FAC alleges that before Recmaq transferred the additional \$139,500.00 to Sotomayor and  
24 Ghasemi in March 2010, Sotomayor informed Recmaq that the eight Caterpillar “back-  
25 hoe loaders,” which had yet to be delivered to Recmaq, would either be delivered to  
26 Recmaq, or the \$338,400.00 in transferred funds would be returned to Recmaq no later  
27 than June 2010. (*Id.* at 29.) Recmaq never received either the machinery or the funds.  
28 (*Id.*)

1 In addition to the funds listed above, the FAC alleges that Recmaq transferred  
2 \$240,000.00 to Sotomayor and Ghasemi to be held on account for deposit as earnest  
3 money at four different auctions, and that Recmaq transferred an additional \$381,100.00  
4 to Sotomayor and Ghasemi for the purchase of heavy machinery at various dealers.<sup>2</sup> (*Id.*  
5 at ¶¶ 31, 32.) The FAC also alleges that Sotomayor falsely told Recmaq that \$60,000.00  
6 was required in order to qualify as a bidder at these auctions, when in fact, Recmaq later  
7 discovered that only \$10,000.00 was required. (*Id.* at ¶ 31.) To date however, Defen-  
8 dants have not delivered any of the machinery as promised, nor have Defendants returned  
9 any portion of the funds transferred to Defendants for the purchase of such machinery.  
10 (*Id.* at ¶¶ 29-32.) As a result, Recmaq alleges it has transferred \$1,099,000.00 to  
11 Sotomayor and Ghasemi, but has not received any equipment or a return of such funds.  
12 (*Id.* at ¶ 33.)

13 On or about January 12, 2011, Frank Keller (“Keller”), an attorney retained by  
14 Recmaq, met with Sotomayor at the office of Hollywood Auto Mall, which is located at  
15 1423 Broadway, El Cajon, California 92021. (*Id.* at ¶ 34.) The FAC alleges that the  
16 purpose of this meeting was to discuss repayment of the debt Sotomayor and Ghasemi  
17 owed to Recmaq. (*Id.*) At the January 12, 2011 meeting, the FAC alleges that  
18 Sotomayor admitted to Keller that he and Ghasemi owed money to Recmaq, and that  
19 Ghasemi, his former business partner, had defrauded both him and Recmaq by stealing  
20 funds from Hollywood Auto Mall, including the funds Recmaq had transferred to  
21 Defendants. (*Id.*) On January 17, 2011 Sotomayor provided Keller a written statement,  
22 which is attached to the FAC as Exhibit A (Spanish) and Exhibit B (English translation).  
23 (*Id.* at Exs. A, B.)

## 24 **II. Procedural History**

25 On April 17, 2012, Recmaq filed a complaint against Defendants alleging fifteen  
26 causes of action, including: (1) fraud; (2) conspiracy to commit fraud; (3) breach of  
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28 <sup>2</sup> The FAC did not specify the date of these alleged transfers.

1 contract; (4) RICO violation, 18 U.S.C. 1962(c); (5) RICO conspiracy, 18 U.S.C.  
2 1962(d); (6) conversion; (7) unfair business practices under California’s Unfair Competi-  
3 tion Law (“UCL”); (8) intentional interference with prospective economic advantage; (9)  
4 breach of the implied covenant of good faith and fair dealing; (10) breach of fiduciary  
5 duty; (11) unjust enrichment; (12) account stated; (13) debt; (14) money lent; and (15)  
6 money paid. (Doc. No. 1.) On July 12, 2012, the clerk entered default against Holly-  
7 wood Auto Mall and Sotomayor. (Doc. No. 9.) The Clerk did not enter default against  
8 Ghasemi at this time because Recmaq had failed to effectuate service of the summons and  
9 complaint on Ghasemi.

10 After Ghasemi failed to timely respond to the complaint, the Clerk entered default  
11 against Ghasemi on November 13, 2012. (Doc. No. 18.) On November 14, 2012,  
12 Ghasemi filed a motion to dismiss the complaint, which was rejected by the Court as  
13 untimely. (Doc. No. 19.) On November 26, 2012, Recmaq filed a motion for default  
14 judgment against all three Defendants. (Doc. No. 20.) On December 14, 2012, Ghasemi  
15 filed a motion to set aside the entry of default, (Doc. No. 23), which was granted by the  
16 Court on February 6, 2013, (Doc. No. 31). Ghasemi then filed a motion to dismiss the  
17 complaint, (Doc. No. 33), which was vacated as moot after Recmaq filed the FAC, (Doc.  
18 No. 37). On April 10, 2013, Ghasemi filed the instant motion to dismiss. (Doc. No. 38.)

### 19 **LEGAL STANDARD**

20 A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6)  
21 tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Black*, 250  
22 F.3d 729, 732 (9th Cir. 2001). Rule 8(a)(2) requires that a pleading stating a claim for  
23 relief contain “a short and plain statement of the claim showing that the pleader is entitled  
24 to relief.” The function of this pleading requirement is to “give the defendant fair notice  
25 of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v.*  
26 *Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed.2d 929 (2007). “While a  
27 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual  
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1 allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’  
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
3 cause of action will not do.” *Id.* A complaint does not “suffice if it tenders naked  
4 assertions devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 667,  
5 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). “Factual allegations must be enough to  
6 raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. “All  
7 allegations of material fact are taken as true and construed in the light most favorable to  
8 plaintiff. However, conclusory allegations of law and unwarranted inferences are  
9 insufficient to defeat a motion to dismiss for failure to state a claim.” *Epstein v. Wash.*  
10 *Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *see also Twombly*, 550 U.S. at 555.

## 11 DISCUSSION

12 The FAC alleges the same fifteen causes of action alleged in the original com-  
13 plaint: (1) fraud; (2) conspiracy to commit fraud; (3) breach of contract; (4) RICO  
14 violation, 18 U.S.C. § 1962(c); (5) RICO conspiracy, 18 U.S.C. § 1962(d); (6) conver-  
15 sion; (7) unfair business practices under the UCL; (8) intentional interference with  
16 prospective economic advantage; (9) breach of the implied covenant of good faith and  
17 fair dealing; (10) breach of fiduciary duty; (11) unjust enrichment; (12) account stated;  
18 (13) debt; (14) money lent; and (15) money paid. (Doc. No. 35.) The Court addresses  
19 each in turn.

### 20 **I. Fraud and Conspiracy to Commit Fraud**

21 Recmaq’s first and second causes of action allege fraud and conspiracy to commit  
22 fraud. (FAC ¶¶ 37-55.) To successfully plead a cause of action for fraud, a plaintiff must  
23 show: (1) a false representation; (2) knowledge of its falsity; (3) intent to defraud; (4)  
24 justifiable reliance; and (5) damages. *Moore v. Brewster*, 96 F.3d 1240, 1245 (9th Cir.  
25 1996) (quotations omitted). Pursuant to Federal Rule of Civil Procedure 9(b), “[i]n all  
26 averments of fraud . . . the circumstances constituting fraud . . . shall be stated with  
27 particularity.” Fed. R. Civ. P. 9(b). The intention of Rule 9(b) is to give the defendant  
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1 notice of the particular misconduct so that the defendant can defend against it.  
2 *Bly-Magee v. Cal.*, 236 F.3d 1014, 1019 (9th Cir. 2001) (citing *Neubronner v. Milken*, 6  
3 F.3d 666, 672 (9th Cir. 1993)). Therefore, pursuant to Rule 9(b), a plaintiff must plead  
4 the time, place, and nature of the actions, in addition to why the actions are false. *Decker*  
5 *v. Glenfed, Inc. (In re Glenfed, Inc., Sec. Litig.)*, 42 F.3d 1541, 1548 (9th Cir. 1994).

