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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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NNN SIENA OFFICE PARK I 2, LLC a
Delaware limited liability company, et al.,

Case No. 2:12-cv-01524-MMD-PAL

Plaintiffs,

ORDER

v.

(Def.'s Motion for Summary Judgment –
dkt. no. 86)

WACHOVIA BANK NATIONAL
ASSOCIATION, now known as WELLS
FARGO BANK, NATIONAL
ASSOCIATION, successor by merger, et
al.,

Defendants.

I. SUMMARY

This case arises out of Defendant Holland & Hart LLP's legal representation of several investors owning commercial properties ("the Property") as tenants-in-common. Holland & Hart was retained by the property manager to represent the investors in an action initiated by a court-appointed receiver who sought to include the Property in the receivership estate. Plaintiffs, a subset of the investors, claim that Holland & Hart's purported representation of them without their authorization was improper and unnecessarily embroiled them in litigation. Plaintiffs brought this suit seeking the total cost of legal representation as damages.

Before the Court is Holland & Hart's Motion for Summary Judgment. (Dkt. no. 86.) The Court heard oral argument on August 28, 2014. Because the Court finds that Holland & Hart's representation was authorized, the Court grants summary judgment. Holland & Hart's Motion to Exclude Expert Witness (dkt. no. 88) is denied as moot.

1 **II. BACKGROUND**

2 The following material facts are undisputed.

3 Plaintiffs are thirty (30) Delaware limited liability companies owning two
4 commercial properties in Henderson, Nevada (“the Property”) as tenants-in common.
5 (Dkt. no. 1 ¶¶ 1, 9, 11, 29.) In June and July of 2007, Plaintiffs, along with other investors
6 (collectively, the “Investors”), purchased the Property through a transaction involving the
7 sale of the Property (“the Investment”) from R.O.C.S.E.V. Capital, LLC (“ROCSEV”)
8 pursuant to a purchase and sale agreement (“PSA”).¹ (*Id.* ¶¶ 29, 32, 34, 36.) Under the
9 PSA, the parties agreed that \$3,023,306.63 of the purchase price would be held in
10 escrow to cover shortfalls in rental receipts from certain tenants of the Property as well
11 as lost revenue and improvement costs resulting from another tenant’s early termination
12 (the “Holdback Funds”). (*Id.* ¶ 16.) After the PSA was executed, investors of ROCSEV’s
13 parent company filed several lis pendens on the Property relating to litigation involving
14 ROCSEV, its parent company, and its controlling principal. (*Id.* ¶ 17.) Consequently, the
15 parties agreed to withhold an additional \$300,000.00 of the purchase price in a separate
16 escrow account (the “Litigation Holdback”) to pay costs associated with resolving future
17 legal disputes concerning the Property post closing. (*Id.*)

18 As part of the Investment, the Investors entered into a management agreement
19 (the “Management Agreement”) and a tenants-in-common agreement (the “TIC
20 Agreement”). (Dkt. no. 86-7, Exh. G; dkt. no. 86-8, Exh. H.) Through the TIC Agreement,
21 the Investors expressed their desire “to provide for the orderly administration of the
22 Property and to delegate authority and responsibility for the operation and management
23 of the Property” (dkt. no. 86-8, Exh. H), and agreed to appoint Triple Net Properties
24 Realty, Inc. (“TNPR”) as Property Manager “to act on behalf of the Tenants in Common
25

26 ¹The transaction was structured in three waves. An initial group purchased the
27 Property, then sold portions of their interests to subsequent groups of investors for cash
28 and an apportioned assumption of the loan obligation used to make the initial purchase.
(*Id.* ¶¶ 29, 32, 34, 36.)

1 with respect to the management, operation, maintenance and leasing of the Property.”
2 (*Id.* § 2.) The Management Agreement required TNPR to “manage the Property in an
3 efficient, economic, and satisfactory manner” and to “manage everything reasonably
4 necessary for the proper operation of the Property for the tenants thereof.” (Dkt. no. 86-
5 7, Exh. G, § 2.2.) The Management Agreement also gave TNPR authority to pay for “all
6 expenses of the operation, maintenance and repair of the Property contemplated by the
7 Budget directly from the Operating Account . . . including . . . (f) legal fees of attorneys.”
8 (*Id.* § 7.1.)

