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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

WORLDWIDE TRAVEL,  
INCORPORATED, *et al.*,

Plaintiffs,

v.

TRAVELMATE US, INC., *et al.*,

Defendants.

Case No. 14-cv-00155-BAS(DHB)

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS**

(ECF No. 49)

On June 12, 2013, Plaintiffs World Wide Travel Incorporated dba Worldwide Travel, Inc. (“WWT”), Laxmi Chand, and Usha Chand (collectively, “Plaintiffs”) commenced this action against Defendants Travelmate US, Inc. dba TMI, dba TMI Web, dba TMI Web Services, dba Travelmate (“TMI”) and Ritu Singla (collectively, “Defendants”) in Superior Court for the District of Columbia. Defendants removed the case to the United States District Court for the District of Columbia on September 4, 2013 on the basis of diversity jurisdiction. (ECF No. 1.) The case was transferred to the Southern District of California in January 2014. (ECF Nos. 16, 17.)

On March 11, 2014, Plaintiffs filed a First Amended Complaint (“FAC”) alleging (1) breach of contract, (2) fraud, (3) money had and received, (4) conversion, (5) breach of the implied covenant of good faith and fair dealing, (6) violation of

1 California's Unfair Competition Law ("UCL"), Business and Professions Code  
2 Section 17200, *et seq.*, and (7) accounting. (ECF No. 39.) Defendants moved to  
3 dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 40.) The  
4 Court granted in part and denied in part Defendants' motion to dismiss with leave to  
5 amend. (ECF No. 47.)

6 On March 30, 2016, Plaintiffs filed a Second Amended Complaint ("SAC")  
7 alleging (1) breach of contract, (2) fraud, (3) money had and received, (4) conversion  
8 by theft, (5) breach of implied covenant of good faith and fair dealing, and (6)  
9 violation of the UCL. (ECF No. 48.) Presently before the Court is a motion to  
10 dismiss the SAC. (ECF No. 49.) Plaintiffs oppose. (ECF No. 52.)

11 The Court finds this motion suitable for determination on the papers submitted  
12 and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the reasons set forth below,  
13 Defendants' motion to dismiss (ECF No. 49) is **GRANTED IN PART** and **DENIED**  
14 **IN PART**.

## 15 **I. BACKGROUND**

### 16 **A. Repeated Allegations**

17 The following allegations, which were set forth in the FAC, were re-alleged in  
18 the SAC. Plaintiffs Laxmi Chand and Usha Chand are the shareholders and officers  
19 of plaintiff WWT, a corporation in the business of selling overseas travel  
20 arrangements. (SAC at ¶ 1.) In 2004, Plaintiffs sponsored defendant Ritu Singla to  
21 move from India to the United States in order to work for WWT. (*Id.* at ¶ 9.) In  
22 2005, Ms. Singla left WWT and allegedly moved to Texas. (*Id.* at ¶ 11.)

23 Plaintiffs allege that, while in Texas, Ms. Singla formed TMI, a business  
24 designed to sell the same type of overseas travel arrangements sold by Plaintiffs. (*Id.*  
25 at ¶ 12.) Plaintiffs further allege that Ms. Singla moved to California in 2009 and  
26 began to operate TMI in the City of San Diego. (*Id.* at ¶¶ 2–3, 13.) Plaintiffs also  
27 allege that Ms. Singla is TMI's sole officer, director, and shareholder. (*Id.* at ¶ 6.)

28 Due to the increase in online travel arrangements, Plaintiffs began seeking

1 assistance to advertise WWT’s website on Google. (*Id.* at ¶ 14.) Plaintiffs allege  
2 that, in or about February 2009, TMI, through its agent, “Tanya,” solicited Laxmi  
3 Chand to use TMI’s advertising services on Google. (*Id.* at ¶ 15, Exh. 1.) In February  
4 2009, Laxmi Chand and WWT entered into a written contract (“Contract”) with TMI  
5 for “guaranteed ‘first page placement’” of Plaintiffs’ website on Google. (*Id.*) Ms.  
6 Singla was not a party to the Contract. (*See id.* at Exh. 1.) Usha Chand was also not  
7 a party to the Contract. (*See id.*) The Contract authorized TMI to charge its billings  
8 directly to Plaintiffs’ American Express accounts. (*Id.* at ¶ 16, Exh. 1.) Usha Chand  
9 was jointly liable with WWT for amounts charged to those accounts. (*Id.* at ¶ 16.)

