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

10 REX INVESTMENT COMPANY LTD, a  
11 California corporation,

12 Plaintiff,

13 v.

14 S.M.E., INC., a dissolved Nebraska  
15 corporation; SHENNEN SALTZMAN,  
16 individually; THEODORE SALTZMAN,  
17 JR., individually; and DOES 1-20,

18 Defendants.

Case No.: 3:15-cv-02607-H-JMA

**ORDER**

**(1) DENYING PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

**(2) GRANTING SUMMARY  
JUDGMENT TO  
DEFENDANTS**

[Doc. No. 43.]

19  
20 On September 12, 2017, Plaintiff Rex Investment Company Ltd (“Rex”) filed a  
21 motion for partial summary judgment. (Doc. No. 43.) On October 10, 2017, Defendant  
22 S.M.E., Inc. (“SME”) filed an opposition to the motion. (Doc. No. 47.) On October 13,  
23 2017, the Court gave notice that it may construe SME’s opposition as a cross motion for  
24 summary judgment on each of Rex’s remaining claims based on BRE DDR BR Whittwood  
25 CA LLC v. Farmers & Merchants Bank of Long Beach, 14 Cal. App. 5th 992 (2017), a  
26 decision from the California Court of Appeal issued on August 29, 2017. (Doc. No. 48.)  
27 On October 16, 2017, Rex filed a reply, in which it addressed BRE DDR BR and attempted  
28 to distinguish the case on its facts. (Doc. No. 49.) The Court held a hearing on the motion

1 on October 23, 2017. Richard S. Davis appeared for Rex. Patrick Joseph D’Arcy and  
2 James Lee appeared for SME. For the reasons below, the Court denies the motion.  
3 Because there are no disputed material facts which, if resolved in Rex’s favor, would  
4 permit Rex to prevail on any of its claims at trial, the Court enters summary judgment for  
5 SME.

## 6 Background

### 7 **I. Factual History**

8 This diversity action presents the question of whether a company that is not on a  
9 commercial real estate lease but occupies the premises is bound by the lease after it ceases  
10 occupying the leased property. Rex, the lessor in this case, argues that equitable principles  
11 should bind SME, a company that occupied Rex’s property from at least the mid-1990s  
12 until 2012, but never signed a lease with Rex, to a lease agreement that Rex signed with  
13 non-party Northeast Nebraska Development, Inc. (“NE Nebraska”). Invoking BRE DDR  
14 BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach, 14 Cal. App. 5th  
15 992 (2017), SME argues that any obligations it had to Rex ended when it vacated Rex’s  
16 property in 2012. Because California case law clearly holds that an assignee’s “obligations  
17 terminate when the assignee terminates his possession” of the lessor’s property, unless the  
18 assignee expressly assumes the lease, id. at 1000 (quotation marks omitted), the Court  
19 agrees with Rex.

20 On June 5, 1985, Rex entered into a commercial lease agreement (“1985 Lease  
21 Agreement” or “Lease Agreement”) with NE Nebraska, wherein Rex agreed to lease the  
22 commercial building located at 610 Imperial Avenue in Calexico, California (“Calexico  
23 property”) to NE Nebraska for the purpose of operating a Burger King restaurant. (Doc.  
24 No. 43-3, Rex’s Statement of Undisputed Material Facts, ¶ 1.) The lease agreement  
25 commenced on December 5, 1985 and provided for an original term of twenty years with  
26 two optional five-year extensions. (Id.)

27 At some point during the period of the original lease term, SME took possession of  
28

1 the Calexico property began operating a Burger King restaurant.<sup>1</sup> (Doc. No. 46, SME's  
2 Statement of Undisputed Material Facts, ¶ 16.) After SME took possession of the property,  
3 it paid rent to Rex, paid all relevant property taxes, made repairs to the property as needed,  
4 and maintained liability insurance as required by the Lease Agreement. (Id. ¶¶ 19–23.)

5 Upon expiration of the lease agreement's original 20-year term, on December 5,  
6 2005, SME exercised the first five-year extension, including an increase in the rental  
7 payments due under the lease. (Doc. No. 16, FAC, ¶ 11.) And upon expiration of that  
8 term, on December 5, 2010, SME exercised the second five-year extension, including an  
9 additional increase in the rental payments due under the lease. (Id. ¶ 12.)

