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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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PNC Equipment Finance, LLC, Plaintiff, v. California Fairs Financing Authority, et al., Defendants. AND RELATED CROSS-CLAIMS	Case No. 2:11-cv-02019-GEB-CKD **OPPOSITION BY EL DORADO COUNTY FAIR ASSOCIATION, INC. TO PLAINTIFF AND COUNTER-DEFENDANT PNC EQUIPMENT FINANCE, LLC'S MOTION TO DISMISS SECOND AMENDED COUNTERCLAIM OF EL DORADO COUNTY FAIR ASSOCIATION, INC.** **Date: Sept. 24, 2012** **Time: 9:00 a.m.** **Place: Courtroom 10, 13th Floor** **Hon. Garland E. Burrell, Jr.**

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I. INTRODUCTION

"[W]e will get the info you require—but, really our deal was we were going to take the CREBs and, if we didn't, we would help them move the deal to someone who would."

The above is an excerpt from an email from Cliff Svoboda, the highest ranking PNC salesperson on this deal, to PNC's Chief Operating Officer, Ralph Martinez. The email is dated June 12, 2007, a year after the contracts were executed, and just after PNC had decided not to purchase the CREBs to refinance this transaction.[1] It clearly supports EDCFA's primary arguments and claims—that the parties contemplated two options: (1) either PNC would purchase the CREBs, or (2) they would be purchased by a third party. In either scenario the deal is refinanced. The parties did not contemplate a Plan C—that if PNC did not purchase the CREBs, and they could not be sold to a third party, PNC would switch this transaction into a long-term deal and obtain a $4.9 million windfall. The email is further evidence not only of intent at the time of contracting, but it also goes to the performance of the agreement by PNC before the dispute between the parties arose.

This case represents an extraordinary pattern of wrongdoing by PNC, approved by its highest level executives. The extent of PNC's continued misrepresentation of the parties' agreement and the mutually understood intent and purpose of the transaction as a whole is truly remarkable. PNC would have the Court believe that the parties' transaction consisted of simply a lease and a sublease. This is a misrepresentation of not only the intent of the parties at the time they entered into the contract, but also the plain language of the contracts themselves.

For the reasons set forth in detail below, EDCFA has adequately pled each of its claims against PNC. None of the defenses raised by PNC are sufficient to dismiss any of EDCFA's claims. To the extent that the Court finds deficiencies in any of the claims asserted, EDCFA requests leave to amend to cure the defects upon amendment.

[1] This email was produced by PNC to EDCFA on September 5, 2012, despite the fact that PNC has acknowledged that it is responsive to EDCFA's requests for production of documents served almost eight months prior on January 10, 2012. EDCFA would have made an express allegation relating to this email in its Second Amended Counterclaim ("SACC") had PNC produced the document when it should have. Given the lengthy, prior discovery dispute between the parties relating to Cliff Svoboda emails specifically, and the fact that this email is directly germane to EDCFA's theories, it is difficult to imagine a proper excuse for failing to produce this document earlier.

II. ARGUMENT

A. PNC's Motion to Dismiss EDCFA's Breach of the Implied Covenant Claim Should Be Denied Because EDCFA Has Alleged Bad Faith and Frustration of Contractual Benefits

PNC seeks dismissal of EDCFA's first claim for breach of the implied covenant of good faith and fair dealing solely on the basis that it is duplicative of EDCFA's breach of contract claim. (MTD, p.6). To support its position, PNC cites to *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990).[2] Numerous courts, however, have rejected this very same argument, addressing the exact language in *Careau & Co*. cited by PNC, where a plaintiff has alleged more than a "mere contract breach" and, instead, has alleged that the defendant acted in bad faith and in frustration of contractual benefits. In the SACC, as further detailed below, EDCFA has stated multiple, significant allegations of bad faith on the part of PNC and has also alleged that PNC completely and intentionally frustrated EDCFA's contractual benefits. The *Careau* decision, and PNC's theory thereunder, clearly does not bar EDCFA's first claim for relief for breach of the implied covenant of good faith and fair dealing.

A case on point is *Celador Intern. Ltd. v. Walt Disney Co.*, 347 F. Supp. 2d 846 (C.D. Cal. 2004). In *Celador*, the defendant filed a motion to dismiss asserting that plaintiff's breach of implied covenant claim was duplicative of its breach of contract claim. Citing to *Careau*, the *Celador* court found that breach of the implied covenant "involves unfair dealing, whether or not it also constitutes a breach of a consensual contract term, prompted by a conscious and deliberate act that 'unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party.'" *Id.* at 852 (citing *Careau & Co., supra*, 222 Cal. App. 3d at 1395). The court noted that, under *Careau*, 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 clause of action, they may be disregarded as superfluous as no

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[2] PNC also cites to *True v. Allstate Ins. Co.*, 160 Fed. Appx. 616, 618 (9th Cir. 2005), which should be ignored on the basis that it is a non-published decision issued before Jan. 1, 2007. Pursuant to Ninth Circuit Rule 36-3, it is not precedent and cannot be cited by courts within the circuit, barring certain exceptions which do not apply here. Even if considered, the case does not provide enough factual background as to the allegations in that case to be of any use in the present analysis.

additional claim is actually stated." *Id.* However, the court cited three exceptions to this rule, including "*where the plaintiff alleges that the defendant acted in bad faith to frustrate the contract's benefits*." *Id.* at 852 (citing *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 353 n.18) (emphasis added).