6 To state a claim for conspiracy to commit fraud a plaintiff must allege sufficient  
7 facts to state a claim for both fraud and civil conspiracy. *Del E. Webb Corp. v. Structural*  
8 *Materials Co.*, 123 Cal. App. 3d 593, 603 n.4, 176 Cal. Rptr. 824 (Cal. Ct. App. 1981)  
9 (“A conspiracy to commit fraud is not itself a tort and such conduct is not actionable  
10 unless a fraud is in fact committed.”). California law provides that to state a cause of  
11 action for civil conspiracy the plaintiff must allege: (1) formation and operation of the  
12 conspiracy; (2) wrongful conduct in furtherance of the conspiracy; and (3) damage  
13 resulting from such wrongful conduct. *Wasco Prods. v. Southwall Techs.*, 435 F.3d 989,  
14 992 (9th Cir. 2006); *Cellular Plus, Inc. v. Super. Ct.*, 14 Cal. App.4th 1224, 1236, 18 Cal.  
15 Rptr. 2d 308 (Cal. Ct. App. 1993). Moreover, because conspiracy is a legal doctrine used  
16 to establish joint and vicarious liability by the conspirators for an underlying tort, *Entm’t*  
17 *Research Gp. v. Genesis Creative Gp.*, 122 F.3d 1211, 1228 (9th Cir. 1997), each  
18 member of the conspiracy must be able to commit the underlying tort, and all the  
19 elements of that tort must be satisfied, *Applied Equip. Corp. v. Lipton Saudi Arabia Ltd.*,  
20 7 Cal. 4th 503, 511, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (Cal. 1994); *see also Swartz v.*  
21 *KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (stating that Rule 9(b) applies to claims  
22 alleging conspiracy to commit fraud).

23 Ghasemi moves to dismiss the first and second causes on the basis that the  
24 allegations are vague, conclusory, and fail to satisfy the particularity requirement of Rule  
25 9(b). (Doc. No. 38 at 4-5.) Specifically, Ghasemi contends that although the FAC lists  
26 five statements that were allegedly made by Sotomayor between December 2009 and  
27 December 2010, the FAC does not provide any allegations as to how Ghasemi actively  
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1 participated in the alleged fraudulent scheme at the time the representations were made,  
2 or even that Ghasemi knew these representations had been made, or were going to be  
3 made. Thus, Ghasemi contends Recmaq's arguments that he ratified Sotomayor's  
4 statements or conduct after the fact are insufficient to state a claim for fraud or conspiracy  
5 to commit fraud.

6 The Court is not inclined to agree. Although Recmaq alleges that multiple  
7 defendants had a part in perpetuating the alleged fraudulent scheme, the Court finds  
8 Recmaq has adequately pled Ghasemi's role in the alleged scheme. *Swartz*, 476 F.3d at  
9 765 (stating that when there are multiple defendants, "a plaintiff must, at a minimum,  
10 identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme") (internal  
11 quotations and citations omitted). Specifically, Recmaq alleges that Ghasemi was at all  
12 relevant times a business partner and/or former employee of Hollywood Auto Mall, and  
13 that Ghasemi and Sotomayor were at all relevant times business partners, alter egos,  
14 agents, employees, and/or joint venturers. Recmaq supports this allegation with a letter  
15 from Sotomayor (FAC, Exs. A, B), and citation to a lawsuit filed by Ghasemi against  
16 Sotomayor in 2010, wherein Ghasemi represented to the Superior Court that Sotomayor  
17 was his business partner.<sup>3</sup>

18 Moreover, Recmaq alleges that in or around August 2005, Glusevic, Recmaq's  
19 owner, visited both Sotomayor and Ghasemi at an office located at 1423 Broadway, El  
20 Cajon, California. (FAC ¶ 27.) On one of these visits, Recmaq alleges that Glusevic  
21 spoke in English and Spanish with both Sotomayor and Ghasemi regarding the process  
22 for bidding on heavy machinery, and future business opportunities, and that Ghasemi  
23 personally showed Glusevic the process for how Ghasemi bid on machinery at auctions.  
24 (*Id.*) Recmaq then alleges that in or around March 2010, Sotomayor solicited an agree-  
25 ment from Recmaq for the purpose of providing Defendants additional time to either  
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27 <sup>3</sup> San Diego Superior Court Case No. 37-2010-00071662-CU-HR-EC. Although  
28 Recmaq directed the Court to this citation, Recmaq did not provide the Court with the  
actual case filing. (FAC ¶ 11, n.1.)



1 deliver the equipment to Recmaq as promised, or return the previously transferred funds.  
2 (*Id.* at ¶¶ 29, 30.) Recmaq alleges that Ghasemi knew of, abetted, and ratified each of  
3 Sotomayor’s representations. (*Id.* at ¶¶ 42, 43, 46.) Each of these allegations are  
4 supported by the letter submitted by Sotomayor and attached to the FAC as Exhibits A  
5 and B.

6 Therefore, the Court finds Recmaq has adequately alleged fraud against Defendant  
7 Ghasemi. The FAC alleges that: (1) Ghasemi either made or ratified a false representa-  
8 tion; (2) Ghasemi knew the statement was false; (3) Ghasemi made such statement with  
9 the intent to defraud Recmaq; (4) Recmaq justifiably relied on such statement(s); and as a  
10 result (5) Recmaq sustained damages in the amount of \$1,099,000.00. The Court also  
11 finds Recmaq has adequately alleged conspiracy to commit fraud against Defendant  
12 Ghasemi. The FAC alleges: (1) a conspiracy by and between the Defendants; (2) that  
13 Defendants, including Ghasemi, made continued misrepresentations in furtherance of the  
14 conspiracy; and as a result (3) Recmaq has sustained damages in the amount of  
15 \$1,099,000.00. Thus, although further discovery may prove otherwise, at this stage in the  
16 proceedings, the Court finds Recmaq has adequately alleged fraud and conspiracy to  
17 commit fraud. Accordingly, Ghasemi’s motion to dismiss the first and second causes of  
18 action are DENIED.

## 19 **II. Breach of Oral Contract**

20 Recmaq’s third cause of action alleges breach of an oral contract by and between  
21 Defendants and Recmaq. (FAC ¶¶ 56-62.) To the extent Plaintiff alleges an oral contract  
22 based on Defendants’ representations that all funds transferred to Defendants from  
23 Recmaq would be used to acquire heavy machinery at auctions, it sufficiently states a  
24 claim. “The standard elements of a claim for breach of contract are: (1) the contract; (2)  
25 plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4)  
26 damage to plaintiff therefrom.” *Abdelhamid v. Fire Ins. Exch.*, 182 Cal. App. 4th 990,  
27 999, 106 Cal. Rptr. 3d 26 (Cal. Ct. App. 2010).

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1 Here, Plaintiff alleges that: (1) Sotomayor, on behalf of all Defendants, entered  
2 into an oral contract with Recmaq, and that Ghasemi subsequently ratified such contract  
3 through his conduct, communications, and course of dealing; (2) Recmaq performed all  
4 obligations under the contract by depositing funds with Defendants; (3) Defendants,  
5 including Ghasemi, breached the contract by failing to deliver the equipment as requested  
6 or return the deposited funds; and (4) Recmaq sustained damages in the amount of  
7 \$1,099,000.00 as a result of Defendants breach. Therefore, the Court finds such allega-  
8 tions are sufficient to plead the existence of an oral contract. Accordingly, Ghasemi's  
9 motion to dismiss the third cause of action for breach of oral contract is DENIED.