10 On January 6, 2012, SME solid its interest in the Burger King franchise to non-party  
11 Calexico Group, Inc. (Doc. No. 46 ¶ 33.) Sometime later that year, SME vacated the  
12 Calexico property.<sup>2</sup> (Doc. No. 16 ¶¶ 50, 69–70.) Rex continued to receive rent from non-  
13 parties S.M.E., Inc., Burger King, Yuma, AZ and Shen-Dae-Man Properties, LLC—  
14 companies that Rex believes are affiliates of SME—until May 2014. (Doc. No. 43-7 at  
15 PageID 892–900.)

16 On December 20, 2012, SME filed articles of dissolution with the Nebraska  
17 Secretary of State. (Doc. No. 43-3 ¶ 34.) Plaintiff alleges that at the time of its dissolution,  
18 SME had outstanding obligations to Plaintiff under the lease agreement. (Doc. No. 16  
19 ¶ 78.)

20 Plaintiff alleges that around May 2014, it stopped receiving the payments due under  
21 the Lease Agreement, and that the current balance due under the agreement is at least  
22 \$115,710. (Id. ¶ 53.) Plaintiff also alleges that SME failed to pay property taxes for the  
23 Calexico property and caused a mechanic's lien to be recorded on the property. (Id. ¶¶ 55-  
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25  
26 <sup>1</sup> Rex alleges that NE Nebraska never occupied the Calexico property, and that SME operated the  
27 Burger King from the Lease Agreement's inception. (Doc. No. 43-3 ¶ 11.) NE Nebraska filed articles of  
28 dissolution on December 9, 1994. (Doc. No. 43-3 ¶ 12.)

<sup>2</sup> Rex's First Amended Complaint acknowledges that SME vacated the Calexico property after  
selling it, but the record is silent as to the exact date SME ceased occupancy. SME must have vacated the  
property in 2012, however, because it filed articles of dissolution in December of that year.

1 56.) Plaintiff alleges that around late 2014 or early 2015, the Calexico property was  
2 abandoned, vandalized, and fixtures were stolen and/or removed from the premises. (Id.  
3 ¶ 26.) Plaintiff alleges that the vandalism caused \$194,450.00 or more in damages. (Id.  
4 ¶ 75.)

## 5 **II. Procedural History**

6 On November 19, 2015, Rex filed a complaint against SME, Shennen Saltzman, and  
7 Theodore Saltzman, Jr. (former SME officers), alleging causes of action for: (1) breach of  
8 written contract against SME; (2) negligence against SME; (3) negligence against  
9 Saltzmans and (4) violation of California Corporations Code § 2116 against the Saltzmans.  
10 (Doc. No. 1, Compl.) On May 13, 2016, the Court granted Defendants' motion to dismiss  
11 the original complaint for failure to state a claim with leave to amend. (Doc. No. 15.)

12 On June 13, 2016, Rex filed a first amended complaint against the Defendants,  
13 alleging the same four causes of action that were contained in the original complaint and  
14 adding a claim against SME for breach of implied-in-fact contract. (Doc. No. 16.) On  
15 August 29, 2016, the Court dismissed all claims against the Saltzmans, but denied SME's  
16 motion to dismiss Rex's alternative claims for breach of written contract and breach of an  
17 implied-in-fact contract. (Doc. No. 26.) SME answered Rex's contract claims, and the  
18 parties proceeded to discovery.

19 On September 12, 2017, Rex filed the instant motion for partial summary judgment.  
20 (Doc. No. 43.) The parties have completed their briefing on the motion, and the matter is  
21 ripe for disposition.

## 22 **Discussion**

### 23 **I. Legal Standards for Summary Judgment**

24 Summary judgment is appropriate under Federal Rule of Civil Procedure 56 if the  
25 moving party demonstrates that there is no genuine issue of material fact and that it is  
26 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477  
27 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it  
28 could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248

1 (1986); Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc., 618 F.3d  
2 1025, 1031 (9th Cir. 2010). “A genuine issue of material fact exists when the evidence is  
3 such that a reasonable jury could return a verdict for the nonmoving party.” Fortune  
4 Dynamic, 618 F.3d at 1031 (internal quotation marks and citations omitted); accord  
5 Anderson, 477 U.S. at 248. “Disputes over irrelevant or unnecessary facts will not preclude  
6 a grant of summary judgment.” T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809  
7 F.2d 626, 630 (9th Cir. 1987).