10 The Contract authorized charges of \$3,225 for the period of February 2, 2009  
11 to March 1, 2009, and then subsequent monthly charges “based on hits on keyword  
12 phrases specified in . . . the Contract.” (*Id.*) The parties allegedly orally modified  
13 the Contract in June 2009, “by basing charges on a ‘per click’ basis, that is, the  
14 number of times visitors ‘clicked’ on Plaintiffs’ advertising appearing on Google.”  
15 (*Id.*) Defendants allegedly made charges to Plaintiffs’ credit card accounts from May  
16 2009 through December 2009, and from February 2010 through November 2010. (*Id.*  
17 at ¶ 17.)

18 Plaintiffs allege that, “[w]ithout Plaintiffs’ knowledge or consent, in about July  
19 2010, Defendants returned to keyword rather than ‘per click’ invoicing[.]” and that  
20 “[i]n 2010, Defendants inexplicably began invoicing Plaintiffs for greatly increased  
21 amounts.” (*Id.* at ¶¶ 18, 19.) In December 2010, Plaintiffs requested that Defendants  
22 provide documentation to justify the “unusually large charges.” (*Id.* at ¶ 19.)  
23 Defendants refused Plaintiffs’ request, and Plaintiffs subsequently notified them that  
24 no further charges were authorized to Plaintiffs’ credit cards until the documentation  
25 was provided. (*Id.*)

26 In January 2011, Plaintiffs disputed Defendants’ charges directly with  
27 American Express, and Defendants opposed the dispute. (*Id.* at ¶ 20.) In apparent  
28 response to the dispute, Defendants sent Plaintiffs “a few highly redacted Google

1 account records” on February 22, 2011. (*Id.* at ¶ 21.) Plaintiffs allege the records  
2 “showed that Defendants had systematically lied to Plaintiffs about the number of  
3 ‘clicks’ and keyword hits realized, thus grossly overcharging Plaintiffs for services,  
4 and charging for services never provided and results never obtained.” (*Id.*)  
5 Specifically, Plaintiffs allege the records “showed that Defendants diverted  
6 Plaintiffs’ funds to their own Google advertising, billing Plaintiffs for Defendants’  
7 own Google keywords and clicks, thereby doubling, tripling or even quadrupling the  
8 charges Defendants invoiced to Plaintiffs taken by direct credit card charging.” (*Id.*  
9 at ¶ 23.)

10 Plaintiffs allege, for example, that Defendants’ records for May 2010 show that  
11 Plaintiffs were charged for thirty-two keywords, when only five of those keywords  
12 appeared on Plaintiffs’ price list, and only one of them was used; and that Plaintiffs  
13 were charged for seventeen keywords in September 2010, when only six of those  
14 keywords appeared on Plaintiffs’ price list, and again only one of them was used. (*Id.*  
15 at ¶ 24.) Defendants charged Plaintiffs’ American Express card \$12,865 in May and  
16 \$8,680 in September, when, according to Plaintiffs, only \$400 was actually justified  
17 and authorized for each month. (*Id.*)

18 In April 2011, Plaintiffs hired a “Google advertising expert” to analyze  
19 Defendants’ records. (*Id.* at ¶ 25.) According to Plaintiffs, the expert determined  
20 that “the number of ‘clicks’ reported by Defendants was unsubstantiated and  
21 impossible[,]” and that the web logs from Plaintiffs’ web server showed a routing  
22 from Plaintiffs’ website to websites in Texas and California, states in which Plaintiffs  
23 believe Defendants formerly or now reside. (*Id.* at ¶¶ 25, 26.) Plaintiffs allege that  
24 they have suffered damages in excess of \$160,000. (*Id.* at ¶ 30; Prayer.)

25 Finally, Plaintiffs allege on information and belief that there exists a unity of  
26 interest and ownership between Ms. Singla and TMI such that Ms. Singla is the alter  
27 ego of TMI. (*Id.* at ¶ 7.) Ms. Singla is described as TMI’s sole officer, director, and  
28 shareholder, and both TMI and Ms. Singla are described in the FAC as residing and

1 doing business at 13565 Lavender Way, San Diego, California. (*Id.* at ¶¶ 2-3, 6.)  
2 Plaintiffs further allege that Ms. Singla used TMI to misappropriate Plaintiffs’  
3 advertising funds and then used those funds to advertise her own business, TMI. (*Id.*  
4 at ¶ 7.) Plaintiffs also allege that adherence to TMI’s corporate existence would  
5 sanction fraud and promote injustice, as TMI is insolvent and unable to pay Plaintiffs’  
6 damages. (*Id.*)

7 **B. New Allegations**

8 Pursuant to Civil Local Rule 15.1(c), “[a]ny amended pleading filed after the  
9 granting of a motion to dismiss or motion to strike with leave to amend, must be  
10 accompanied by a version of that pleading that shows --- through redlining,  
11 underlining, strikeouts, or other similarly effective typographic methods --- how that  
12 pleading differs from the previously dismissed pleading.” Civ. L.R. 15.1(c).  
13 Plaintiffs have complied with this rule. (ECF No. 51.)