9 In December 2007, TNPR’s parent company merged with Grubb & Ellis Company
10 (“G&E”). TNPR was renamed Grubb & Ellis Realty Investors, LLC (“GERI”) and
11 continued to serve as Property Manager. (Dkt. no. 1 ¶ 39.)

12 On February 6, 2008, the state of Utah charged Val Southwick, ROCSEV’s
13 controlling principal, with nine second-degree felonies for violating state securities laws.
14 (*Id.* ¶ 40.) The same day, the SEC filed a civil suit against Mr. Southwick and several of
15 his controlled entities, including Vescor LLC, ROCSEV’s parent company, for violating
16 securities law by operating a Ponzi scheme. (*Id.* ¶ 41.) As part of the civil action, the U.S.
17 District Court for the District of Utah appointed Robert Wing as receiver of the
18 Southwick-related entities’ assets (the “Receiver”). (*Id.* ¶ 43.)

19 On June 8, 2008, the Receiver notified GERI of its claim that the Holdback Funds
20 and Litigation Holdback belonged to the receivership estate as assets of Vescor LLC.
21 (*Id.* ¶ 44.) The funds in the escrow accounts were frozen while the SEC investigated the
22 sale of the Property. (*Id.* ¶ 43.) The freeze placed on the Holdback Funds decreased
23 profits from the Property, and GERI notified the Investors that it was necessary to reduce
24 cash distributions. (*Id.* ¶ 45.) GERI retained counsel at Holland & Hart to contest the
25 Receiver’s claim and clarify ownership of the Holdback Funds. (*Id.* ¶ 46.) In quarterly
26 reports sent to the Investors, GERI also informed the Investors of the Receiver’s claims
27 and its response. (Dkt. no. 86-9, Ex. M.) The quarterly reports included descriptions of
28 payments GERI made to Holland & Hart. (*Id.*)

1 The Receiver eventually began an investigation into the Investment transaction
2 and later filed suit against GERI on July 6, 2009, alleging that the Property was
3 fraudulently transferred in continuation of Mr. Southwick's Ponzi scheme (the "Receiver
4 Action"). (Dkt. no. 1 ¶ 47.) The Receiver asserted rights to the Holdback Funds as well
5 as the Property itself. (*Id.*) GERI once again retained Holland & Hart, and instructed
6 Holland & Hart to file a motion to intervene on behalf of the Investors, as they were the
7 Property owners and real parties in interest.² (*Id.* ¶¶ 48-49.) The motion was granted and
8 the Investors became parties to the Receiver Action. (*Id.* ¶ 49.) GERI used the
9 Property's funds to pay for the legal representation. (*Id.* ¶ 48.) GERI provided updates
10 about the Receiver Action, including its payments to Holland & Hart, in quarterly reports.
11 (Dkt. no. 86-9, Exh. M).

12 In June 2010, a group of the Investors (the "Minority TICs") retained separate
13 counsel to represent them in the Receiver Action and to pursue claims against the
14 original sponsors of the Investment and GERI. (Dkt. no. 1 ¶ 54.) The law firms of Hansen
15 Bridgett and Ray Quinney & Nebeker were substituted in place of Holland & Hart for the
16 Minority TICs. (Burton Dep., dkt. no. 86-9, Exh. K at 56.) The remainder of the Investors
17 (the "Majority TICs") did not object to Holland & Hart's representation and — Holland &
18 Hart continued to represent them until December 2011. Ultimately, in March 2013, the
19 Investors settled with the Receiver, paying \$864,000.00 of the Holdback Funds to extract
20 themselves from the Receiver Action. (Dkt. no. 1 ¶ 59.)

21 Plaintiffs, a subset of the Investors, then filed this lawsuit against Holland & Hart
22 for legal malpractice and breach of fiduciary duty. (Dkt. no. 1.) Holland & Hart now
23 moves for summary judgment on all of Plaintiffs' claims.

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25 ///

27 ²A number of Investors were not added to the motion to intervene and, in turn,
28 were not parties to the Receiver Action.