8 A party seeking summary judgment always bears the initial burden of establishing  
9 the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving  
10 party can satisfy this burden in two ways: (1) by presenting evidence that negates an  
11 essential element of the nonmoving party’s case; or (2) by demonstrating that the  
12 nonmoving party failed to establish an essential element of the nonmoving party’s case that  
13 the nonmoving party bears the burden of proving at trial. Id. at 322–23; Jones v. Williams,  
14 791 F.3d 1023, 1030 (9th Cir. 2015). Once the moving party establishes the absence of a  
15 genuine issue of material fact, the burden shifts to the nonmoving party to “set forth, by  
16 affidavit or as otherwise provided in Rule 56, ‘specific facts showing that there is a genuine  
17 issue for trial.’” T.W. Elec. Serv., 809 F.2d at 630 (quoting former Fed. R. Civ. P. 56(e));  
18 accord Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1035 (9th Cir. 2007). To carry  
19 this burden, the non-moving party “may not rest upon mere allegation or denials of his  
20 pleadings.” Anderson, 477 U.S. at 256; see also Behrens v. Pelletier, 516 U.S. 299, 309  
21 (1996) (“On summary judgment, . . . the plaintiff can no longer rest on the pleadings.”).  
22 Rather, the nonmoving party “must present affirmative evidence . . . from which a jury  
23 might return a verdict in his favor.” Anderson, 477 U.S. at 256.

24 When ruling on a summary judgment motion, the court must view the facts and draw  
25 all reasonable inferences in the light most favorable to the non-moving party. Scott v.  
26 Harris, 550 U.S. 372, 378 (2007). The court should not weigh the evidence or make  
27 credibility determinations. See Anderson, 477 U.S. at 255. “The evidence of the non-  
28 movant is to be believed.” Id. Further, the Court may consider other materials in the record

1 not cited by the parties, but it is not required to do so. See Fed. R. Civ. P. 56(c)(3);  
2 Simmons v. Navajo Cnty., 609 F.3d 1011, 1017 (9th Cir. 2010).

## 3 **II. Analysis**

4 Rex argues that there is no genuine dispute of material fact that SME breached the  
5 1985 Lease Agreement by failing to pay rent and property taxes at the Calexico property,  
6 and by failing to keep the property in good repair. Rex thus seeks summary judgment as  
7 to SME's liability. Citing BRE DDR BR Whittwood CA LLC v. Farmers & Merchants  
8 Bank of Long Beach, 14 Cal. App. 5th 992 (2017), SME argues that any obligations it had  
9 to Rex ended when it vacated Rex's property in 2012, and that therefore SME is not liable  
10 for any rent, taxes or property damage that accrued after 2012.

11 The parties agree that California law governs this dispute. The Ninth Circuit has  
12 recently explained that:

13 “The task of a federal court in a diversity action is to approximate state law as  
14 closely as possible in order to make sure that the vindication of the state right  
15 is without discrimination because of the federal forum.” Gee v. Tenneco, Inc.,  
16 615 F.2d 857, 861 (9th Cir. 1980); accord U.S. Fidelity and Guaranty Co. v.  
17 Lee Investments LLC, 641 F.3d 1126, 1133 (9th Cir. 2011) (“Perhaps a better  
18 way of putting it is to say that one of the goals in deciding state law questions  
19 is to do no harm to state jurisprudence.”). “[F]ederal courts are bound by the  
20 pronouncements of the state's highest court on applicable state law.” Ticknor  
21 v. Choice Hotels, Inc., 265 F.3d 931, 939 (9th Cir. 2001). Similarly, a federal  
22 court is “not free to reject a state judicial rule of law merely because it has not  
23 received the sanction of the state's highest court, but it must ascertain from all  
available data what the state law is and apply it.” Estrella v. Brandt, 682 F.2d  
814, 817 (9th Cir. 1982). “An intermediate state appellate court decision is a  
'datum for ascertaining state law which is not to be disregarded by a federal  
court unless it is convinced by other persuasive data that the highest court of  
the state would decide otherwise.’” Id. at 817 (quoting West v. A.T.&T. Co.,  
311 U.S. 223, 237 (1940)); see also Lewis v. Tel. Empl. Credit Union, 87 F.3d  
1537, 1546 (9th Cir. 1996) (citing In re Kirkland, 915 F.2d 1236, 1239 (9th  
Cir. 1990) to recognize that “. . . where there is no convincing evidence that  
the state supreme court would decide differently, ‘a federal court is obligated  
to follow the decisions of the state's intermediate appellate courts’”).