The *Celador* court found that the plaintiff in that case had alleged that certain actions violated the implied covenant because they intentionally frustrated plaintiff's enjoyment of their rights under the contract. The court found:

> "Even if Plaintiffs are not ultimately successful on their breach of contract claim, they may still be able to prevail on their breach of the covenant of good faith and fair dealing claim. *Even if the fact finder concludes that the consensual terms of the contract did not impose such obligations on Defendants, the fact finder could conclude that the actions of Defendants frustrated a benefit of the contract*...." *Id.* at 853 (emphasis added).

The defendants and moving parties in *Celador* made the same argument that PNC makes here: that "because the claim is based on the same facts as the breach of contract claim and seeks the same remedy, it is superfluous." *Id.* at 853. The court rejected this argument, stating that "such claims will always be based on the same facts; a certain set of circumstances gives rise to a lawsuit. They will always seek the same remedy; the same remedies are available for both claims." *Id.*

Similarly, in *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159 (S.D. Cal. 2010), the plaintiff moved to dismiss under *Careau & Co.*, arguing that the plaintiff's breach of implied covenant claim was duplicative of a breach of contract claim. The court rejected the argument holding: "*Construing the factual allegations in the light most favorable to Plaintiffs, the Court concludes Plaintiffs have satisfied the pleading requirement of alleging Provide unfairly frustrated a benefit of the contract*...." *Id.* at 1174 (emphasis added).[3]

In its first claim for breach of the implied covenant, EDCFA made multiple allegations of bad faith and frustration of contractual benefits, and therefore has pled the recognized exception to *Cureau & Co.* Among the multiple, relevant allegations, EDCFA alleges the following:

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[3] *See also, U.S. Bank Nat. Ass'n v. PHL Variable Ins. Co.*, 2012 WL 1525012, *4 (C.D. Cal. Apr. 26, 2012) (denying motion to dismiss where the plaintiff alleged a bad faith element); *Creager v. Yoshimoto*, 2007 WL 2938168, *2-3 (N.D. Cal. Oct. 9, 2007) (denying summary judgment and holding that where there remained disputed facts regarding whether a party acted in bad faith in allegedly frustrating the purpose of the contract, Court could not hold as a matter of law that the plaintiff may not maintain a separate cause of action for breach of the implied covenant of good faith and fair dealing).

- "PNC's failure to purchase the CREBs, as contemplated by the parties and anticipated by the fairs, including EDCFA, *frustrated EDCFA's rights to the benefits of the contract*." (SACC ¶ 55) (emphasis added).

- "[T]he duty of good faith and fair dealing required that PNC agree to refinance this transaction to ensure that the contract it sold to the Authority and the fairs would be performed according to the reasonable expectations of the parties and to ensure that PNC did not obtain a multi-million windfall to be paid by the fairs, leaving the public entity fairs, including EDCFA, *with absolutely no benefit from the transaction*." (SACC, ¶ 58) (emphasis added).

- "The aforementioned conduct demonstrates that PNC has acted in a manner that is in complete disregard of the purposes of the contract and in a manner so as to destroy any and all benefits that the fairs, including EDCFA, expected to obtain by way of this project." (Id., ¶ 60).

- "Rather than purchase the CREBs immediately after the IRS authorization in November 2006, or purchase the CREBs once they become non-sellable/non-marketable to any third party buyer, PNC decided to thereafter switch the label of this financing from 'interim' financing, as confirmed in PNC's own internal communications both before and after the contract was entered into, and as PNC's representatives and executives understood that the deal was sold to CFFA and the fairs, into a different label of long-term financing where the fairs, including EDCFA were 'locked' at the premium interest rates from day one, thereby completing the bait-and-switch." (SACC, ¶ 55).[4]

Accordingly, it would strain credulity to conclude that EDCFA has pled a "mere contract breach." Instead, EDCFA has clearly distinguished its breach of implied covenant claim from its breach of contract claim, and has pled the recognized exception to *Careau & Co.* The aforementioned case law demonstrates that EDCFA's implied covenant claim can survive even if the Court finds that EDCFA's breach of contract claim cannot.