### 10 **III. RICO and Conspiracy to Commit RICO**

11 Recmaq's fourth and fifth causes of action allege a RICO claim against all  
12 Defendants under 18 U.S.C. § 1962(c), and conspiracy to commit RICO under 18 U.S.C.  
13 § 1962(d). The Court first looks to whether there is a valid RICO claim before address-  
14 ing whether there is a conspiracy to commit RICO. *See Odom v. Microsoft Corp.*, 486  
15 F.3d 541, 547 (9th Cir. 2007) (stating that the survival of plaintiffs' claim under §  
16 1962(c) will ensure the survival of their claim under § 1962(d)).<sup>4</sup>

17 To state a claim under § 1962(c), a plaintiff must allege: "(1) conduct (2) of an  
18 enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P. R.L. v. Imrex*  
19 *Co., Inc.*, 473 U.S. 479, 496 (1985). A plaintiff must also show harm of a specific  
20 business or property interest by the racketeering conduct. *Id.*; *Diaz v. Gates*, 420 F.3d  
21 897, 900 (9th Cir. 2005). "Racketeering activity" is any act indictable under the several  
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25 <sup>4</sup> 18 U.S.C. § 1962(c) provides that "[i]t shall be unlawful for any person employed  
26 by or associated with any enterprise engaged in, or the activities of which affect,  
27 interstate or foreign commerce, to conduct or participate, directly or indirectly, in the  
28 conduct of such enterprise's affairs through a pattern of racketeering activity or collection  
of unlawful debt." Pursuant to 18 U.S.C. § 1962(d), "[i]t shall be unlawful for any  
person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this  
section."

1 provisions of Title 18 of the United States Code, including the predicate acts alleged by  
2 Recmaq in this case: mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343).

3 Ghasemi moves to dismiss the RICO and conspiracy to commit RICO causes of  
4 action on the basis that Recmaq has not pled the predicate acts of mail fraud and wire  
5 fraud with the required specificity under Rule 9(b), and that the FAC fails to allege a  
6 “pattern of racketeering” as required under § 1962(c). Ghasemi further argues that both  
7 of these claims should be dismissed without leave to amend because Recmaq is unable to  
8 cure any deficiencies in the pleadings. Although the Court finds Recmaq has not ade-  
9 quately pled the predicate acts of mail fraud and wire fraud, the Court finds such defi-  
10 ciencies may be cured by further amendment and therefore grants Recmaq limited leave  
11 to amend.

#### 12 **A. Mail Fraud and Wire Fraud**

13 To sufficiently plead mail fraud and wire fraud a plaintiff must allege: (1) the  
14 formation of a scheme to defraud; (2) the use of the United States mail or wire in  
15 furtherance of the scheme to defraud; and (3) the specific intent to deceive or defraud.  
16 *See Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1399–1400  
17 (9th Cir. 1986). Because both of these predicate acts involve fraud, Recmaq must plead  
18 the facts constituting the fraud with particularity as required by Rule 9(b). *Edwards v.*  
19 *Marin Park, Inc.*, 356 F.3d 1058, 1065–66 (9th Cir. 2004) (stating that Rule 9(b) applies  
20 equally to civil RICO claims and that the plaintiff must state with particularity the  
21 circumstances constituting the fraud). “Allegations of mail fraud under section  
22 1962(a)–1962(c) ‘must identify the time, place, and manner of each fraud plus the role of  
23 each defendant in each scheme.’ ” *Schreiber Distrib. Co.*, 806 F.2d at 1401 (quoting  
24 *Lewis v. Sporck*, 612 F. Supp. 1316, 1325 (N.D. Cal. 1985)).

25 Although the FAC references specific dates, wherein Recmaq alleges a specific  
26 amount of money was transferred to Defendants by Recmaq for the purpose of purchas-  
27 ing heavy equipment on behalf of Recmaq, the FAC fails to allege the time, place, and  
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1 manner of each alleged fraudulent activity, i.e., when Defendants allegedly used the  
2 wires, telephone, mail, and/or email to commit the fraud, and the individual role of each  
3 Defendant in the alleged fraud. *See Scribner Distrib. Co.*, 806 F.2d at 1401 (“We have  
4 interpreted Rule 9(b) to mean that the pleader must state the time, place, and specific  
5 content of the false representations as well as the identities of the parties to the misrepre-  
6 sentation.”). Therefore, the Court finds the pleadings do not meet the specificity require-  
7 ment under Rule 9(b), as the FAC does not specify when the alleged invoices were  
8 sent/received, and who, as in which Defendant(s), sent the invoice, email, or telephoned  
9 Recmaq.<sup>5</sup> Therefore, the Court finds Recmaq has failed to sufficiently allege the  
10 predicate acts of mail fraud and wire fraud as required under Rule 9(b).

### 11 **B. Pattern of Racketeering**

12 A “pattern of racketeering” requires “at least two acts of racketeering activity, one  
13 of which occurred after the effective date of this chapter and the last of which occurred  
14 within ten years . . . after the commission of a prior act of racketeering activity .” 18  
15 U.S.C. § 1961(5). The United States Supreme Court in *H.J., Inc. v. Northwestern Bell*  
16 *Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), defined the term  
17 “pattern” as the “showing of a relationship between the predicates” and of “the threat of  
18 continuing activity.” 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)  
19 (citing to Legislative History, S. Rep. No. 91–617 at 158 (1969)). “It is this factor of  
20 continuity plus relationship which combines to produce a pattern.” *Id.* (citation omitted).  
21 As to continuity, a plaintiff . . . must prove continuity of racketeering activity, or its  
22 threat.” *Id.* at 241. Continuity applies to “a closed period of repeated conduct or to past  
23 conduct that by its nature projects into the future with a threat of repetition.” *Id.* at 241.

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26 <sup>5</sup> Although the FAC states that Recmaq’s owner spoke to Ghasemi on the phone  
27 “subsequent to the August 2005 meetings,” the Court finds this time frame lacks  
28 specificity, and nevertheless, the allegations fail to allege the purpose of such call(s),  
besides the general “to discuss their business relationship” allegation. (FAC ¶ 28.) Thus,  
because this information can be obtained by Recmaq without discovery, the Court finds  
such information should have been alleged under Rule 9(b).

1 A plaintiff may show continuity over a closed period by “proving a series of related  
2 predicates extending over a substantial period of time. Predicate acts extending over a  
3 few weeks or months and threatening no future criminal conduct do not satisfy this  
4 requirement.” *Id.* at 242.

5 Ghasemi contends Recmaq has failed to plead a “pattern of racketeering” because  
6 the RICO allegations materially lack a defined time frame from which a pattern can be  
7 based. Ghasemi further argues that the allegations in the FAC “boil[] down” to the claim  
8 that between December 2009 and December 2010, Sotomayor and Ghasemi engaged in  
9 conduct that constitutes a pattern of racketeering. Thus, Ghasemi essentially argues that  
10 the alleged conduct cannot constitute a “pattern of racketeering” because the time period  
11 of such conduct was no more than a year in length.