24 Kwan v. SanMedica Int'l, 854 F.3d 1088, 1093 (9th Cir. 2017).

25 Under California law, in order to establish a breach of contract, a party must show:  
26 (i) the existence of a contract; (ii) performance by the plaintiff or excuse for  
27 nonperformance; (iii) breach by defendant; and (iv) damages. See, e.g., Oasis W. Realty,  
28 LLC v. Goldman, 51 Cal. 4th 811, 821 (2011).

1           There is no dispute in this case that the 1985 Lease Agreement was a valid contract,  
2 and that Rex performed its obligations under that contract. Rather, the parties dispute  
3 whether SME breached its obligations under the Lease Agreement. SME argues that it was  
4 never in full contractual privity with Rex, and thus ceased having any obligations under  
5 the Lease Agreement when it vacated the Calexico property. Rex argues that SME became  
6 liable for NE Nebraska’s obligations under the Lease Agreement. Rex thus argues that  
7 SME is responsible for all outstanding rent, property taxes, and upkeep costs associated  
8 with the Calexico property from 2012 until the Lease Agreement expired in 2015. The  
9 Court will address each of Rex’s theories in turn.

10           A. Direct Party or Assignee.

11           Rex first argues that SME became a direct party to the 1985 Lease Agreement by  
12 voluntarily accepting the benefits of the lease—use of the Calexico property—and by  
13 performing the lease’s obligations for more than twenty years.<sup>3</sup> See Cal. Civil Code § 1589  
14 (“A voluntary acceptance of the benefit of a transaction is equivalent to the consent to all  
15 the obligations arising from it . . . .”). However, California’s statute of frauds provides that  
16 real estate lease agreements “for a longer period than one year” are “invalid, unless they,  
17 or some note or memorandum thereof, are in writing and subscribed by the party to be  
18 charged or by the party’s agent.” California Civil Code § 1624(a)(3); see also Bed, Bath  
19 & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners, 52 Cal. App. 4th  
20 867, 877 (1997) (“[W]e hold that an agreement to lease real property for a term exceeding  
21 one year is within the statute of frauds . . . regardless whether such agreement provides that  
22 it may be canceled or terminated within one year of the date of its making . . . .”). There  
23 is no dispute that Rex and SME never signed a written lease with one another.

24           In the Court’s prior order on SME’s second motion to dismiss, the Court determined  
25 that Rex could state a valid claim notwithstanding the statute of frauds by providing  
26 \_\_\_\_\_

27 <sup>3</sup>           The record is unclear as to when SME took possession of the Calexico property. Rex asserts that  
28 SME occupied the property for more than twenty years, but does not give a precise date range for SME’s  
occupancy.

1 evidence that NE Nebraska assigned the lease to SME by operation of law. (Doc. No. 26  
2 at PageID 312 (citing Maron v. Howard, 258 Cal. App. 2d 473, 484 (1968)).) See also Cal.  
3 Civil Code § 1091 (“An estate in real property . . . can be transferred . . . by operation of  
4 law, or by an instrument in writing . . .”). Accordingly, Rex argues that SME became an  
5 assignee as a matter of law by occupying the Calexico property for more than two decades,  
6 paying rent and property taxes, maintaining the premises, and by holding itself out to third  
7 parties as a party to the 1985 Lease Agreement. Rex further argues that SME was obligated  
8 as an assignee to perform all of the obligations imposed by the Lease Agreement until it  
9 expired in 2015, regardless of when SME vacated the Calexico property.

10 However, recent developments in California law make clear that Rex’s theory is  
11 untenable. In BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long  
12 Beach, 14 Cal. App. 5th 992 (2017),<sup>4</sup> the California Court of Appeal explained that, in the  
13 context of commercial real estate lease agreements:

14 An assignee's liability to the landlord turns on the nature of the assignment.  
15 If the assignee takes possession of the premises but no more, privity of estate  
16 exists and he is bound by all lease covenants which run with the land. Upon  
17 a subsequent assignment, privity of estate ends and, with it, all obligation to  
18 the landlord. If, however, the assignee expressly agrees with the assignor to  
19 assume the obligations of the lease, far different consequences attend. The  
20 assumption agreement creates a new privity of contract between landlord and  
21 assignee, enforceable by the landlord as a third party beneficiary, regardless  
22 of whether the landlord was a party to the assumption agreement. As a  
23 consequence, the assuming assignee is required to perform all covenants of  
24 the lease for the remainder of its term, absent a release by the landlord.