14 1. First, Second, Third, and Fifth Causes of Action

15 In the SAC, Plaintiffs revised their first, second, third, and fifth causes of action  
16 to bring these claims only on behalf of WWT and Laxmi Chand. (*Id.* at 7-12.)  
17 Plaintiffs also removed sentences relating to the amount of damages in the first,  
18 second, and fifth causes of action. (*See id.* at 7-13.)

19 2. Fourth Cause of Action

20 Plaintiffs revised their fourth cause of action to state a claim for conversion by  
21 theft based on California Penal Code section 496. (*See id.* at 10-12.) Plaintiffs allege  
22 Defendants received and withheld money from Plaintiffs through conversion or theft  
23 by false pretense. (*Id.* at ¶ 43.) Specifically, Plaintiffs allege that from about  
24 February 2009 through February 2011, Defendants made repeated misrepresentations  
25 of material fact to Plaintiffs, with the specific intent to defraud Plaintiffs “by gaining  
26 consensual access to make charges to Plaintiffs’ American Express card accounts to  
27 thereafter make excessive, unearned, and fraudulent charges thereon.” (*Id.* at ¶¶ 43-  
28 44.)

1 The alleged misrepresentations include the following: (1) “Plaintiffs were  
2 being billed on a keyword basis”; (2) Plaintiffs were being billed “only on keywords  
3 actually approved by Plaintiffs and utilized in Plaintiffs’ Google advertising  
4 campaigns”; and (3) that the number of “clicks” and keywords invoiced to Plaintiffs  
5 was true and accurate. (*Id.* at ¶ 43.) Plaintiffs further allege that “Defendants created  
6 and gave to Plaintiffs fictitious reports and statistics to justify overbilling Plaintiffs  
7 for services purportedly rendered, and billing Plaintiffs for services never performed  
8 or results never obtained.” (*Id.*) Defendants also allegedly “diverted Plaintiffs’ funds  
9 to their own Google advertising, billing Plaintiffs for Defendants’ own Google  
10 keywords and clicks, thereby doubling, tripling or even quadrupling the charges . . .  
11 to Plaintiffs’ American Express card accounts.” (*Id.*)

### 12 3. Old Sixth Cause of Action

13 Plaintiffs deleted their sixth cause of action for Declaratory Relief for  
14 Accounting. (*Id.* at 13-14.)

### 15 4. New Sixth Cause of Action

16 Plaintiffs amended their UCL claim to allege that Defendants’ practices  
17 constitute “unlawful” business practices premised on Penal Code section 496. (*Id.* at  
18 ¶ 54.)

## 19 **II. STATEMENT OF LAW**

### 20 **A. Federal Rule of Civil Procedure 12(b)(6)**

21 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
22 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.  
23 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court  
24 must accept all allegations of material fact pleaded in the complaint as true and must  
25 construe them and draw all reasonable inferences from them in favor of the  
26 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.  
27 1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed  
28 factual allegations, rather, it must plead “enough facts to state a claim to relief that is

1 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A  
2 claim has facial plausibility when the plaintiff pleads factual content that allows the  
3 court to draw the reasonable inference that the defendant is liable for the misconduct  
4 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at  
5 556). “Where a complaint pleads facts that are merely consistent with a defendant’s  
6 liability, it stops short of the line between possibility and plausibility of entitlement  
7 to relief.” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557) (internal quotations  
8 omitted).

9 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to  
10 relief’ requires more than labels and conclusions, and a formulaic recitation of the  
11 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (quoting  
12 *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (alteration in original)). A court need  
13 not accept “legal conclusions” as true. *Iqbal*, 556 U.S. at 678. Despite the deference  
14 the court must pay to the plaintiff’s allegations, it is not proper for the court to assume  
15 that “the [plaintiff] can prove facts that [he or she] has not alleged or that defendants  
16 have violated the...laws in ways that have not been alleged.” *Associated Gen.  
17 Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526  
18 (1983).

19 Generally, courts may not consider material outside the complaint when ruling  
20 on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896  
21 F.2d 1542, 1555 n.19 (9th Cir. 1990); *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.  
22 1994) (overruled on other grounds by *Galbraith v. Cnty of Santa Clara*, 307 F.3d  
23 1119, 1121 (9th Cir. 2002)). “However, material which is properly submitted as part  
24 of the complaint may be considered.” *Hal Roach Studios, Inc.*, 896 F.2d at 1555, n.  
25 19. Documents specifically identified in the complaint whose authenticity is not  
26 questioned by the parties may also be considered. *Fecht v. Price Co.*, 70 F.3d 1078,  
27 1080 n.1 (9th Cir. 1995) (superseded by statute on other grounds); *see also Branch*,  
28 14 F.3d at 453-54. Such documents may be considered, so long as they are referenced

1 in the complaint, even if they are not physically attached to the pleading. *Branch*, 14  
2 F.3d at 453-54; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)  
3 (rule extends to documents upon which the plaintiff’s complaint “necessarily relies”  
4 but which are not explicitly incorporated in the complaint). Moreover, the court may  
5 consider the full text of those documents even when the complaint quotes only  
6 selected portions. *Fecht*, 70 F.3d at 1080 n. 1. Additionally, the court may consider  
7 materials which are judicially noticeable. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th  
8 Cir. 1994).