12 The Court is not inclined to agree. As stated by the Ninth Circuit in *Allwaste, Inc.*  
13 *v. Hechi*, 65 F.3d 1523, 1528 (9th Cir. 1995), a bright line, one-year rule undermines *H.J.*  
14 *Inc.*’s principle that flexibility rather than rigidity should govern the application of RICO.  
15 *See also, Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14, 105 S. Ct. 3275, 3285  
16 n.14, 87 L .Ed. 2d 346 (1985) ( “RICO is to be read broadly.”). Thus, although the FAC  
17 alleges that money was not exchanged between the parties until December 31, 2009, the  
18 FAC also alleges a relationship and representations made by Defendants as early as  
19 2002.<sup>6</sup> Therefore, even based on the one-year time frame between December 2009 and  
20

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21 <sup>6</sup> The FAC alleges that in or around 2002, Recmaq entered into an oral contract  
22 with Defendants, whereby Defendants agreed to locate heavy machinery for sale at  
23 auctions and purchase such machinery on behalf of Recmaq. (FAC ¶ 11.) Thereafter, in  
24 or around August 2005, Recmaq’s owner visited both Sotomayor and Ghasemi at an  
25 office located in El Cajon, California, wherein Ghasemi showed Recmaq’s owner how  
26 Ghasemi bid on machinery at auctions on behalf of Recmaq. (*Id.* at ¶ 27.) The FAC  
27 then alleges that in or around December 31, 2009, Recmaq transferred \$338,400.00 to  
28 Sotomayor and Ghasemi for the purchase of eight Caterpillar “backhoe loaders.” (*Id.* at ¶  
29.) However, in March 2010, Sotomayor notified Recmaq that it would be unable to  
deliver the requested machinery, and informed Recmaq that Defendants would either  
deliver the machinery or return the funds by the end of June 2010. (*Id.*) Based on this  
reassurance, Recmaq transferred an additional \$139,500.00 to Sotomayor and Ghasemi  
for the future purchase of three Caterpillar “420 E 2008” units. (*Id.* at ¶ 30.) To date,  
Recmaq has not received any machinery or a return of previously delivered funds from  
Defendants. Recmaq also alleges Defendants have not returned \$240,000.00, which was

1 December 2010, at this stage in the proceedings, the Court finds Recmaq has adequately  
2 alleged a “pattern of racketeering” as required under § 1962(c).

3 In sum, even though the Court finds Recmaq has sufficiently pled a “pattern of  
4 racketeering,” the Court GRANTS Ghasemi’s motion to dismiss the fourth cause of  
5 action alleging violation of RICO and the fifth cause of action alleging RICO conspiracy,  
6 as Recmaq has not pled the predicate acts of mail fraud and wire fraud with the required  
7 specificity under Rule 9(b). *See Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir.  
8 2000) (“Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not  
9 adequately plead a substantive violation of RICO.”). Accordingly, Ghasemi’s motion to  
10 dismiss the fourth and fifth causes of action are GRANTED with leave to amend.  
11 Recmaq is granted limited leave to amend the FAC to correct the deficiencies noted  
12 above.

#### 13 **IV. Conversion**

14 Recmaq’s sixth cause of action alleges conversion. (FAC ¶¶ 76-83.) A conversion  
15 occurs where someone wrongfully exercises dominion over the property of another.  
16 *Greka Integrated, Inc. v. Lowry*, 133 Cal. App. 4th 1572, 1581, 35 Cal. Rptr. 3d 684 (Cal.  
17 Ct. App. 2005). The elements of a conversion are: (1) the plaintiff’s ownership or right  
18 to possession of the property at the time of the conversion; (2) the defendant’s conversion  
19 by a wrongful act or disposition of property rights; and (3) damages. *Farmers Ins. Exch.*  
20 *v. Zerín*, 53 Cal. App. 4th 445, 451 (Cal. Ct. App. 1997). “It is not necessary that there  
21 be a manual taking of the property; it is only necessary to show an assumption of control  
22 or ownership over the property, or that the alleged converter has applied the property to  
23 his own use.” *Oakdale Vill. Gp. v. Fong*, 43 Cal. App. 4th 539, 543–44, 50 Cal. Rptr. 2d  
24 810 (Cal. Ct. App. 1996). Money can be the subject of an action for conversion if the  
25 sum is specific and identifiable. *Ross v. U.S. Bank Nat. Ass’n*, 542 F. Supp. 2d 1014,

26 \_\_\_\_\_  
27 held on account with Defendants as earnest money, and Defendants falsely represented  
28 that auctions required a \$60,000.00 deposit, when in fact, auctions only require a  
\$10,000.00 deposit. (*Id.* at ¶ 31.)

1 1024 (N.D. Cal. 2008) (citing *Baxter v. King*, 81 Cal. App. 192, 253, 253 P. 172 (Cal. Ct.  
2 App. 1927)).

3 Here, Recmaq's conversion claim is based on allegations that after Recmaq  
4 transferred and deposited funds with Defendants, Recmaq had the right to possess either  
5 the heavy machinery the funds were intended to purchase, or to recover the funds  
6 previously delivered to Defendants. However, because Sotomayor and Ghasemi inten-  
7 tionally and wrongfully retained the funds Recmaq had delivered to Defendants, and  
8 Defendants did not deliver the heavy machinery as promised, Recmaq alleges it has been  
9 deprived of its right to possess the funds or the machinery. In response, Ghasemi argues  
10 that the FAC fails to allege a single instance where money was transferred to him, or  
11 wrongfully converted by him, and therefore, this cause of action must be dismissed as to  
12 him because Recmaq is once again attempting to summarily impute liability to Ghasemi  
13 without any basis.

14 At this stage in the proceedings, the Court finds Recmaq has adequately pled a  
15 cause of action for conversion against Ghasemi. The FAC states that on multiple  
16 occasions, including December 31, 2009 and March 3, 2010, Recmaq transferred funds to  
17 Sotomayor and Ghasemi for the purchase of heavy equipment, and that neither the  
18 equipment nor the funds have been recovered or returned by Recmaq. (FAC ¶¶ 29, 30,  
19 31, 32.) *See Messerall v. Fulwider*, 199 Cal. App. 3d 1324, 1329, 245 Cal. Rptr. 548  
20 (Cal. Ct. App. 1988) ("One who wrongfully withholds personal property from another  
21 who is entitled to it under a security agreement may be liable for conversion."). Thus,  
22 although Ghasemi argues that the FAC does not adequately allege his involvement in the  
23 wrongful withholding of Recmaq's personal property, and further discovery on the issue  
24 is needed to support his contentions, the Court finds Recmaq has sufficiently stated a  
25 claim for conversion against Ghasemi. *See Textainer Equip. Mgmt. (U.S.) Ltd. v. TRS*  
26 *Inc.*, C 07-01519 WHA, 2007 WL 1795695 (N.D. Cal. June 20, 2007) (finding that the  
27 plaintiff stated a claim for breach of contract and conversion because the duty to not  
28

1 misappropriate the containers existed outside the contract); *Robinson Helicopter Co., Inc.*  
2 *v. Dana Corp.*, 34 Cal. 4th 979, 993, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (Cal. 2004)  
3 (stating that parties to contracts are expected to understand the risks allocated by contract,  
4 but are not expected to anticipate fraud or dishonesty). Accordingly, Ghasemi’s motion  
5 to dismiss Recmaq’s sixth cause of action for conversion is DENIED.

6 **V. Violation of California’s Unfair Competition Law**

7 Recmaq’s seventh cause of action alleges violation of the UCL, Cal. Bus. & Prof.  
8 Code § 17200, which prohibits unlawful, unfair or fraudulent business acts or practices  
9 and unfair, deceptive, untrue, or misleading advertising. (FAC ¶¶ 84-87.) “Each prong  
10 of [§ 17200] is a separate and distinct theory of liability.” *Birdsong v. Apple, Inc.*, 590  
11 F.3d 955, 959 (9th Cir. 2009). “An act can be alleged to violate any or all of the three  
12 prongs of the UCL—unlawful, unfair, or fraudulent.” *Berryman v. Merit Prop. Mgmt.,*  
13 *Inc.*, 152 Cal. App. 4th 1544, 1554, 62 Cal. Rptr. 3d 177 (Cal. Ct. App. 2007).