25 In [Enterprise Leasing Corp. v. Shugart Corp., 231 Cal. App. 3d 737, 746  
26 (1991)], this court found that **there must be an express assumption of the**  
27 **contractual obligations of a real property lease to hold an assignee liable**  
28 **for the lease obligations.** Lease covenants that run with the land bind and  
inure an assignee only as long as it remains in possession of the premises. As  
long as he remains in possession the nonassuming lessee is bound to pay the  
rent, maintain the insurance, make repairs, and pay taxes, if the lease so  
provides. **However, these obligations terminate when the assignee**

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25 <sup>4</sup> The Court is aware that BRE DDR BR, like many of the California cases cited in this order, was  
26 not a decision from the California Supreme Court. “However, where there is no convincing evidence that  
27 the state supreme court would decide differently, ‘a federal court is obligated to follow the decisions of  
28 the state’s intermediate appellate courts.’” Lewis v. Tel. Empl. Credit Union, 87 F.3d 1537, 1545 (9th  
Cir. 1996) (quoting In re Kirkland, 915 F.2d 1236, 1239 (9th Cir. 1990)). The Court is aware of no  
authority from the California Supreme Court that undermines any of the California Court of Appeal  
decisions cited in this order.

1           **terminates his possession.**

2 Id. at 1000 (emphases added; citations and internal quotation marks altered or omitted;  
3 footnote omitted). In other words, the Court of Appeal held that merely accepting  
4 *assignment* of a real estate lease does not bind a party to a lease’s terms beyond the  
5 assignee’s period of occupancy unless the assignee also *expressly assumes* the lease. Id.

6           The Court of Appeal then turned to the question of what constitutes an “express  
7 assumption.” After a lengthy examination of California cases, the court held that an  
8 “express assumption of a real property lease requires specific affirmation by the assignee  
9 to bind itself to the lease obligations.” Id. at 1001. This specific affirmation must be a  
10 statement “either orally or in writing that [the assignee] agrees to be bound by the terms of  
11 the lease,” Kelly v. Tri-Cities Broadcasting, Inc., 147 Cal. App. 3d 666, 678 (1983),  
12 because California courts have “declined to impose obligations on an assignee where the  
13 assignee did not sign the lease or any document evidencing an acceptance of the lease or  
14 its obligations.” BBE DDR BR, 14 Cal. App. 5th at 1001 (citing Treff v. Gulko, 214 Cal.  
15 591 (1932)).

16           The facts of Kelly are particularly instructive. In that case, the defendant purchased  
17 a radio station that had been operating on land leased from the plaintiffs. Kelly, 147 Cal.  
18 App. 3d at 670. The defendant explicitly acknowledged the lease in its purchase agreement  
19 with the radio station, operated on the leased real estate for nine months, paid all relevant  
20 property taxes, and named the plaintiffs as additional insureds on its general commercial  
21 liability policy. Id. at 672. Nevertheless, the Court of Appeal held that these actions were  
22 insufficient “as a matter of law . . . to substantiate the conclusion [that the defendant] had  
23 assumed the lease,” because there was no evidence that the defendant had ever made an  
24 express statement agreeing to be bound by the lease’s terms, as opposed to the covenants  
25 the lease attached to the leased property. Id. at 676.

26           The evidence identified by Rex here is similarly deficient. Rex has put forth  
27 substantial evidence that SME was aware of the lease, and abided by all lease covenants  
28 (such as the obligations to pay rent and property taxes) that ran with the Calexico property.

1 This evidence is arguably sufficient to show that SME became NE Nebraska’s assignee by  
2 operation of law sometime after 1985. However, Rex has put forward no evidence that  
3 SME or its agents ever made an express statement “either orally or in writing that [SME]  
4 agree[d] to be bound by the terms of the lease.” Kelly, 147 Cal. App. 3d at 678. In the  
5 absence of such a statement, Rex cannot show that SME expressly assumed the Lease  
6 Agreement, and thus SME’s obligations to Rex ended in 2012 when SME vacated the  
7 Calexico property. BBE DDR BR, 14 Cal. App. 5th at 1000; Enterprise, 231 Cal. App. 3d  
8 at 746. Since Rex is only seeking damages that accrued after SME vacated the Calexico  
9 property, it cannot recover on its assignment theory, because any assignment that may have  
10 occurred by operation of law did not bind SME to any of the lease’s obligations beyond  
11 those covenants that ran with the land.

