

TENTATIVE Order Regarding Motion to Dismiss

Plaintiff/Counter-Defendant DCR Marketing Inc. (“DCR Marketing”) moves to dismiss Defendant/Counter-Plaintiff U.S. Alliance Group, Inc. d/b/a Alternative Payments International’s (“US Alliance Group”) third amended counterclaims (“TAC”). Mot., Dkt. No. 82. US Alliance Group opposed the motion. Opp’n, Dkt. No. 83. DCR Marketing replied. Reply, Dkt. No. 84.

For the following reasons, the Court **GRANTS in part** and **DENIES in part** the motion with leave to amend.

I. BACKGROUND

A. The Complaint

On October 3, 2019, DCR Marketing filed this action against US Alliance Group alleging the following causes of action: (1) breach of contract; (2) conversion; (3) Unfair Business Practices under Business and Professions Code Sections 17200 *et seq.*; (4) constructive trust; (5) declaratory judgment; and (6) injunctive relief. Compl., Dkt. No. 1. The Complaint alleges the following.

DCR Marketing is a merchant service provider. Id. at ¶ 9. US Alliance Group provides payment processing services to merchants and other services providers. Id. at ¶ 10. On or about May 25, 2018, DCR Marketing submitted a Universal Application (the “Application”) to US Alliance Group. Id. at ¶ 17. US Alliance Group approved the Application and entered into a Merchant Processing Agreement (the “Agreement”) with DCR Marketing. Id. Pursuant to the Agreement, US Alliance Group was to process payment card and other electronic transactions submitted by DCR Marketing and transfer the proceeds to DCR Marketing’s settlement account. Id. at ¶ 18. The Agreement’s “Reserve Procedures” allow US Alliance Group to withhold 10% of settlement proceeds from DCR Marketing’s submitted transactions in trust in a reserve account for 180 days. Id. at ¶ 21.

Beginning on or about July 31, 2018 until September 9, 2019, US Alliance

Group processed tens of thousands of DCR Marketing's payment card and other electronic transactions totaling more than \$17 million and withheld 10% of the proceeds in a reserve account. Id. at ¶ 22. Of the amounts withheld, US Alliance Group has only returned \$130,078.87. Id. at ¶ 23. US Alliance Group continues to hold \$1,597,472.47 of DCR Marketing's funds, approximately "\$1,072,408.19 of which it has withheld for longer than the Rolling Reserve Holding Period." Id.

On September 9, 2019, US Alliance Group sent DCR Marketing a "Notice of Termination" of the Agreement. Id. at ¶ 25. Subsequently, DCR Marketing notified US Alliance Group that withholding funds longer than 180 days and terminating the Agreement "for cause" "effective immediately" were breaches of the Agreement. Id. at ¶ 28. US Alliance Group then attempted to coerce and extort DCR Marketing to pay higher fees to US Alliance Group, "proposing extra-contractual conditions to resume processing." Id. at ¶ 30. DCR Marketing rejected that offer. Id. at ¶ 31.

B. The Counterclaims and Second Amended Counterclaims

US Alliance Group counterclaimed, and subsequently filed first amended counterclaims ("FAC"). Dkt. No. 13; Dkt. No. 17. The parties then stipulated to the filing of second amended counterclaims. Stipulation, Dkt. No. 56. The Court approved this stipulation, granting leave for US Alliance group to file second amended counterclaims ("SAC"). Order, Dkt. No. 57.

US Alliance Group brought the SAC against DCR Marketing and Plaintiff/Counter-Defendant Diana Fletcher ("Fletcher") for: (1) breach of contract; (2) breach of covenant of good faith and fair dealing; (3) unjust enrichment; (4) unfair business practices, California Business and Professions Code § 17200 *et seq.*; and (5) promissory fraud. SAC, Dkt. No. 58. Thereafter, DCR Marketing filed a motion to dismiss the SAC. Mot., Dkt. No. 65. The Court granted, with leave to amend, the motion to dismiss as to the SAC's first, second, third and fourth counterclaims, and denied it as to the fifth counterclaim for promissory fraud. See Order, Dkt. No. 72.