14 In the instant case, it appears Recmaq is alleging that Defendants acts and practices  
15 violated all three prongs of the UCL. Specifically, Recmaq alleges that by misrepresent-  
16 ing that auctions required \$60,000.00 deposits for heavy machinery, and by misrepresent-  
17 ing that Sotomayor and Ghasemi would use Recmaq’s funds to purchase the heavy  
18 machinery on behalf of Recmaq, Defendants actions constitute “unlawful and unfair  
19 business acts” and it “would be fundamentally unfair for Defendants to retain the funds.”  
20 (FAC ¶¶ 85, 86.) Ghasemi moves to dismiss the UCL cause of action, arguing that the  
21 claims are without merit, and nonetheless, Recmaq has failed to sufficiently allege  
22 Ghasemi’s role and or participation in any unlawful, unfair, or fraudulent practices.  
23 Although the Court finds Recmaq has sufficiently pled Ghasemi’s participation in the  
24 alleged conduct, the Court finds Recmaq has not adequately pled a violation under the  
25 unlawful or fraudulent prongs.

26 ///

27 ///

28



1           **A.     Unlawful Prong**

2           A claim based on the unlawful prong incorporates other laws and treats violations  
3 of those laws as unlawful business practices independently actionable under state law.  
4 *Chabner v. United Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000). Thus, the  
5 operative pleading must allege the way in which the practices violated the “borrowed”  
6 law by “stat[ing] with reasonable particularity the facts supporting the statutory elements  
7 of the violation.” *Khoury v. Maly’s of Cal., Inc.*, 14 Cal. App. 4th 612, 618–19, 17 Cal.  
8 Rptr. 2d 708 (Cal. Ct. App. 1993). Here however, aside from stating that Defendants’  
9 conduct was “unlawful,” Recmaq does not set forth what laws Defendants have allegedly  
10 violated. *See, e.g., In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection*  
11 *HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1091 (S.D. Cal. 2010) (“Throughout the  
12 FACC, Plaintiffs allege that Sony violated several laws, but they do not link those claims  
13 to the UCL except by stating that Sony’s unlawful and unfair business acts and practices  
14 present a continuing threat to plaintiffs.”) (internal quotations omitted). Thus, the Court  
15 concludes Recmaq has not sufficiently pled that Ghasemi’s acts and practices were  
16 unlawful under the UCL.

17           **B.     Fraudulent Prong**

18           To state a cause of action under the fraudulent prong of the UCL a plaintiff must  
19 show that members of the public are likely to be deceived. *Schnall v. Hertz Corp.*, 78  
20 Cal. App. 4th 1144, 1167, 93 Cal. Rptr. 2d 439 (Cal. Ct. App. 2000). Heightened  
21 pleading requirements under Rule 9(b) apply to UCL claims under the fraud prong.  
22 *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009). To satisfy this standard the  
23 allegations must be “specific enough to give defendants notice of the particular miscon-  
24 duct that is alleged to constitute the fraud charged so that the defendants can defend  
25 against the charge and not just deny that they have done anything wrong.” *Semegen v.*  
26 *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Thus, claims sounding in fraud must allege  
27 “an account of the time, place, and specific content of the false representations[,] as well  
28

1 as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d  
2 756, 764 (9th Cir. 2007).

3 As stated above, with respect to the first and second causes of action, the Court  
4 finds Recmaq’s fraud allegations are sufficient to state claim under the fraudulent prong.  
5 As pertinent to Ghasemi’s instant motion, Recmaq identifies the who (Ghasemi), the  
6 what (that Ghasemi knew about and ratified Sotomayor’s misrepresentations to Recmaq  
7 regarding the purpose of the funds Recmaq was providing Defendants), the when (in  
8 2002, August 2005, December 2009, and March 2010), the where (at an office located at  
9 1423 Broadway, El Cajon, California, and over the telephone), and the how (that it was  
10 misleading to represent the amount of the deposit required by auctions and that Defen-  
11 dants would purchase equipment for Recmaq with funds provided to Defendants by  
12 Recmaq). Thus, it cannot plausibly be said that the allegations in the FAC do not  
13 “identif[y] the circumstances constituting fraud so that [the] Defendant[s] can prepare an  
14 adequate answer from the allegations.” *Moore v. Kayport Package Express, Inc.*, 885  
15 F.2d 531, 540 (9th Cir. 1989); *see also Lima v. Gateway*, 710 F. Supp. 2d 1000, 1006  
16 (C.D. Cal. 2010). Thus, the Court concludes Recmaq has sufficiently pled that  
17 Ghasemi’s acts and practices were fraudulent under the UCL.

### 18 C. Unfair Prong

19 To state a claim under the unfair prong, the Ninth Circuit has explained that  
20 California courts must determine whether the practice undermines a legislatively declared  
21 policy or threatens competition, or whether the practice has an impact on its alleged  
22 victim that outweighs the reasons, justifications, and motives of the alleged wrongdoer.  
23 *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007); *see also*  
24 *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 186–87, 83 Cal. Rptr.  
25 2d 548, 973 P.2d 527 (Cal. 1999); *South Bay Chevrolet v. Gen. Motors Acceptance*  
26 *Corp.*, 72 Cal. App. 4th 861, 886, 85 Cal. Rptr. 2d 301 (Cal. Ct. App. 1999). Although  
27 Recmaq has not identified a “specific constitutional, statutory or regulatory provision”  
28

1 that has been violated, the Court finds Ghasemi’s actions and practices may be consid-  
2 ered unfair if the utility of his conduct is outweighed by the gravity of the harm that  
3 Recmaq allegedly suffered. *See id.* Therefore, the Court concludes that Recmaq’s  
4 allegations are sufficient to withstand a motion to dismiss because Recmaq has plausibly  
5 alleged that the utility of Ghasemi’s practice of failing to disclose the actual deposit  
6 amounts required by auctions, and Ghasemi’s failure to actually purchase equipment as  
7 promised, is outweighed by the harm Recmaq has allegedly suffered. *Linear Tech. Corp.*  
8 *v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 134–35, 61 Cal. Rptr. 3d 221 (2007)  
9 (“Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact  
10 which requires consideration and weighing of evidence from both sides and which  
11 usually cannot be made on demurrer.”); *see also Williams v. Gerber Prods. Co.*, 552 F.3d  
12 934, 938–39 (9th Cir. 2008). Thus, the Court concludes Recmaq has sufficiently pled  
13 that Ghasemi’s acts and practices were unfair under the UCL.

14 In sum, after considering Recmaq’s allegations and Ghasemi’s arguments, the  
15 Court concludes Recmaq has adequately alleged a cause of action under the fraudulent  
16 and unfair prongs, but has failed to adequately allege a cause of action under the unlawful  
17 prong. Accordingly, the Court GRANTS IN PART AND DENIES IN PART Ghasemi’s  
18 motion to dismiss Recmaq’s seventh cause of action for violation of the UCL. Recmaq is  
19 granted limited leave to amend the FAC in order to correct the deficiencies noted above.

## 20 **VI. Intentional Interference with Prospective Economic Advantage**

21 Recmaq’s eighth cause of action alleges intentional interference with prospective  
22 economic advantage (“IIEPA”). (FAC ¶¶ 88-93.) An IIEPA claim consists of six  
23 elements: “(1) an economic relationship between broker and vendor or broker and vendee  
24 containing the probability of future economic benefit to the broker; (2) knowledge by the  
25 defendant of the existence of the relationship; (3) intentional acts on the part of the  
26 defendant designed to disrupt the relationship; (4) actual disruption of the relationship;  
27 (5) damages to the plaintiff proximately caused by the acts of the defendant;” and (6)  
28

1 “conduct that was wrongful by some legal measure other than the fact of interference  
2 itself.” *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 389, 393, 45  
3 Cal. Rptr. 2d 436, 902 P.2d 740 (Cal. 1995); *Edwards v. Arthur Andersen LLP*, 44 Cal.  
4 4th 937, 944, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (Cal. 2008) (citing *Korea Supply Co. v.*  
5 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153–54, 131 Cal. Rptr. 2d 29, 63 P.3d 937  
6 (Cal. 2003)).