1 **III. DISCUSSION**

2 **A. Legal Standard**

3 The purpose of summary judgment is to avoid unnecessary trials when there is no
4 dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
5 F.3d 1468, 1471 (9th Cir.1994). Summary judgment is appropriate when "the movant
6 shows that there is no genuine dispute as to any material fact and the movant is entitled
7 to judgment as a matter of law." Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477
8 U.S. 317, 322-23 (1986). An issue is "genuine" if there is a sufficient evidentiary basis on
9 which a reasonable fact-finder could find for the nonmoving party and a dispute is
10 "material" if it could affect the outcome of the suit under the governing law. *Anderson v.*
11 *Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Where reasonable minds could differ
12 on the material facts at issue, however, summary judgment is not appropriate. *Warren v.*
13 *City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). "The amount of evidence necessary
14 to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve
15 the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d
16 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S.
17 253, 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts
18 and draws all inferences in the light most favorable to the nonmoving party. *Kaiser*
19 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

20 The moving party bears the burden of showing that there are no genuine issues
21 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). "In
22 order to carry its burden of production, the moving party must either produce evidence
23 negating an essential element of the nonmoving party's claim or defense or show that
24 the nonmoving party does not have enough evidence of an essential element to carry its
25 ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
26 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56's requirements,
27 the burden shifts to the party resisting the motion to "set forth specific facts showing that
28 there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may

1 not rely on denials in the pleadings but must produce specific evidence, through
2 affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME*
3 *Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show
4 that there is some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285
5 F.3d 764, 783 (9th Cir. 2002) (internal quotation marks omitted). “The mere existence of
6 a scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*,
7 477 U.S. at 252.

8 **B. Analysis**

9 Plaintiffs argue that Holland & Hart acted without authorization and breached its
10 fiduciary duties to Plaintiffs. Holland & Hart seeks summary judgment based on two
11 independent arguments: (1) Plaintiffs’ grant of authority to GERI authorized Holland &
12 Hart’s representation of Plaintiffs; and (2) Plaintiffs cannot articulate any harm arising
13 from Holland & Hart’s representation even if such representation was not authorized.
14 Because the undisputed facts show GERI had actual implied authority to retain legal
15 counsel, the Court grants Holland & Hart’s Motion. The Court does not reach Holland &
16 Hart’s damages argument.

17 Under Nevada law, a principal “may be bound by the acts of its agent as to third
18 parties who have no reason to know of the agent’s improper conduct.” *Homes Sav.*
19 *Ass’n v. Gen. Elec. Credit Corp.*, 708 P.2d 280, 283 (Nev. 1985). However, for the acts
20 of the agent to bind the principal, the agent “must have actual authority, express or
21 implied, or apparent authority.” *Dixon v. Thatcher*, 742 P.2d 1029, 1031 (Nev. 1987).
22 “Actual authority includes both implied authority and incidental authority.” *Coblentz v.*
23 *Riskin*, 322 P.2d 905, 907 (Nev. 1958). Thus, in certain instances, a principal may
24 simultaneously have a cause of action against an agent for exceeding the scope of his
25 agency and be liable to a third party with whom the agent contracted for services. See
26 *Homes Sav. Ass’n*, 708 P.2d at 283.

27 Holland & Hart was retained by GERI, who was undisputedly the agent of the
28 Investors. Plaintiffs, however, argue that because GERI exceeded the scope of its actual

1 agency in retaining counsel for the Receiver Action, Holland & Hart's representation was
2 unauthorized. Plaintiffs' argument is valid only if Holland & Hart had reason to know of
3 GERI's improper conduct. Otherwise, even though Plaintiffs may have a claim against
4 GERI for its actions, they are bound to Holland & Hart by the actions of GERI, their
5 agent. The Court must determine whether Holland & Hart had reason to know that GERI
6 exceeded the scope of its agency with Plaintiffs and therefore lacked actual authority.

7 Holland & Hart argues that it could not have known of GERI's improper conduct
8 because there was no improper conduct — GERI acted within the scope of its actual
9 authority, express or implied, under the Management Agreement. In support of its
10 express authority argument, Holland & Hart identifies the section in the Management
11 Agreement authorizing GERI to retain counsel on Plaintiffs' behalf. (Dkt. no. 86-7, Exh.
12 G, § 7.1.) Plaintiffs counter that the cited section limits this authorization to disputes
13 involving "operation, maintenance and repair of the Property." (*Id.*) Holland & Hart
14 highlights several other provisions of the Management Agreement giving GERI broad
15 power over the operation, management, and maintenance of the Property. (Dkt. no. 86.)
16 But none of these provisions expressly authorizes GERI to retain counsel in the context
17 of defending title to the Property.