C. The Third Amended Counterclaim

US Alliance Group filed the TAC against DCR Marketing and Fletcher for: (1) breach of contract; (2) express contractual indemnity; (3) breach of the covenant of good faith and fair dealing; (4) unjust enrichment; and (5) promissory

fraud. See Dkt. No. 74. The TAC alleges the following.

US Alliance Group provides electronic payment processing services to businesses under their confidential agreements and “relationships with third-party financial institutions and software and payment processing companies.” Id. at ¶ 8. US Alliance Group is charged different rates by the third party vendors based on the risk associated with the transactions. Id. at ¶ 10. Risk is determined by several factors including “chargebacks” and business type. Id. DCR Marketing is a “high risk” merchant based on the risk factors, but it intentionally “concealed and/or misrepresented its true operations” from US Alliance Group during the parties’ negotiations. Id. at ¶ 13.

Specifically, DCR Marketing used its knowledge of how electronic payment processing works to attempt to defraud US Alliance Group “regarding how it would utilize a sub-merchant model under the auspice that it exclusively sold prepaid payment cards” (gift cards) under its brand TrueCash¹ even though DCR Marketing’s main source of revenue was allowing sub-merchants to process prohibited transactions through DCR Marketing’s relationship with US Alliance Group. Id. at ¶ 15. In reality, only 2% of DCR Marketing’s total transactions were derived from sales of its TrueCash product. Id. at ¶¶ 16, 77. The remaining 98% of DCR Marketing’s transactions was derived from processing transactions for loan products related to tribal lending. Id. By concealing its involvement with tribal lending enterprises, DCR Marketing’s conduct equated to allowing an undisclosed third-parties to use its Merchant Account to process transactions, which DCR Marketing knew would be prohibited or much more expensive than what US Alliance Group was charging if it had been disclosed. Id. at ¶ 18.

On or about July 8, 2019, a DCR Marketing customer and sub-merchant directly contacted US Alliance Group regarding DCR Marketing’s failure to pay transactions it had processed through its US Alliance Group Merchant Account. Id. at ¶ 24. The sub-merchant requested that US Alliance Group pay the sub-merchant directly because DCR Marketing said that its failure to pay resulted from US Alliance Group wrongfully withholding funds from DCR Marketing. Id. Prior to this encounter, US Alliance Group was unaware that the sub-merchant was processing transactions through DCR Marketing’s US Alliance Group Merchant

¹The brand is referred to as both “TrueCash” and “TruCash” throughout the TAC.

Account. Id.

After learning that US Alliance Group was processing transactions for previously undisclosed sub-merchants, US Alliance Group requested that DCR Marketing provide information concerning that and other sub-merchant relationships. Id. at ¶ 25. Nonetheless, DCR Marketing continued to omit information about certain sub-merchant relationships. Id. US Alliance Group discovered such omissions through a forensic audit of the documentation that DCR Marketing did provide. Id. After confirming through said forensic audit that DCR Marketing intentionally misrepresented or concealed its business model, on or about September 9, 2019, US Alliance Group sent DCR Marketing notice of termination of the Agreement. Id. at ¶ 28.

Under Section 2.2 of the Agreement, US Alliance Group was entitled to immediately terminate the Agreement if DCR Marketing changed any part of its business. Id. at ¶ 19. At Section 5.3, the Agreement sets forth that DCR Marketing is responsible to US Alliance Group for an early termination fee calculated as the average monthly processing fees charged to DCR Marketing for the previous twelve (12) months of processing multiplied by the remaining months for the term of the Agreement. Id. at ¶ 32.

Accordingly, US Alliance Group used amounts in DCR Marketing's reserve funds account to offset amounts owed by DCR Marketing to US Alliance Group for the early termination fee. Id. DCR Marketing continues to owe US Alliance Group for the rates/fees that US Alliance Group would have charged DCR Marketing had it disclosed the true nature of its business. Id. at ¶ 34. Additionally, recently, Blue Novis, Inc. ("Blue Novis"), the sub-merchant referred to above that notified US Alliance Group of its existence and DCR Marketing's illegal and unauthorized straw merchant operation, filed suit against US Alliance Group in this Court. Id. at ¶ 35. US Alliance Group has to date incurred and will continue to incur legal expenses and costs related to its defense of such claims. Id.