7 Ghasemi moves to dismiss this cause of action on the basis that Recmaq has not  
8 sufficiently pled the third and fourth elements. (Doc. No. 38 at 11-12.) Specifically,  
9 Ghasemi argues that the FAC fails to adequately allege how Ghasemi individually  
10 interfered with the alleged relationship, and that Recmaq is attempting to summarily  
11 impute liability to Ghasemi.<sup>7</sup> The Court is not persuaded. At this stage in the proceed-  
12 ings, the Court finds Recmaq has sufficiently pled the requisite elements to state a cause  
13 of action for IIPEA. The FAC specifically alleges that Ghasemi interfered with  
14 Recmaq’s relationship with its prospective customers by failing to purchase heavy  
15 machinery as requested, and/or by failing to return money delivered to Defendants by  
16 Recmaq for the purchase of such equipment. (FAC ¶¶ 90, 91.) Thus, although further  
17 discovery may prove otherwise, the Court finds Recmaq has adequately stated a claim for  
18 relief against Ghasemi. Accordingly, Ghasemi’s motion to dismiss Recmaq’s eighth  
19 cause of action for IIEPA is DENIED.

## 20 **VII. Breach of the Implied Covenant of Good Faith and Fair Dealing**

21 Recmaq’s ninth cause of action alleges breach of the implied covenant of good  
22 faith and fair dealing. (FAC ¶¶ 94-99.) California law recognizes that “[e]very contract  
23 imposes upon each party a duty of good faith and fair dealing in its performance and its  
24

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25  
26 <sup>7</sup> Ghasemi devoted only two sentences to his argument as to why this cause of  
27 action should be dismissed. Moreover, it was unclear from Ghasemi’s motion who the  
28 “alleged relationship” he was referring to included. (Doc. No. 38 at 12:4-4.) In  
Recmaq’s opposition, Recmaq presumed that this “alleged relationship” was between  
Recmaq and its prospective customers for heavy machinery. (Doc. No. 41 at 16:9-12.)  
The Court is inclined to agree.

1 enforcement.” *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 937 (9th Cir. 1999)  
2 (applying California law). That duty, known as the covenant of good faith and fair  
3 dealing, requires “that neither party . . . do anything which will injure the right of the  
4 other to receive the benefits of the agreement.” *Andrews v. Mobile Aire Estates*, 125 Cal.  
5 App. 4th 578, 589, 22 Cal. Rptr. 3d 832 (Cal. Ct. App. 2005). “The implied covenant of  
6 good faith and fair dealing is limited to assuring compliance with the express terms of the  
7 contract and cannot be extended to create obligations not contemplated by the contract.”  
8 *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089, 1094, 8 Cal. Rptr. 3d  
9 233 (Cal. Ct. App. 2004) (quotation omitted); *see also Racine & Laramie, Ltd. v. Dep’t of*  
10 *Parks & Recreation*, 11 Cal. App. 4th 1026, 1032, 14 Cal. Rptr. 2d 335 (Cal. Ct. App.  
11 1992). Thus, a breach of the implied covenant of good faith and fair dealing requires  
12 something more than a breach of the contractual duty itself. *Careau & Co. v. Security*  
13 *Pacific Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1394, 272 Cal. Rptr. 387 (Cal. Ct. App.  
14 1990) (citations omitted). This “implies unfair dealing rather than mistaken judgment.”  
15 *Id.*

16 Ghasemi moves to dismiss this cause of action alleging that the FAC fails to  
17 establish a written or oral contract between Plaintiff and Ghasemi. (Doc. No. 38 at 12.)  
18 Thus, because there is no obligation to deal fairly or in good faith absent an existing  
19 contract, it appears Ghasemi is arguing that this cause of action should be dismissed  
20 based on the Court’s dismissal of the third cause of action for breach of oral contract.  
21 However, as stated above, because the Court finds Recmaq has sufficiently stated a cause  
22 of action for breach of oral contract, the Court also finds Ghasemi’s arguments for  
23 dismissal of the ninth cause of action without merit.<sup>8</sup> Therefore, because Recmaq has  
24 sufficiently pled an oral contract between the parties—at this stage in the proceed-  
25 ings—the Court finds Recmaq does not also need to enumerate specific acts by Ghasemi  
26

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27 <sup>8</sup> Although Recmaq is correct, in that Ghasemi states that the parties “engaged in a  
28 healthy business relationship for eight years,” the Court finds this is not an explicit  
admission of an oral or written contract between the parties. (Doc. No. 38 at 7:23-25.)

1 and allege why such acts were unreasonable. *See Love v. Fire Ins. Exch.*, 221 Cal. App.  
2 3d 1136, 1151-52, 271 Cal. Rptr. 246 (Cal. Ct. App. 1990). Accordingly, Ghasemi's  
3 motion to dismiss the ninth cause of action for breach of the implied covenant of good  
4 faith and fair dealing is DENIED.

### 5 **VIII. Breach of Fiduciary Duty**

6 Recmaq's tenth cause of action alleges breach of fiduciary duty. (FAC ¶¶ 100-05.)  
7 A claim for breach of fiduciary duty requires a showing that: (1) a relationship giving rise  
8 to a fiduciary duty existed; (2) the defendant breached that fiduciary duty; and (3) the  
9 plaintiff suffered damages as a result of that breach. *See Apollo Capital Fund LLC v.*  
10 *Roth Capital Partners LLC*, 158 Cal. App. 4th 226, 244, 70 Cal. Rptr. 3d 199 (Cal. Ct.  
11 App. 2007); *Tina v. Countrywide Home Loans, Inc.*, No. 08cv1233 JM (NLS), 2008 WL  
12 4790906, at \*4 (S.D. Cal. Oct. 30, 2008) ("Without a fiduciary relationship, there can be  
13 no breach of fiduciary duty."). "A fiduciary relationship is a recognized legal relation-  
14 ship such as a guardian and ward, trustee and beneficiary, agent and principal, or attorney  
15 and client." *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 271, 130  
16 Cal. Rptr. 2d 601 (Cal. Ct. App. 2003). "[B]efore a person can be charged with a  
17 fiduciary obligation, he must either knowingly undertake to act on behalf and for the  
18 benefit of another, or must enter into a relationship which imposes that undertaking as a  
19 matter of law." *City of Hope Nat. Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 386, 181  
20 P.3d 142, 150 (2008) (citing *Committee on Children's Television, Inc. v. Gen. Foods*  
21 *Corp.*, 35 Cal.3d 197, 221, 197 Cal. Rptr. 783, 673 P.2d 660 (Cal. 1993)).

22 Ghasemi moves to dismiss this cause of action on the basis that there are insuffi-  
23 cient allegations to support the conclusion that Ghasemi, in his individual capacity, held  
24 any money in trust for the benefit of Recmaq, or acted in a manner that gave rise to an  
25 individual obligation on his part for the benefit of Recmaq. (Doc. No. 38 at 13.) As a  
26 result, Ghasemi contends he never owed a fiduciary duty to Recmaq that could have been  
27 subsequently breached. In response, and also contained within the body of the FAC,  
28

1 Recmaq contends that Defendants, through Sotomayor and Ghasemi, served as agents for  
2 Recmaq by bidding on and purchasing heavy machinery for Recmaq at auctions and  
3 through dealers in the United States. (FAC ¶ 101.) Thus, as Recmaq’s agents, the FAC  
4 alleges that Defendants, through Sotomayor and Ghasemi, had a fiduciary duty to act in  
5 Recmaq’s best interest, and breached this duty by: (1) failing to deliver eight Caterpillar  
6 backhoe loaders and three Caterpillar “420 E 2009” units to Recmaq; (2) failing to bid on  
7 and purchase heavy machinery on behalf of Recmaq; and (3) stealing over \$1,000,000.00  
8 from Recmaq. (*Id.* at ¶¶ 102, 103.)