12 B. Alter Ego.

13 Rex next argues that the Court should use its equitable powers to bind SME to the  
14 1985 Lease Agreement’s terms because SME was the alter ego of NE Nebraska. Under  
15 California law, in order to “justify piercing the corporate veil on an alter ego theory in order  
16 to hold [one] corporation liable for the acts or omissions of [another], a plaintiff must show  
17 that there is such a unity of interest and ownership between the two corporations that their  
18 separate personalities no longer exist.” Laird v. Capital Cities/ABC Inc., 68 Cal. App. 4th  
19 727, 741 (1998), overruled on other grounds by Reid v. Google, Inc., 50 Cal. 4th 512  
20 (2010); see also Institute of Veterinary Pathology, Inc. v. Cal. Health Labs., Inc., 116 Cal.  
21 App. 3d 111, 119–20 (1981) (“[T]he plaintiff must show ‘specific manipulative conduct’  
22 by the parent toward the subsidiary which ‘relegate[s] the latter to the status of merely an  
23 instrumentality, agency, conduit or adjunct of the former . . . .’”). The plaintiff must also  
24 show that there would “be an inequitable result if the acts in question are treated as those  
25 of the corporation alone.” Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523,  
26 538 (2000). “Alter ego liability is not limited to the parent-subsidiary corporate  
27 relationship; rather, ‘under the single enterprise rule, liability can [also] be found between  
28 sister [or affiliated] companies.” Troyk v. Farmers Grp., Inc., 171 Cal. App. 4th 1305,

1 1341 (2009) (quoting Las Palmas Assocs. v. Las Palmas Ctr. Assocs., 235 Cal. App. 3d  
2 1220, 1249 (1991)).

3 Under California law, because the alter ego doctrine is equitable in nature, “a trial  
4 court is empowered to determine alter ego issues.” Dow Jones Co. v. Avenel, 151 Cal.  
5 App. 3d 144, 149 (1984). In determining whether one corporation is the alter ego of  
6 another, “[f]actors for the trial court to consider include the commingling of funds and  
7 assets of the two entities, identical equitable ownership in the two entities, use of the same  
8 offices and employees, disregard of corporate formalities, identical directors and officers,  
9 and use of one as a mere shell or conduit for the affairs of another.” Toho-Towa Co., Ltd.  
10 v. Morgan Creek Productions, Inc., 217 Cal. App. 4th 1096, 1108–09 (2013) (quoting  
11 Troyk, 171 Cal. App. 4th at 1342). “No one characteristic governs, but the courts must  
12 look at all the circumstances to determine whether the doctrine should be applied.” Sonora  
13 Diamond, 83 Cal. App. 4th at 539. “Because it is founded on equitable principles,  
14 application of the alter ego [doctrine] ‘is not made to depend upon prior decisions involving  
15 factual situations which appear to be similar . . . . ‘It is the general rule that the conditions  
16 under which a corporate entity may be disregarded vary according to the circumstances of  
17 each case.’” Toho-Towa, 217 Cal. App. 4th at 1108 (quoting McLoughlin v. L. Bloom  
18 Sons Co., Inc., 206 Cal. App. 2d 848, 853 (1962)). “What the formula comes down to,  
19 once shorn of verbiage about control, instrumentality, agency, and corporate entity, is that  
20 liability is imposed to reach an equitable result.” Mesler v. Bragg Mgmt. Co., 39 Cal.3d  
21 290, 301 (1985) (citation and internal quotation marks omitted). “Thus the corporate form  
22 will be disregarded only in narrowly defined circumstances and only when the ends of  
23 justice so require.” Id.

24 Here, Rex argues that the following factors show that SME and NE Nebraska were  
25 alter egos: (i) the two companies shared common officers and directors; (ii) former SME  
26 director Ronald Eriksen negotiated the 1985 Lease Agreement with Rex; (iii) NE Nebraska  
27 was a “holding company” that dissolved in 1994, well before the expiration of the Lease  
28 Agreement’s twenty-year term; and (iv) SME functionally performed all of NE Nebraska’s

1 obligations under the Lease Agreement. (Doc. No. 43 at PageID 481.)