II. LEGAL STANDARD

A. Motion to Dismiss

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to

state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has “facial plausibility” if the plaintiff pleads facts that “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Iqbal, 556 U.S. at 678. Nor must the Court “accept as true a legal conclusion couched as a factual allegation.” Id. at 678-80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must “determine whether they plausibly give rise to an entitlement to relief.” Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.” Id.

B. Motion to Strike

Under Rule 12(f), a party may move to strike any insufficient defense or redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). A motion to strike is appropriate when a defense is insufficient as a matter of law. Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1057 (5th Cir. 1982). The grounds for a motion to strike must appear on the face of the pleading under attack, or from matters of which the Court may take judicial notice. SEC v. Sands, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995).

The essential function of a Rule 12(f) motion is to “avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev’d on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). “As a general proposition, motions to strike are regarded with disfavor because [they] are often used as delaying tactics, and because of the limited importance of pleadings in federal practice.” Sands, 902 F. Supp. at 1165–66 (alteration in original) (internal quotation marks omitted).

Therefore, courts frequently require the moving party to demonstrate prejudice “before granting the requested relief, and ‘ultimately whether to grant a

motion to strike falls on the sound discretion of the district court.” Greenwich Ins. Co. v. Rodgers, 729 F. Supp. 2d 1158, 1162 (C.D. Cal. 2010) (quoting Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc., 217 F.Supp.2d 1028, 1033 (C.D.Cal.2002)).

III. DISCUSSION

A. Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing

The elements of breach of contract are: “(1) the contract, (2) plaintiff performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff.” Coles v. Glaser, 2 Cal. App. 5th 384, 391, 205 Cal. Rptr. 3d 922, 927 (2016).

i. Damages

DCR Marketing argues that US Alliance Group’s counterclaims for breach of contract and breach of the covenant of good faith and fair dealing still to fail to allege any injury for which US Alliance Group can be awarded damages. Mot. Dkt. No. 82, at 5–7. US Alliance Group’s TAC identifies one type of alleged damages in connection with the breach of contract claim: an early termination fee pursuant to Section 5.3 of the Agreement’s Terms and Conditions. TAC, Dkt. No. 74, Ex. A. DCR Marketing argues that US Alliance Group is not entitled to receive an early termination fee unless it alleges compliance with the contractual conditions entitling it to such a fee. Mot. Dkt. No. 82, at 5.

“[W]here monetary damages is an element of the offense, accrual of the action does not occur until pecuniary loss is suffered.” Buschman v. Anesthesia Bus. Consultants LLC, 42 F. Supp. 3d 1244, 1250 (N.D. Cal. 2014). Under Section 5.3 of the Agreement, titled “Program Early Termination Fee,” US Alliance Group is entitled to an early termination fee only if DCR Marketing breached the agreement by: (a) failing to process any transactions in a calendar month by switching to another processor; (b) failing to cure any default under the Agreement; or (c) terminating the Agreement. TAC, Ex. A. US Alliance Group’s claims rest on the contention that DCR Marketing breached the Agreement, but admits that it was the one that terminated the Agreement and does not allege that

DCR Marketing switched to another processor. TAC ¶ 48. Therefore, its only remaining claim for entitlement to early termination fees would be if DCR Marketing failed to cure a default.

DCR Marketing argues that US Alliance Group does not allege that it provided DCR Marketing with a notice of default and that it accordingly did not afford DCR Marketing to subsequently cure its breach. Mot., Dkt. No. 82, at 6. DCR Marketing points out that under Section 5.2 of the Agreement, it is entitled to a 30 day cure period after receiving written notice of default from US Alliance Group. Id.; TAC, Ex. A.