18 Viewing the facts in the light most favorable to Plaintiffs, the Management
19 Agreement does not expressly authorize GERI to retain counsel to defend a lawsuit
20 involving a claim to the Property. Although the Management Agreement provides GERI
21 with broad power over the operation, management, and maintenance of the Property,
22 the language of the Management Agreement suggests that these powers refer to the
23 day-to-day oversight and upkeep of the Property. (See dkt. no. 86-7, Exh. G, §§ 2.2, 2.3,
24 2.5.1, 2.10.1, 2.10.4, 7.1.) Under the TIC Agreement, the Investors retain the power to
25 manage the Property's disposition. (See dkt. no. 86-8, Exh. H, §§ 1.3, 5.1.) Thus,
26 viewing the facts in the light most favorable to Plaintiffs, there is no express authorization
27 for GERI's actions.

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1 The Court, however, agrees with Holland & Hart that it acted with implied actual
2 authority. "Implied authority is that which the agent reasonably believes himself to
3 possess as a result of representations by the principal or of acts of the agent permitted
4 by the principal over a course of time in which the principal has acquiesced." *Coblentz*,
5 322 P.2d at 907. Under Nevada law, a principal's ratification of an agent's acts by
6 acquiescence requires knowledge and acceptance of the benefits of the agent's actions.
7 *See Fed. Mining & Eng'g Co. v. Pollack*, 85 P.2d 1008, 1011-12 (Nev. 1939).

8 The undisputed evidence is sufficient to establish that GERI had implied authority
9 to retain counsel and manage the Receiver Action on behalf of the Investors, and that
10 Plaintiffs ratified these actions as GERI carried them out. GERI first retained Holland &
11 Hart to defend the Investors' interests in the Property shortly after receiving the
12 Receiver's letter in June 2008. (Burton Dep., dkt. no. 86-9, Exh. K at 13.) GERI then
13 notified Plaintiffs in the November 19, 2008, quarterly report that it had "retained a
14 national law firm to pursue legal remedies to expedite" resolution of the dispute involving
15 the Property. (Dkt. no. 86-9, Exh. M.) The expense report in the same quarterly report
16 listed payments to Holland & Hart. (*Id.*) The March 5, 2009, and June 2, 2009, quarterly
17 reports further updated Plaintiffs on the status of the litigation and listed more payments
18 to Holland & Hart in the included expense report. (*Id.*)

19 The August 25, 2009, quarterly report disclosed the Receiver Action and the
20 retained counsel's projections. (*Id.*) The November 23, 2009, February 26, 2010, and
21 June 11, 2010, quarterly statements all updated the Investors on the status of the
22 litigation. (*Id.*) These reports included payments to Holland & Hart in their expense
23 reports. (*Id.*) The June 11, 2010, report stated:

24 Please know that we are doing everything we can to achieve the best
25 possible outcome for the owners and the property. We will keep you
26 apprised as mediation or settlement negotiations develop and will seek
investor approval prior to agreeing to any settlement with the Receiver.

27 (*Id.*)

28 *///*

1 In addition to the quarterly reports, GERI also conducted regular conference calls
2 in which Investors could participate and during which participants discussed litigation
3 surrounding the Property. (See, e.g., Farinas Dep., dkt. no. 86-4, Exh. D-5 at 123; Streiff
4 Dep., dkt. no. 86-7, Exh. E at 19-20.) Representatives from Holland & Hart participated
5 in some of the conference calls. (Burton Dep., dkt. no. 86-9, Exh. K at 50-55.) One of the
6 Investors, an attorney, even had direct communications with Holland & Hart about the
7 status of, and issues raised in, the Receiver Action. (*Id.* at 54-55.)