9 **B. Federal Rule of Civil Procedure 12(b)(1)**

10 Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss  
11 based on the court’s lack of subject matter jurisdiction. *See Fed. R. Civ. P. 12(b)(1)*.  
12 “A federal court is presumed to lack jurisdiction in a particular case unless the  
13 contrary affirmatively appears.” *Stock West, Inc. v. Confederated Tribes*, 873 F.2d  
14 1221, 1225 (9th Cir. 1989) (citation omitted). “Article III of the Constitution confines  
15 the federal courts to adjudication of actual ‘Cases’ and ‘Controversies.’” *Lujan v.*  
16 *Defenders of Wildlife*, 504 U.S. 555, 590 (1992). Consequently, a “lack of Article III  
17 standing requires dismissal for lack of subject matter jurisdiction under Federal Rule  
18 of Civil Procedure 12(b)(1).” *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir.  
19 2011) (emphasis omitted). “For the purposes of ruling on a motion to dismiss for  
20 want of standing,” the court “must accept as true all material allegations of the  
21 complaint, and must construe the complaint in favor of the complaining party.”  
22 *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Tyler v. Cuomo*, 236 F.3d 1124,  
23 1131 (9th Cir. 2000).

24 The “irreducible constitutional minimum” of Article III standing contains three  
25 elements: (1) “the plaintiff must have suffered an ‘injury in fact’”; (2) “there must be  
26 a causal connection between the injury and the conduct complained of”; and (3) “it  
27 must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed  
28 by a favorable decision.” *Lujan*, 504 U.S. at 560-61. The injury in fact must be an



1 invasion of a legally protected interest that is concrete and particularized, and actual  
2 or imminent, not conjectural or hypothetical. *Id.* at 560 (citation omitted).  
3 Furthermore, to satisfy the casual-connection prong, the injury has to be fairly  
4 traceable to the challenged action of the defendant, and not the result of the  
5 independent action of some third party not before the court. *Id.* (citing *Simon v. E.*  
6 *Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Furthermore, “[s]tanding must  
7 be shown with respect to each form of relief sought, whether it be injunctive relief,  
8 damages or civil penalties.” *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985  
9 (9th Cir. 2007).

10 As a general rule, a court freely grants leave to amend a complaint which has  
11 been dismissed. Fed. R. Civ. P. 15(a); *Schreiber Distrib. Co. v. Serv-Well Furniture*  
12 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). However, leave to amend may be denied  
13 when “the court determines that the allegation of other facts consistent with the  
14 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co.*,  
15 806 F.2d at 1401 (citing *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962)).

### 16 **III. DISCUSSION**

#### 17 **A. California Penal Code Section 496**

18 In the FAC, Plaintiffs alleged a common law conversion claim, which the  
19 Court dismissed, finding, as dictated by relevant case law, that the dispute was “more  
20 akin to a dispute over a bill than it is to outright theft.” (ECF No. 47 at p. 17.)  
21 Plaintiffs now bring a “conversion by theft” claim based on California Penal Code  
22 section 496 (“Section 496”). Defendants move to dismiss the Section 496 claim,  
23 arguing the “new claim” should be denied because of Plaintiffs’ inexplicable delay  
24 and prejudice in bringing the claim, and because it is inapplicable to the facts of this  
25 case.

26 As an initial matter, Plaintiffs argue in their opposition they are not bringing a  
27 Section 496 claim, but rather a “theft by false pretenses” claim, which, as alleged, is  
28 a hybrid conversion/Section 496 claim. However, as Plaintiffs are seeking relief,

1 including treble damages, under Section 496, the Court will construe it as a Section  
2 496 claim. (*See* SAC at ¶ 45, Prayer for Relief.)<sup>1</sup>

3 1. Section 496 as a New Claim

4 California district courts have occasionally considered new claims submitted  
5 in an amended complaint where the prior order of dismissal granted leave to amend  
6 without limitation. *See Topadzhikyan v. Glendale Police Dept.*, No. CV 10–387,  
7 2010 WL 2740163, at \*3 n. 1 (C.D. Cal. July 8, 2010) (declining to strike new claims  
8 where Court granted leave to amend without limitation); *Gilmore v. Union Pac. R.R.*  
9 *Co.*, No. 09–cv–02180, 2010 WL 2089346, at \*4 (E.D. Cal. May 21, 2010) (finding  
10 that Plaintiff was not required to seek leave to add new claims where Court granted  
11 leave to amend without limitation and Defendants would not be prejudiced by  
12 addition of claims).