2       Nevertheless, even crediting all of the facts alleged by Rex, the Court declines to  
3 invoke the alter ego doctrine. Rex has not shown “undercapitalization, commingled funds  
4 or disregard for corporate formalities,” or any other circumstances showing that this is one  
5 of the cases where use of the doctrine is appropriate. See Wady v. Provident Life &  
6 Accident Ins. Co. of Am., 216 F. Supp. 2d 1060, 1068–69 (C.D. Cal. 2002) (collecting  
7 cases rejecting the alter ego doctrine despite overlap in corporate finances, decision-  
8 making, or key personnel); Tomaselli v. Transamerica Ins. Co., 25 Cal. App. 4th 1269,  
9 1285 (1994) (declining to invoke the alter ego doctrine in spite of intermingling corporate  
10 financial arrangements and the two companies holding themselves out as one entity). At  
11 best, Rex’s evidence shows that NE Nebraska negotiated the 1985 Lease Agreement with  
12 the intent that SME would use the Calexico property and pay the rent. There is nothing  
13 uncommon or nefarious in this arrangement.

14       Moreover, it would be inequitable to disregard the corporate veil under the  
15 circumstances present here. Rex could have insisted that SME sign the Lease Agreement  
16 if it wished to continue to occupy the Calexico property, and had the power to void the  
17 agreement if SME refused. (Doc. No. 16-1 at PageID 148). See also BRE DDR BR, 14  
18 Cal. App. 5th at 1004 (declining to hold purported assignee to lease’s terms where the  
19 plaintiff, “as a signatory to the initial lease, was in the best position to protect itself by  
20 including provisions in the lease requiring consent and assumption”). The Court will not  
21 invoke its equitable powers to remedy Rex’s failure to diligently protect its rights.

### 22       C. Modification.

23       Next, Rex argues that the parties executed an oral modification to the 1985 Lease  
24 Agreement at its inception that substituted SME as a party to the lease in NE Nebraska’s  
25 place. This argument also fails. First, Rex has put forward no evidence of this oral  
26 agreement, beyond the fact that SME took possession of the Calexico property and paid  
27 the rent during much of the life of the lease. Under California law, while this evidence is  
28 sufficient to demonstrate privity of estate and make SME liable for covenants running with

1 the land during the time of SME’s occupancy, it is insufficient to show privity of contract.  
2 BRE DDR BR, 14 Cal. App. 5th at 1000. Second, the purported modification was not in  
3 writing, and therefore does not satisfy the statute of frauds. See Cal. Civil Code § 1698(c)  
4 (“The statute of frauds (Section 1624) is required to be satisfied if the contract as modified  
5 is within its provisions.”); Secrest v. Sec. Nat’l Mortg. Loan Tr. 2002-2, 167 Cal. App. 4th  
6 544, 553 (2008) (“An agreement to modify a contract that is subject to the statute of frauds  
7 is also subject to the statute of frauds.”). Finally, the 1985 Lease Agreement itself renders  
8 all oral modifications invalid. (Doc. No. 16-1 at PageID 152 (“No modification . . . of this  
9 Lease shall be binding unless in writing and executed by the parties hereto, their heirs,  
10 successors or assigns.”)). Accordingly, Rex’s modification theory also failed to  
11 demonstrate a basis for binding SME to the Lease Agreement’s Terms.

12 D. Implied-In-Fact Contract.

13 Finally, Rex argues that it and SME entered into an implied-in-fact lease agreement  
14 with the same terms as the 1985 Agreement with NE Nebraska, and that SME breached the  
15 terms of this lease. An implied-in-fact contract is an agreement whose terms are manifested  
16 by conduct rather than words. See Pac. Bay Recovery, Inc. v. Cal. Physicians’ Servs., Inc.,  
17 12 Cal. App. 5th 200, 215 (2017) (explaining the difference between express and implied-  
18 in-fact contracts). Rex points to the same core facts in support of this argument that it used  
19 in other arguments: (i) NE Nebraska intended that SME would perform its obligations  
20 under the Lease Agreement; (ii) SME paid rent and property taxes for more than twenty  
21 years; and (iii) SME held itself out to third parties as a party to the Lease Agreement.<sup>5</sup>

22 Rex’s implied-in-fact contract theory suffers from a fundamental problem: implied-  
23 in-fact contracts are invalid to the extent they violate the statute of frauds. See Buckaloo  
24 v. Johnson, 14 Cal. 3d 815, 821 (1975) (“Any action . . . based on implied contract must  
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26 <sup>5</sup> The arrangement Rex alleges more closely resembles a novation substituting SME as a party to  
27 the Lease Agreement in place of NE Nebraska than an implied-in-fact contract between Rex and SME,  
28 because Rex could not have promised exclusive use of the Calexico property to SME without breaching  
its lease with NE Nebraska. Presumably, Rex does not mean to argue that it simultaneously had an express  
lease with NE Nebraska and an implied-in-fact lease with SME covering the same property.