8 Plaintiffs maintain that GERI exceeded its express authority under the
9 Management Agreement by retaining counsel to defend title to the Property. Plaintiffs
10 contend that the reports and conference calls were insufficient to put them on notice of
11 GERI's actions because Holland & Hart was not identified as the "national law firm"
12 retained by GERI, the payments to Holland & Hart were "buried deep within the 20 to 30
13 page general ledgers" included in the report, and the Motion to Intervene was never
14 specifically disclosed. (Dkt. no. 92.) These arguments are unavailing — whether
15 Plaintiffs chose to review the quarterly reports or participate in the conference calls does
16 not change the fact that they acquiesced to GERI's management of the litigation on their
17 behalf. The reports and conference calls clearly indicated that GERI had retained
18 counsel to defend the Property.³ Rather than objecting, many Plaintiffs indicated that
19 they specifically relied on GERI to manage the litigation. (See, e.g., John K. Rausch
20 Dep., dkt. no. 86-4, Exh. D-1 at 76; June Rausch Dep., dkt. no. 86-4, Exh. D-2 at 38;
21 White Dep., dkt. no. 86-5, Exh. D-15 at 120.) Thus, Plaintiffs acquiesced to GERI's
22 retention of counsel to defend their interests with knowledge and received the benefits of
23 that representation. Plaintiffs further acquiesced to GERI's management of the litigation

24
25 ³Plaintiffs claim to be unaware that GERI used the Property's operating funds to
26 pay Holland & Hart's legal fees despite the inclusion of payments to Holland & Hart in
27 the reports to the Investors. However, such a claim of ignorance is simply unpersuasive
28 and raises only a metaphysical doubt about the material facts. Who else would cover the
fees to defend title to the Property if not the Investors? More importantly, Plaintiffs have
failed to produce specific evidence showing such a dispute exists.

1 for nearly two years. At that point, only a minority of Investors objected to GERI's actions
2 and retained separate counsel — the majority of Investors continued to acquiesce to
3 GERI's management of the litigation. Plaintiffs' acquiescence to GERI's actions gave
4 GERI implied authority to retain counsel and manage the litigation on behalf of the
5 Investors.

6 The Court also rejects Plaintiffs' argument that they were unaware that they had
7 been made parties to the Receiver Action through the motion to intervene. Although the
8 Receiver improperly filed suit against GERI, the action involved ownership of the
9 Property and necessarily implicated Plaintiffs' rights. GERI had implied authority to
10 manage litigation involving ownership of the Property and intervened for the real parties
11 in interest to advance the litigation efficiently.⁴ Moreover, even if the instruction to
12 intervene in the Receiver Action stands apart from GERI's other actions in managing the
13 litigation, Holland & Hart would have no reason to know of GERI's improper conduct, and
14 Plaintiffs would still be bound by their agent's actions.

15 The Court therefore finds that Holland & Hart was authorized to represent
16 Plaintiffs in the disputes involving the Property. Because Holland & Hart acted with
17 implied actual authority, Plaintiffs' allegations are insufficient to sustain a claim against
18 Holland & Hart for legal malpractice or breach of fiduciary duties.

19 Plaintiffs also allege that Holland & Hart breached its duties to Plaintiffs in
20 representing them because it acted at the direction of GERI, failed to disclose a conflict
21 of interest caused by representing both Plaintiffs and GERI, accepted payment from
22 GERI for legal fees that rightfully belonged to Plaintiffs, and caused Plaintiffs to incur
23 unnecessary legal fees as a result of being made parties to the Receiver Action. None of
24 these allegations is a breach of Holland & Hart's duties as GERI was authorized to
25 manage the litigation on Plaintiffs' behalf, which includes paying Holland & Hart's fees.

27 ⁴Plaintiffs conceded at oral argument that had Holland & Hart not filed the motion
28 to intervene, the Investors, as owners of the Property, would have likely needed to seek
intervention at some point.

1 Additionally, because GERI's and Plaintiffs' interests aligned, there was no conflict of
2 interest. Any representation of GERI occurred precisely because of GERI's role as
3 Plaintiffs' agent. Finally, no matter what procedural route the Receiver Action took,
4 Plaintiffs would be embroiled in the lawsuit — and would incur legal fees in defending
5 the Property — because ownership of the Property was central to the Receiver Action.


6 **IV. CONCLUSION**

7 It is therefore ordered that Defendant Holland & Hart LLP's Motion for Summary
8 Judgment (dkt. no. 86) is granted. The Clerk of the Court is instructed to enter judgment
9 in favor of Holland & Hart LLP.

10 It is further ordered that Defendant Holland & Hart LLP's Motion to Exclude
11 Plaintiffs' Expert Witness (dkt. no. 88) is denied as moot.

12 The Clerk of the Court is instructed to close this case.

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14 DATED THIS 8th day of September 2014.

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17 MIRANDA M. DU
18 UNITED STATES DISTRICT JUDGE
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