13 In other cases, however, where leave to amend is given to cure deficiencies in  
14 certain specified claims, courts have agreed that new claims alleged for the first time  
15 in the amended pleading should be dismissed or stricken. *See, e.g., DeLeon v. Wells*  
16 *Fargo Bank, N.A.*, No. 10-CV-01390-LHK, 2010 WL 4285006, at \*3 (N.D. Cal. Oct.  
17 22, 2010) (finding that plaintiffs were required to seek leave of court to add new  
18 claims, where leave to amend was previously given to cure deficiencies in certain  
19 specified claims and thus limited in scope); *Kennedy v. Full Tilt Poker*, No. CV 09–  
20 07964, 2010 WL 3984749, at \*1 (C.D. Cal. Oct. 12, 2010) (stating that court  
21 previously struck amended complaint because plaintiffs failed to seek leave to add  
22 new claims or defendants); *Andrew W. v. Menlo Park City Sch. Dist.*, 2010 WL  
23 3001216, at \*2 (N.D. Cal. July 29, 2010) (agreeing that new claims should be stricken  
24 because prior order did not grant leave to add new claims, but construing plaintiff’s  
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26 <sup>1</sup> The Court notes that Plaintiffs are also contending Usha Chand has  
27 standing pursuant to Section 496 and that Section 496 provides the basis for the  
28 “unlawful” prong of its UCL claim. Plaintiffs cannot argue both that they are not  
bringing a Section 496 claim and that it confers standing and provides the basis for  
other claims.

1 opposition as belated motion for leave to amend).

2 In this case, the prior order granting leave to amend was given to cure specific  
3 deficiencies in the FAC, and Plaintiffs were therefore required to seek leave from the  
4 Court before adding new claims. However, in the interest of judicial economy, and  
5 because the issue was briefed by the parties, the Court will consider Plaintiff's  
6 opposition to be a belated motion for leave to amend. *See Andrew W.*, 2010 WL  
7 3001216, at \*2.

8 No scheduling order has been issued in this case setting a deadline for  
9 amending the complaint. Accordingly, any request for leave to amend is governed  
10 by Rule 15 of the Federal Rules of Civil Procedure. *See Johnson v. Mammoth*  
11 *Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Under Rule 15, courts  
12 should "freely" give leave to amend "when justice so requires." Fed. R. Civ. P.  
13 15(a)(2). After a responsive pleading is filed, "leave to amend should be granted  
14 unless amendment would cause prejudice to the opposing party, is sought in bad faith,  
15 is futile, or creates undue delay." *Johnson*, 975 F.2d at 607.

16 Defendants argue leave to amend should be denied because there was undue  
17 delay in bringing the claim, the claim is futile, and they will be prejudiced by the  
18 amendment. "Prejudice to the opposing party is the most important factor." *Jackson*  
19 *v. Bank of Hawaii*, 902 F. 2d 1385, 1387 (9th Cir. 1996) (citing *Zenith Radio Corp.*  
20 *v. Hazeltine Research, Inc.*, 401 U.S. 321, 330–31 (1971)). Defendants argue they  
21 will be prejudiced because they have not been on notice since the initiation of this  
22 lawsuit that they could be subjected to treble damages and attorneys' fees for  
23 allegedly violating a Penal Code section related to the receipt of stolen property.  
24 (ECF No. 49-1 ("Mot.") at p. 13.) As this case is still at the motion to dismiss stage,  
25 however, the Court does not find that Defendants have established prejudice.  
26 Moreover, the Court does not find that there was undue delay or, as discussed below,  
27 that amendment would be futile. Accordingly, the Court grants Plaintiffs leave to  
28 amend to add a Section 496 claim.

1                   2.     Plaintiffs Plausibly Allege a Section 496 Claim

2     Section 496(a) provides, in relevant part:

3     Every person who buys or receives any property that has been stolen or  
4     that has been obtained in any manner constituting theft or extortion,  
5     knowing the property to be so stolen or obtained, or who conceals, sells,  
6     withholds, or aids in concealing, selling, or withholding any property  
7     from the owner, knowing the property to be so stolen or obtained, shall  
8     be punished by imprisonment . . . . A principal in the actual theft of the  
9     property may be convicted pursuant to this section. However, no person  
10    may be convicted both pursuant to this section and of the theft of the  
11    same property.

12    Cal. Penal Code § 496(a). Under Section 496(c), “[a]ny person who has been injured  
13    by a violation of subdivision (a) . . . may bring an action for three times the amount  
14    of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable  
15    attorney’s fees.” Cal. Penal Code § 496(c).