1 fail for want of compliance with the statute of frauds.”), overruled on other grounds by  
2 Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376 (1995); Colbaugh v.  
3 Hartline, 29 Cal. App. 4th 1516, 1524 (1994). As the Court has already explained, any  
4 lease between the parties—express or implied—for a term of twenty years must have been  
5 in writing. Cal. Civil Code § 1624(a)(3). It is undisputed that no such written lease exists.

6 In the Court’s prior order on SME’s second motion to dismiss, the Court ruled that  
7 Rex could proceed on an implied-in-fact contract theory notwithstanding the statute of  
8 frauds by invoking the doctrine of equitable estoppel. (Doc. No. 26 at PageID 317 (citing  
9 Chavez v. Indymac Mortg. Servs., 219 Cal. App. 4th 1052, 1058 (2013).) However, Rex  
10 chose not to develop an equitable estoppel theory in its briefing. Accordingly, the Court  
11 concludes that Rex’s implied-in-fact contract theory is barred by the statute of frauds.

### 12 Conclusion

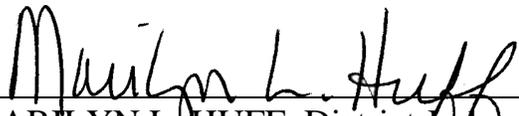
13 Rex has failed to show a genuine dispute of material fact that SME breached any  
14 obligation to Rex under the 1985 Lease Agreement, and therefore not only is Rex not  
15 entitled to judgment as a matter of law, it has not demonstrated any basis for proceeding to  
16 trial. Nor can Rex materially strengthen its claims at this stage of the proceedings, as the  
17 parties have already completed discovery.

18 Federal Rule of Civil Procedure 56(f)(1) permits courts to “grant summary judgment  
19 for a nonmovant” after “giving notice and a reasonable time to respond.” However, “a  
20 court may grant summary judgment without notice if the losing party has had a ‘full and  
21 fair opportunity to ventilate the issues involved in the motion.’” In re Rothery, 143 F.3d  
22 546, 549 (9th Cir. 1998) (quoting In re Harris Pine Mills, 44 F.3d 1431, 1439 (9th Cir.  
23 1995)); see also Celotex, 477 U.S. at 326 (“[D]istrict courts are widely acknowledged to  
24 possess the power to enter summary judgments sua sponte, so long as the losing party was  
25 on notice that she had to come forward with all of her evidence.”); Acton v. City of  
26 Columbia, 436 F.3d 969, 975 n.5 (8th Cir. 2006) (“A district court maintains the discretion  
27 to grant a non-moving party summary judgment, even where the nonmovant does not file  
28 a cross-motion for summary judgment.”).

1 The Court gave notice that it was considering treating SME's opposition as a cross-  
2 motion for summary judgment on each of Rex's remaining causes of action on October 13,  
3 2017. (Doc. No. 48.) Rex filed a reply brief on October 16, 2017, in which it attempted to  
4 distinguish BRE DDR BR on its facts, but did not address that case's central holding that  
5 an assignee's liability for a lease of real property terminates when the assignee vacates the  
6 property, unless the assignee makes an express oral or written statement agreeing to assume  
7 the lease. (Doc. No. 49.) The Court also heard argument on this motion on October 23,  
8 2017. The Court concludes that Rex was given a reasonable time to respond to SME's  
9 opposition brief, and that "[d]elaying a ruling until Defendants file a formal motion for  
10 summary judgment would serve no purpose." Allen v. Honeywell Ret. Earnings Plan, 382  
11 F. Supp. 2d 1139, 1165 (D. Ariz. 2005). The Court accordingly grants summary judgment  
12 in favor of SME, and directs the Clerk of the Court to close this case and enter judgment  
13 in favor of the Defendants. See English & Sons, Inc. v. Straw Hat Restaurants, Inc., 176  
14 F. Supp. 3d 904, 919 n.59 (N.D. Cal. 2016) (granting summary judgment to defendants sua  
15 sponte where it "follow[ed] necessarily from the court's analysis of the plaintiffs' motion"  
16 that summary judgment was appropriate).

17 **IT IS SO ORDERED.**

18 DATED: October 23, 2017

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21 MARILYN L. HUFF, District Judge  
22 UNITED STATES DISTRICT COURT  
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