9 Although the Court is cognizant that an agency relationship creates a fiduciary  
10 relationship, *Maganallez v. Hilltop Lending Corp.*, 505 F. Supp. 2d 594, 608 (N.D. Cal.  
11 2007), the allegations as currently pled are insufficient to establish such a duty under  
12 agency principles. “California courts define an agent as ‘anyone who undertakes to  
13 transact some business, or manage some affair, for another, by authority of and on  
14 account of the latter, and to render an account of such transactions.’ ” *In re Coupon*  
15 *Clearing Serv., Inc.*, 113 F.3d 1091, 1099 (9th Cir. 1997) (citing *Violette v. Shoup*, 16  
16 Cal. App. 4th 611, 620, 20 Cal. Rptr. 2d 358 (Cal. Ct. App. 1993)). When determining  
17 whether an agency relationship exists, one of the chief considerations is whether the  
18 “agent” has authority to act for and in the place of the “principal” for the “purposes of  
19 bringing him or her into legal relations with third parties.” *DSU Aviation, LLC v. PCMT*  
20 *Aviation, LLC*, No.:07-1478 SC, 2007 WL 3456564, at \*5 (N.D. Cal. Nov. 14, 2007).  
21 “The other important aspect in determining the existence of an agency relationship is the  
22 degree of control exercised by the principal over the activities of the agent.” *Id.* “If the  
23 principal has the right to control the agent’s day-to-day operations, then an agency  
24 relationship exists. If, however, the principal has no control over the day-to-day opera-  
25 tions and only has [the] right to dictate the end result of the agent’s activities, then an  
26 ‘independent contractor’ relationship exists.” *Figi Graphics, Inc. v. Dollar Gen. Corp.*,

1 33 F. Supp. 2d 1263, 1266 (S.D. Cal. 1998) (citing *In re Coupon Clearing Serv., Inc.*, 113  
2 F.3d 1091, 1099-1100 (9th Cir. 1997)).

3 Here, the FAC alleges that in or around 2002, Recmaq, acting through its then  
4 manager Anibal Ortiz, and Sotomayor, acting on behalf of Hollywood Auto Mall, entered  
5 into an oral contract whereby Sotomayor and his business partner Ghasemi would locate  
6 heavy machinery, advise Recmaq of the availability, condition, and specifications of the  
7 machinery, and upon instructions by Recmaq, purchase the machinery for the benefit and  
8 on behalf of Recmaq. (FAC ¶ 11.) Thus, the FAC alleges that Defendants had the  
9 “authority” to purchase machinery for the benefit and on behalf of Recmaq, but does not  
10 allege whether Recmaq had the authority to dictate and control the day-to-day operations  
11 of Defendants, including, by way of example, what auctions and/or dealers Defendants  
12 purchased the equipment from. Moreover, the FAC does not allege facts that tend to  
13 show that Ghasemi “knowingly” undertook such fiduciary obligations, exceeding those  
14 duties set out in the alleged oral contract between the parties, which would then suggest  
15 that Ghasemi intended to subordinate his interests to the interests of Recmaq.<sup>9</sup> *City of*  
16 *Hope Nat’l Med. Cent. v. Genentech, Inc.*, 43 Cal. 4th 375,386, 75 Cal. Rptr. 3d 333, 181  
17 P.3d 142 (Cal. 2008).

18 Therefore, the Court finds the allegations as currently pled allege nothing more  
19 than a contractual, arms-length relationship between the parties, whereby Defendants  
20 were instructed to purchase heavy machinery for Recmaq.<sup>10</sup> *See Oakland Raiders v. Nat’l*

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22 <sup>9</sup> The Court finds Recmaq’s conclusory allegations that Ghasemi served as an agent  
23 for Recmaq, and that Ghasemi was fully aware that he was serving as Recmaq’s agent,  
24 does not satisfy its pleading obligations. *See Iqbal*, 556 U.S. at 678 (finding the although  
a complaint need not include “detailed factual allegations,” it must offer “more than an  
unadorned, the defendant-unlawfully-harmed-me accusation”).

25 <sup>10</sup> The Court is also cognizant that even in cases where the contract itself does not  
26 establish a fiduciary relationship, extrinsic factors may “elevate a contractual relationship  
27 to a fiduciary one.” *Portney v. CIBA Vision Corp.*, No. SAcv07-0854, 2008 WL  
28 5505517, at \*4 (C.D. Cal. July 17, 2008) (citing *City of Hope*, 43 Cal. 4th at 388-89, 75  
Cal. Rptr. 3d 333, 181 P.3d 142). Relevant extrinsic factors include: (1) the relative  
sophistication and bargaining power of the parties; (2) whether the parties were  
represented by counsel throughout negotiations; (3) whether one party’s reliance on the



1 *Football League*, 131 Cal. App. 4th 621, 633-34, 32 Cal. Rptr. 3d 266 (Cal. Ct. App.  
2 2005) (finding that a mere contractual relationship, without more, does not give rise to a  
3 fiduciary obligation); *City Solutions, Inc. v. Clear Channel Commc'ns, Inc.*, 201 F. Supp.  
4 2d 1048, 1050 (N.D. Cal.2002) (“The mere fact that in the course of their business  
5 relationships the parties reposed trust and confidence in each other does not impose any  
6 corresponding fiduciary duty.”); *Margosian v. Margosian*, No. CV F 11–0137, 2011 WL  
7 703614, at \*11 (E.D. Cal. Feb.18, 2011) (stating that as a general rule, “California courts  
8 have not extended the special relationship doctrine to include ordinary commercial  
9 contractual relationships”) (internal quotations omitted). Accordingly, Ghasemi’s motion  
10 to dismiss Recmaq’s tenth cause of action for breach of fiduciary duty is GRANTED  
11 with leave to amend. Recmaq is granted limited leave to amend the FAC to comply with  
12 the deficiencies noted above.

13 **IX. Common Counts: Unjust Enrichment, Account Stated, Debt, Money Lent,**  
14 **Money Paid**

15 Recmaq’s remaining causes of action are common count claims. (FAC ¶¶ 106-  
16 120.) A common count claim is a claim based on a debt owed by a defendant to a  
17 plaintiff, generally for goods or services rendered. *See* Arthur Linton Corbin, Corbin on  
18 Contracts ¶ 20 (1963) (the common counts are statements “that the defendant is indebted  
19 to the plaintiff for a variety of commonly occurring reasons, such as money had and  
20 received, money lent, work and labor done, and goods sold and delivered. They are  
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23 other is “so substantial as to give rise to equitable concerns”; and (4) whether the contract  
24 requires one party to transfer confidential information to the other. *See City of Hope*, 43  
25 Cal. 4th at 389–91, 75 Cal. Rptr. 3d 333, 181 P.3d 142. In evaluating these or other  
26 extrinsic factors, the Court essentially assesses whether one party was so vulnerable that  
27 it could not effectively protect itself, and whether the stronger party took advantage of  
28 that vulnerability. *See Person v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1161, 23  
Cal. Rptr. 3d 335 (Cal. Ct. App. 2005) (“[V]ulnerability ‘is the necessary predicate of a  
confidential relation,’ and ‘the law treats [it] as absolutely essential.’”) (quoting *Richelle  
L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 273, 130 Cal. Rptr. 2d 601  
(Cal. Ct. App. 2003)). Here, however, the FAC does not allege that a fiduciary duty was  
created because Recmaq was so vulnerable that it could not effectively protect itself.

1 allegations of indebtedness, and the action may be properly described as indebitatus assumpsit.”)