16    Proving a Section 496 violation generally requires establishing that (a) the  
17    property was stolen, and (b) the defendant was in possession of it, (c) knowing it was  
18    stolen. *See Verdugo-Gonzalez v. Holder*, 581 F.3d 1059, 1061 (9th Cir. 2009) (citing  
19    *People v. Anderson*, 210 Cal. App. 3d 414, 420 (1989)); *see also Finton Constr., Inc.*  
20    *v. Bidna & Keys, APLC*, 238 Cal. App. 4th 200, 213 (2015). The Legislature’s goal  
21    in enacting Section 496 was to “eliminate[e] markets for stolen property.” *Citizens*  
22    *of Humanity, LLC v. Costco Wholesale Corp.*, 171 Cal. App. 4th 1, 18 (2009). To  
23    achieve this goal, the statute, “broadly allows *anyone* injured” by the knowing  
24    purchase, receipt, concealment, withholding, or sale of stolen property to bring a civil  
25    action. *Id.*

26    In the SAC, Plaintiffs do not allege that Defendants purchased or sold stolen  
27    property. Rather, they allege Defendants stole the property, *i.e.*, received the property  
28    by means of false pretense or fraudulent misrepresentation, and then concealed the  
   theft and withheld the property. (SAC at ¶¶ 43, 44.) Defendants argue the statute is  
   inapplicable because “there are no allegations in the SAC that suggest [D]efendants

1 received or purchased stolen property,” and the instant action is clearly “not the type  
2 the legislature intended to protect against with the enactment of subsection (c).”  
3 (Mot. at pp. 9-10.)

4 Although California courts initially “found it logically impossible for a thief  
5 who ha[d] stolen an item of property to buy or receive that property from himself,”  
6 the Legislature amended Section 496 in 1992 to authorize a conviction for receiving  
7 stolen property even though the defendant also stole the property, provided he or she  
8 has not actually been convicted of the theft. *See People v. Allen*, 21 Cal. 4th 846,  
9 854-58 (1999) (citing *People v. Tatum*, 209 Cal. App. 2d 179, 183 (1962)). While  
10 the amendment only explicitly addresses the criminal implications of Section 496, as  
11 discussed below, the few California courts that have addressed the statute in the civil  
12 context, have similarly permitted civil suits under Section 496 against a defendant  
13 who allegedly stole the property at issue.

14 In *Citizens of Humanity, LLC*, the plaintiff, a manufacturer of exclusive denim  
15 apparel, brought suit against the owner and operator of retail stores selling its jeans,  
16 alleging the sale of stolen property under Section 496. *Citizens of Humanity, LLC*,  
17 171 Cal. App. 4th at 6-8. The plaintiff alleged the defendant was selling jeans it may  
18 have stolen directly from the plaintiff. *Id.* Because the facts alleged in the complaint  
19 were that the defendant “obtained and sold knowingly stolen jeans; and [the plaintiff]  
20 is the manufacturer of those jeans, who allegedly suffered commercial injury by [the  
21 defendant’s] sale of stolen merchandise,” the court found the plaintiff’s allegations  
22 were sufficient to allege a civil violation of Section 496. *Id.* at 18. Although the  
23 court focused its discussion on whether or not the alleged *sale* of stolen merchandise  
24 was sufficient to state a claim under the statute, it did not find the defendant was an  
25 improper defendant because it was also potentially the thief.

26 In *Bell v. Feibush*, 212 Cal. App. 4th 1041 (2013), the plaintiff alleged that she  
27 was induced by false pretenses to loan the defendant \$202,500 and was never repaid,  
28 in violation of Section 496. *Id.* at 1043-44. A California Court of Appeal affirmed

1 the entry of default judgment in favor of the plaintiff, and the award of damages on  
2 the plaintiff's breach of contract and fraud causes of action, and treble damages on  
3 her Section 496 cause of action. *Id.* at 1050. In doing so, the court addressed several  
4 arguments raised by the defendant which are relevant to determining whether Section  
5 496 applies in this case. First, the court addressed whether a criminal conviction  
6 under Section 496(a) is a prerequisite to civil liability under Section 496(c). *Id.* at  
7 1044-47. After analyzing the plain language of the statute, case law, and the  
8 legislative history, the court held that a criminal conviction is not a prerequisite. *Id.*

9       Next, the court addressed the defendant's concern that awarding damages  
10 under Section 496(c) "opens the door to any collecting creditor to claim that a breach  
11 of contract action constitutes a fraud, and in turn constitutes a theft, under the  
12 California Penal Code for purposes of [section] 496(a)." *Id.* at 1047. With reference  
13 to California Penal Code section 484(a), which describes acts constituting theft, and  
14 California Penal Code section 532, which defines criminal fraud, the court held that  
15 Section 496(a) extends to property "that has been obtained in any manner constituting  
16 theft," which includes theft by false or fraudulent representation or pretense. *Id.* at  
17 1048.