US Alliance Group responds that under Section 2.2 of the Agreement it was entitled to immediately terminate the Agreement when it discovered that DCR Marketing had changed the basic nature of its business without providing US Alliance Group with notice. Opp'n, Dkt. No 83, at 7; TAC, Ex. A. (“Failure to provide notice as required herein may be deemed a material breach of these Terms and Conditions and shall be sufficient grounds for [US Alliance Group] to immediately terminate the Agreement.”). While US Alliance Group could immediately terminate the Agreement under Section 2.2, this section does not provide for or discuss an early termination fee. Section 5.3 of the Agreement specified only three circumstances under which US Alliance Group was entitled to early termination fees. However, US Alliance Group does allege that it sent a notice of termination on September 9, 2019, which was almost 60 days after they notified DCR Marketing of the default. See TAC, ¶ 28. This 60 day period amounts to time to cure pursuant to Section 5.3 of the agreement. Accordingly, US Alliance Group has alleged compliance with the contractual conditions entitling it to an early termination fee.

US Alliance Group has thus alleged a plausible theory of damages. Accordingly, the Court **DENIES** the motion to dismiss the breach of contract claim and the breach of the claim for breach of the implied covenant of good faith and fair dealing on this ground.

ii. Implied Covenant of Good Faith and Fair Dealing

Every contract includes an implied covenant of good faith and fair dealing. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 683–84 (1988). The precise nature and extent of the covenant depends on the contract. Id. Allegations for breach of

the covenant must show “a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act ...” Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1395 (1990). Such a breach must unfairly frustrate the agreement’s common purpose and deprive the other party of the contract’s benefits. Id. But a claim for breach of the implied covenant is superfluous if it merely restates the claim for breach of contract. Zepeda v. PayPal, Inc., 777 F. Supp. 2d 1215, 1221 (N.D. Cal. 2011). “If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.” Careau, 222 Cal. App. at 1395.

DCR Marketing argues that US Alliance Group’s claim for a breach of the covenant of good faith and fair dealing should be dismissed because it is entirely duplicative of the breach of contract claim. Mot., Dkt. No. 82, at 8. US Alliance Group responds that the breach of the covenant of good faith and fair dealing claim is not duplicative because it is being plead in the alternative to the breach of contract claim². Opp’n. Dkt. No. 83, at 10. DCR Marketing counters that the implied covenant claim cannot be maintained in the alternative because a prerequisite for any action for breach of the implied covenant of good faith is the existence of a contractual relationship. Reply, Dkt. No. 84, at 4.

The Court agrees with DCR Marketing. Although it is true that “if a plaintiff was uncertain as to whether the parties had entered into an enforceable agreement, the plaintiff would be entitled to plead inconsistent claims predicated on both the existence and absence of such an agreement,” here, US Alliance Group cannot simultaneously argue that the agreement did not exist and that a breach of good faith occurred. See Klein v. Chevron U.S.A., Inc., 202 Cal. App. 4th 1342, 1388, as modified on denial of reh’g (Feb. 24, 2012).

Accordingly, the Court **GRANTS** the motion to dismiss the claim for breach of the implied covenant of good faith and fair dealing, with leave to amend.

² The Court acknowledges that US Alliance Group did not plead the breach of good faith claim as a theory in the alternative in its complaint, but that it now asks the Court to allow it to amend its pleading to make it clear that such an argument is intended to be in the alternative. See Opp’n, Dkt. No. 83, at 10.

B. Unjust Enrichment

The elements of unjust enrichment are “receipt of a benefit and unjust retention of the benefit at the expense of another.” Lyles v. Sangadeo-Patel, 225 Cal. App. 4th 759, 769 (2014) (internal citation and quotation omitted). Unjust enrichment “requires one who acquires a benefit which may not justly be retained, to return either the thing or its equivalent to the aggrieved party so as not to be unjustly enriched.” Id. However, “a plaintiff may not pursue or recover on a quasi-contract claim if the parties have an enforceable agreement [on] a particular subject matter.” Copart, Inc. v. Sparta Consulting, Inc., 339 F. Supp. 3d 959, 983 (E.D. Cal. 2018) (internal citations and quotations omitted).

DCR Marketing argues that US Alliance Group’s unjust enrichment claim must fail because US Alliance Group itself claims that it entered into a valid and enforceable agreement with DCR Marketing. Mot., Dkt. No. 82, at 9. DCR Marketing further argues that US Alliance Group’s counterclaim is based on non-disclosure of information or documentation regarding DCR Marketing’s merchants and their business, but that DCR Marketing’s disclosure obligations are governed by the Agreement. Id. US Alliance Group counters that its unjust enrichment claim was plead in the alternative. Opp’n, Dkt. No. 83, at 11.