2 In a conclusory fashion and without citation to case law, Ghasemi contends counts  
3 eleven through fifteen should be dismissed because they are merely duplicative of counts  
4 one through ten.<sup>11</sup> Although the Court finds Ghasemi’s arguments unsupported, the  
5 Court addresses each of Recmaq’s remaining claims in turn.

6 **A. Unjust Enrichment**

7 In California, unjust enrichment is “not a cause of action . . . or even a remedy, but  
8 rather a general principle, underlying various legal doctrines and remedies. It is synony-  
9 mous with restitution.” *McBride v. Boughton*, 123 Cal. App. 4th 379, 387, 20 Cal. Rptr.  
10 3d 115 (Cal. Ct. App. 2004) (stating that a claim for restitution/unjust enrichment will lie  
11 when one party has accepted and retained a benefit with full appreciation of the facts,  
12 under circumstances making it inequitable for him to retain the benefit without payment  
13 of its reasonable value); *see also Paracor Finance, Inc. v. Gen. Elec. Capital Corp.*, 96  
14 F.3d 1151, 1167 (9th Cir. 1996) (“Unjust enrichment is an action in quasi-contract, which  
15 does not lie when an enforceable, binding agreement exists defining the fights of the  
16 parties.”). A claim for unjust enrichment requires pleading the “receipt of a benefit and  
17 the unjust retention of the benefit at the expense of another.” *Lectrodryer v. Seoulbank*,  
18 77 Cal. App. 4th 723, 726, 91 Cal. Rptr. 2d 881 (Cal. Ct. App. 2000). “The mere fact that  
19 a person benefits another is not of itself sufficient to require the other to make restitution  
20 therefor.” *Dinosaur Dev., Inc. v. White*, 216 Cal. App. 3d 1310, 1315, 265 Cal. Rptr. 525  
21 (Cal. Ct. App. 1989). Ordinarily, a plaintiff must show that a benefit was conferred on  
22 the defendant through mistake, fraud, coercion, or request. *Nebbi Bros., Inc. v. Home*  
23 *Fed. Sav. & Loan Ass'n*, 205 Cal. App. 3d 1415, 1422, 253 Cal. Rptr. 289 (Cal. Ct. App.  
24 1988).

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28 <sup>11</sup> Ghasemi devotes a mere two lines to his argument in favor of dismissal of counts eleven through fifteen.

1           Contrary to Ghasemi’s conclusory contentions, the Court finds Recmaq has  
2 properly pled a cause of action for unjust enrichment/restitution. Recmaq alleges that  
3 Defendants, through Sotomayor and Ghasemi, received a total of approximately  
4 \$1,099,000.00 from Recmaq, and that Sotomayor and Ghasemi have neither returned  
5 such funds or provided Recmaq with the equipment such funds were provided for as  
6 promised. (FAC ¶¶ 107-109.) Therefore, even though Recmaq is alleging the same  
7 amount of damages based on breach of an alleged oral contract, the Court finds both  
8 claims may proceed. *See* Fed. R. Civ. P. 8(d)(3) (stating that a “party may state as many  
9 separate claims or defenses as it has, regardless of consistency”); *see also Adelman v.*  
10 *Christy*, 90 F. Supp. 2d 1034, 1045 (D. Ariz. 2000) (“The mere existence of a contract  
11 governing the dispute does not automatically invalidate an unjust enrichment alternative  
12 theory of recovery. A theory of unjust enrichment is unavailable only to a plaintiff if that  
13 plaintiff has already received the benefit of her contractual bargain.”). Accordingly, the  
14 Court finds Recmaq has sufficiently stated a claim for unjust enrichment/restitution in the  
15 alternative to its breach of contract claim, and Ghasemi’s motion to dismiss the eleventh  
16 cause of action is DENIED.

17           **B. Account Stated, Debt, Money Lent, and Money Paid**

18           In California, the essential elements for the common counts of account stated, debt,  
19 money lent, and money paid are essentially: (1) a statement of indebtedness in a certain  
20 sum; (2) consideration (i.e., goods sold); and (3) non-payment. *See e.g., Truestone, Inc.,*  
21 *v. Simi West Indus. Park II*, 163 Cal. App. 3d 715, 209 Cal. Rptr. 757 (Cal. Ct. App.  
22 1984) (applying elements to common count claim for account stated); *See TXU Energy*  
23 *Retail Co. v. Agri-Cel, Inc.*, No. 01–20289, 2006 U.S. Dist. LEXIS 62385, at \*17–18,  
24 2006 WL 2385256 (N.D. Cal. Aug. 16, 2006) (stating that an account stated arises where  
25 a creditor renders a statement of the account with money owed to the debtor and that  
26 debtor failed to object to the statement within a reasonable time); *Nilsson, Robbins,*  
27 *Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538 (9th Cir.  
28

1 1988)); *Farmers Ins. Exch. v. Zerin*, 53 Cal. App. 4th 445, 460 (Cal. Ct. App. 1997)  
2 (applying elements to common count claims for money had and received). Thus,  
3 regardless of which type of common count claim Recmaq seeks to allege, the analysis is  
4 the same.

5 As stated above, Recmaq's common count claims for account stated, debt, money  
6 lent, and money paid have been sufficiently pled. Recmaq specifically alleges that: (1)  
7 Defendants owed Recmaq \$1,099,000.00, (FAC ¶ 111); (2) Sotomayor, on behalf of all  
8 Defendants, agreed that Recmaq owed such funds, (*Id.* at ¶¶ 35, 36); (3) Sotomayor, on  
9 behalf of all Defendants, agreed to return such funds or provide the equipment to Recmaq  
10 by June 2010, (*Id.* at ¶¶ 35, 36); and (4) Defendants have failed to return the funds or  
11 proffer the requested equipment. *See Levy v. Prinzmetal*, 134 Cal. App. 2d Supp. 919  
12 (Cal. Ct. App. 1955) (stating that an account stated need not be submitted by the creditor  
13 to the debtor. A statement expressing the debtor's assent and acknowledging the agreed  
14 amount of the debt to the creditor equally establishes an account stated). Accordingly,  
15 Ghasemi's motion to dismiss Recmaq's twelfth through fifteenth causes of action for  
16 account stated, debt, money lent, and money paid are DENIED.

### 17 CONCLUSION

18 For the reasons set forth above, the Court GRANTS IN PART AND DENIES IN  
19 PART Defendant Ghasemi's motion to dismiss. (Doc. No. 38.) Specifically, the Court  
20 makes the following findings:

- 21 1. DENIES Defendant Ghasemi's motion to dismiss with respect to the First  
22 Cause of Action (fraud), Second Cause of Action (conspiracy to commit  
23 fraud), Third Cause of Action (breach of oral contract), Sixth Cause of  
24 Action (conversion), Seventh Cause of Action (unfair and fraudulent prongs  
25 of the UCL); Eighth Cause of Action (intentional interference with prospec-  
26 tive economic advantage); Ninth Cause of Action (breach of implied cove-  
27 nant of good faith and fair dealing); and Eleventh through Fifteenth Causes  
28

1 of Action (unjust enrichment, account stated, debt, money lent, and money  
2 paid);

3 2. GRANTS Defendant Ghasemi's motion to dismiss with respect to the Fourth  
4 Cause of Action (RICO), Fifth Cause of Action (RICO Conspiracy); Seventh  
5 Cause of Action (unlawful prong of the UCL), and Tenth Cause of Action  
6 (breach of fiduciary duty); and

7 3. Plaintiff Recmaq is granted limited leave to amend the FAC with respect to  
8 the Fourth, Fifth, Seventh, and Tenth Causes of Action, in order to cure the  
9 deficiencies noted above. No new parties or claims may be added without  
10 leave of Court.

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12 IT IS SO ORDERED.

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14 DATED: May 20, 2013

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17 Hon. Anthony J. Battaglia  
18 U.S. District Judge  
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