18       The defendant also argued he could not be liable for both theft and receiving  
19 stolen property under Section 496. *Id.* Referring to the last paragraph of Section  
20 496(a), the court acknowledged that "a person who obtains property by theft may be  
21 convicted for theft or for receiving stolen property, but not both." *Id.* at 1049 (citing  
22 *People v. Allen*, 21 Cal. 4th 846, 857-61 (1999)). If this principle were applied to the  
23 defendant's civil liability under section 496(c), the court stated the defendant "would  
24 not be liable for damages under the breach of contract and fraud causes of action *and*  
25 treble damages under [Section 496]." *Id.* (emphasis added). The court then noted  
26 that although the defendant was awarded damages on her breach of contract and fraud  
27 causes of action, and treble damages on her Section 496 cause of action, the trial court  
28 instructed no double recovery was permitted. *Id.* Therefore, the plaintiff's recovery

1 on all three causes of action could not exceed the amount of treble damages under  
2 Section 496. *Id.* The Court of Appeal affirmed this award.

3 Lastly, the defendant argued that permitting the plaintiff “to recover treble  
4 damages under section 496(c) is contrary to public policy and permits litigants to  
5 circumvent limitations on remedies.” *Id.* While mindful of the defendant’s policy  
6 concerns, the court found that based on “straightforward statutory interpretation,” the  
7 defendant could be held civilly liable under Section 496. *Id.*

8 Here, Plaintiffs allege theft by false pretense and fraudulent misrepresentation.  
9 The statute applies to every person who receives, conceals, or withholds any property  
10 that “has been obtained in any manner constituting theft.” Cal. Penal Code § 496. In  
11 construing the phrase “obtained in any manner constituting theft,” the *Bell* court, in  
12 the context of a civil action, refers to California Penal Code section 484, which  
13 describes acts constituting theft. *See Bell*, 212 Cal. App. 4th at 1048. Under section  
14 484, the following constitutes theft: “knowingly and designedly, by any false or  
15 fraudulent representation or pretense, defraud[ing] any other person of money.” Cal.  
16 Penal Code § 484(a). Theft by false pretenses has three elements: “(1) a false pretense  
17 or representation, (2) the intent to defraud the owner of his or her property, and (3)  
18 the false pretense or representation materially influenced the owner to part with the  
19 property.” *Carrillo-Jaime v. Holder*, 572 F.3d 747, 752 (9th Cir. 2009) (citation  
20 omitted), abrogated on other grounds by *Descamps v. United States*, 133 S.Ct. 2276  
21 (2013). “[T]heft by false pretenses may be accomplished *with* the owners’ consent.”  
22 *Id.*

23 This Court previously held that Plaintiffs had sufficiently alleged a cause of  
24 action for fraud under Federal Rule of Civil Procedure 9(b), which has substantially  
25 similar elements.<sup>2</sup> (*See* ECF No. 47 at p. 15.) Plaintiffs re-allege these same facts to  
26

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27 <sup>2</sup> To state a claim for fraud in California, a plaintiff must allege “[1] a  
28 false representation, [2] knowledge of its falsity, [3] intent to defraud, [4] justifiable  
reliance, and [5] damages.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th

1 establish theft by false pretense and fraudulent misrepresentation in its Section 496  
2 claim. (See SAC at ¶¶ 43-44.) Under Section 496, a plaintiff must also allege that  
3 the defendant had knowledge the property was stolen or obtained in any manner  
4 constituting theft. See Cal. Penal Code § 496(a). In the SAC, Plaintiffs do allege that  
5 Defendants had knowledge the property was obtained in a manner constituting theft.  
6 (See SAC at ¶ 44.) Based on the foregoing, because Plaintiffs allege Defendants  
7 knowingly received, concealed, and withheld their property, which had been obtained  
8 by means of false or fraudulent representations or pretense, the Court finds they have  
9 sufficiently alleged a claim under Section 496.

### 10 **B. Unlawful Prong of Plaintiffs’ UCL Claim**

11 “Section 17200’s unlawful prong borrows violations of other laws . . . and  
12 makes those unlawful practices actionable under the UCL.” *Klein v. Chevron U.S.A.,*  
13 *Inc.*, 202 Cal. App. 4th 1342, 1383 (2012) (quoting *Lazar v. Hertz Corp.*, 69 Cal.  
14 App. 4th 1494, 1505 (1999)) (internal quotations omitted). Violations of almost any  
15 law, federal or state, may serve as a sufficient predicate for a claim under the UCL’s  
16 “unlawful” prong. *Id.* However, violations of the common law (e.g., breach of  
17 contract, common law fraud) are insufficient to satisfy the unlawful prong. See  
18 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010);  
19 *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1074-75  
20 (C.D. Cal. 2003).