US Alliance Group did, in fact, include in its TAC a pleading that “in the alternative, no express agreement exists between the Parties related to the actual transactions submitted by DCR [Marketing] in its use of the US Alliance Group Services.” TAC ¶ 67. The Court finds it appropriate for US Alliance Group to raise this claim as an alternative to its breach of contract claim. Accordingly, the court **DENIES** the motion to dismiss the unjust enrichment claim.

C. Express Contractual Indemnity

DCR Marketing next argues that the contractual indemnity counterclaim should be stricken or dismissed for failure to allege liability or damages for which US Alliance Group has a contractual right to indemnity. Mot., Dkt. No. 82, at 11.

Section 4.2 of the Agreement sets forth the following indemnity provision.

“4.2 Indemnity. [DCR Marketing] agrees to indemnify [US Alliance Group] against any loss, liability or expense (including attorneys’ fees and expenses) resulting from any claim of any person that [DCR Marketing] is responsible for, any act or omission by [DCR Marketing] or its officers, directors, shareholders, employees, agents, and representatives.”

DCR Marketing argues that US Alliance Group fails to allege sufficient facts about the suit against it by Blue Novis to demonstrate that the matter is embraced by the indemnity provision. *Id.* Specifically, DCR Marketing points out that the provision only indemnifies US Alliance group against loss, liability, or expense that arises *from DCR Marketing’s conduct* (rather than from US Alliance Group’s wrongdoing). *Id.* US Alliance Group counters that the Blue Novis action is directly related to DCR Marketing because Blue Novis was DCR Marketing’s customer, and Blue Novis initiated an action against US Alliance Group after DCR Marketing assigned its rights to Blue Novis to pursue the action against US Alliance Group. Opp’n, Dkt. No 83, at 12–13. However, none of this information was alleged in US Alliance Group’s TAC. Moreover, US Alliance Group fails to allege facts sufficient to plausibly raise an inference that the liability for which it seeks indemnification falls within the scope of the indemnity clause.

Accordingly, the Court **GRANTS** the motion to dismiss the contractual indemnity claim, with leave to amend.

D. Motion to Strike

DCR Marketing moves to strike the contractual indemnity claim and certain paragraphs within the promissory fraud claim. Mot., Dkt. No. 82, at 13–17. Because the court has already dismissed the contractual indemnity claim, the Court will only address the motion to strike with respect to the promissory fraud claim.

DCR Marketing asks the court to strike paragraphs 72–76 and paragraph 83 from the TAC as immaterial, impertinent and in disregard of the Courts Order on the prior motion to dismiss. *Id.*, at 15. DCR Marketing argues that these paragraphs were taken from the previously dismissed unfair business practices claim in US Alliange Group’s SAC and simply inserted in the promissory fraud claim. *Id.* DCR Marketing claims that these paragraphs include “salacious” allegations of criminal acts such as credit card laundering, factoring, conspiracy and bank fraud that are irrelevant to a promissory fraud claim. *Id.*

The elements of promissory fraud are: “(1) a promise without any intention of performing it; (2) intent to deceive or intent to induce the party to whom it was made to enter into the transaction; (3) reasonable reliance by the party to whom it was made; (4) the party making the promise did not perform; and (6) the party to whom the promise was made was injured.” Ticketmaster L.L.C. v. Prestige Entm’t, Inc., 306 F. Supp. 3d 1164, 1178 (C.D. Cal. 2018). The paragraphs that DCR Marketing seeks to strike contain allegations that might be pertinent to the first two elements of a fraud claim: the promise without intention of performing it, and the intent to deceive or induce the party to whom it was made without any intention of performing it. Accordingly, the Court **DENIES** the motion to strike these paragraphs within the fraud allegations.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part** the motion with leave to amend.

IT IS SO ORDERED.

Effective immediately all oral arguments are VACATED. The Court will continue to post tentatives in the afternoon of the Court day prior to the scheduled hearing (e.g., Friday afternoon for Monday hearings). Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. the day following the scheduled hearing (e.g., Tuesday 5:00 p.m. for a Monday hearing) stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted. The Court asks for the parties’ understanding and patience in these difficult times.