21 The Court previously held that Plaintiffs failed to state a claim under the  
22 unlawful prong of the UCL. Plaintiffs have amended their claim to allege that  
23 Defendants’ violation of Section 496 serves as the predicate claim for the unlawful  
24 prong. (SAC at ¶ 54.) Defendants move to dismiss on the basis Plaintiffs have failed  
25 to allege a Section 496 claim. Because the Court has determined Plaintiffs have  
26 sufficiently alleged a Section 496 claim, the Court **DENIES** Defendants’ motion to  
27

28 \_\_\_\_\_  
Cir. 2003) (quoting *Moore v. Brewster*, 96 F.3d 1240, 1245 (9th Cir. 1996)) (internal  
quotations omitted).



1 dismiss Plaintiffs' UCL claim under the unlawful prong.

2 **C. Article III Standing**

3 The Court previously granted Defendants' motion to dismiss plaintiff Usha  
4 Chand for lack of standing, with leave to amend. (ECF No. 47 at p. 9.) In the SAC,  
5 Usha Chand does not assert claims for breach of contract, fraud, money had and  
6 received, and breach of implied covenant of good faith and fair dealing against  
7 Defendants. Rather, Usha Chand only asserts Section 496 and UCL claims against  
8 Defendants.

9 Defendants move to dismiss Usha Chand for a second time, arguing she lacks  
10 standing to pursue a "single claim against Defendants" because she does not allege  
11 an "injury in fact." (Mot. at p. 6.) In response, Plaintiffs argue Usha Chand has  
12 standing to bring claims under Section 496 and the UCL due to Section 496's broad  
13 provision that "[a]ny person who has been injured" may bring a private right of  
14 action. *See* Cal. Penal Code § 496(c).

15 In its prior order, the Court addressed whether Usha Chand had established  
16 Article III standing. (*See* ECF No. 47 at pp. 7-8.) "[L]ack of Article III standing  
17 requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil  
18 Procedure 12(b)(1)." *Maya*, 658 F.3d at 1067. In order to satisfy Article III standing,

19 a plaintiff must show (1) [s]he has suffered an "injury in fact" that is  
20 concrete and particularized and actual or imminent, not conjectural or  
21 hypothetical; (2) the injury is fairly traceable to the challenged action  
22 of the defendant; and (3) it is likely, as opposed to merely speculative,  
that the injury will be redressed by a favorable decision.

23 *Braunstein v. Ariz. Dept. of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012) (citing  
24 *Bernhardt v. Cnty. of L.A.*, 279 F.3d 862, 868-69 (9th Cir. 2002)). Plaintiffs have not  
25 alleged or presented any new facts that confer Article III standing, not to be conflated  
26 with statutory standing, on Usha Chand. *See Maya*, 658 F.3d at 1067. Accordingly,  
27 the Court finds Defendants have failed to establish that Usha Chand has Article III  
28 standing to assert claims under Section 496 or the UCL.

1 Plaintiffs further argue that Usha Chand cannot be dismissed because of the  
2 following provision of Rule 17 of the Federal Rules of Civil Procedure:

3 The court may not dismiss an action for failure to prosecute in the name  
4 of the real party in interest until, after an objection, a reasonable time  
5 has been allowed for the real party in interest to ratify, join, or be  
6 substituted into the action. After ratification, joinder, or substitution,  
the action proceeds as if it had been originally commenced by the real  
party in interest.

7 Fed. R. Civ. P. 17(a)(3). As the Court is not dismissing this “action” for failure to  
8 prosecute in the name of the real party in interest, the Court finds this provision of  
9 Rule 17 does not apply.


10 Based on the foregoing, and the reasoning set forth in the Court’s prior order  
11 dismissing Usha Chand, Defendants’ motion to dismiss Usha Chand for lack of  
12 Article III standing is **GRANTED**. Because Plaintiffs have demonstrated they  
13 cannot allege facts sufficient to establish Article III standing, the Court finds  
14 amendment would be futile and Usha Chand is **DISMISSED WITH PREJUDICE**.

#### 15 **IV. CONCLUSION**

16 For the foregoing reasons, Defendants’ motion to dismiss (ECF No. 49) is  
17 **GRANTED IN PART** and **DENIED IN PART**. Plaintiff Usha Chand is  
18 **DISMISSED WITH PREJUDICE** from this action for lack of Article III standing.

19 **IT IS SO ORDERED.**

20  
21 **DATED: March 30, 2016**

22   
23 **Hon. Cynthia Bashant**  
**United States District Judge**