B. PNC's Motion to Dismiss EDCFA's Breach of Contract Claim Must Be Denied Because the Court Is Required to Provisionally Consider Extrinsic Evidence of the Parties' Intent and to Ascertain the Meaning of Contract Terms

Addressing EDCFA's sixth claim for relief for breach of contract, PNC asks the Court to conclude at this pleading stage that, as a matter of law, the contract documents are unambiguous, to ignore extrinsic evidence of the parties' intent and the purpose of the transaction, and to conclude

[4] *See also* SACC ¶¶ 56, 57. Moreover, as indicated in EDCFA's second claim for fraud and deceit, this conduct by PNC of selling one deal and insisting that the parties reached another deal is part of a pattern and practice by PNC. (SACC, ¶ 70-78). Numerous other allegations in the Counterclaim indicate cbad faith on the part of PNC.

PNC had no obligations relating to the CREB refinancing, and therefore could not have breached the Master Photovoltaic Lease-Purchase Agreement ("MLPA") as a matter of law. These arguments should be rejected.

The law is clear that PNC's motion must be denied because the Court must provisionally accept extrinsic evidence of the parties' intent, and in order to determine the meaning of contract terms, even where the Court believes the terms are unambiguous on their face. In this case, the Court cannot even determine what to call this transaction without a provisional consideration of extrinsic evidence. The very nature of this transaction as a lease, finance lease, lease-purchase, or purchase cannot be ascertained from the conflicting language of the contract documents alone. It certainly cannot be concluded, as PNC wants the court to believe, that, as a matter of law, the main contract document is a "lease" or "financing lease." Such a conclusion would be an error of law as PNC clearly and repeatedly admits that under the terms of the contract, title to the solar equipment passed from PNC to CFFA during the term of the "lease."

Moreover, if the Court were to construe the contract as PNC requests, the Court would run afoul of a fundamental tenet of contractual interpretation under California law—that a contract cannot be construed to lead to an absurd result. PNC wants the Court to conclude that it gets the interim, 7.29% premium interest from EDCFA over ten years, <u>*and*</u> that the contract documents do not transfer title to the solar panels (which were permanently installed in EDCFA's roof) to EDCFA at the end of the contract term. As EDCFA has alleged, and is prepared to prove, PNC's interpretation of the contractual documents would lead to a $4.9 million windfall in its favor, and absolutely no benefit whatsoever to EDCFA.

EDCFA repeatedly raises the absurdity issue throughout its pleading. (*See* Second Affirmative Defense and SACC, ¶¶ 42, 56, 58, 60, 91, 123, 124, 134, 135, 137, 142). At no point in its twenty-two page Motion, however, does PNC explain to the court how its interpretation of the purported "unambiguous" terms leads to anything but an absurd and overly harsh result. Therefore, EDCFA submits that PNC has conceded the issue at least at this pleading stage and the Court should deny PNC's motion.

1. <u>The Primary Object of Contractual Interpretation is to Carry Out the Intent of</u>

the Parties and the Court Must Avoid An Absurd Result

Under California law, it is well-established that "[t]he fundamental canon of construction which is applicable to contracts generally is the ascertainment of the intention of the parties." *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal. 2d 751, 760 (1942); *see also Burnett v. Piercy*, 149 Cal. 178, 189 (1906) ("the primary object of all interpretation is to ascertain and carry out the intention of the parties."). "Where two or more written instruments are executed contemporaneously, with reference to each other, for the purpose of attaining a preconceived object, they must all be construed together, and effect given if possible to the purpose intended to be accomplished." *Burnett, supra,* 149 Cal. at 189. An isolated portion of a written instrument may not be selected as furnishing conclusive evidence of intention of the parties. *Universal Sales Corp., supra,* 20 Cal. 2d 751 (1942); *Serv. Emps. Int'l Union, Local 99 v. Options-A Child Care & Human Servs. Agency*, 200 Cal. App. 4th 869, 879 (2011).

Moreover, a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, *if it can be done without violating the intention of the parties*. Cal. Civ. Code § 1643 (emphasis added). Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected. Id. § 1653. When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded. Id. § 1640. The language of a contract is to govern its interpretation, if the language is clear and explicit, *unless it involves an absurdity*. Id. § 1638 (emphasis added).

Indeed, "*the Court shall avoid an interpretation which will make a contract extraordinary, harsh, unjust, inequitable or which would result in absurdity.*" *Marin County v. Assessment Appeals Bd., Marin County*, 64 Cal. App. 3d 319, 325 (1976) (emphasis in original). "Language involving an absurdity is rejected, and so is any phrase or clause which is inconsistent with the object and intention of the parties...." *Brawner v. Wilson*, 126 Cal. App. 2d 381, 384-85 (1954). "Where a contract admits of two constructions, the court ought to adopt that which is most equitable and which will not give an unconscionable advantage to one party over the other." *Id.*

As an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement, including the object, nature and subject matter of the writing, and the preliminary negotiations between the parties, and thus place itself in the same situation in which the parties found themselves at the time of contracting. *Universal Sales Corp., supra,* 20 Cal. 2d at 760. The construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court. *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 296-97 (1970); *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.* 281 F.3d 929, 937 (9th Cir. 2002). "A party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean." *City of Hope Nat. Medical Center v. Genentech, Inc.*, 43 Cal.4th 375, 393-394 (2008).

2. <u>Dismissal At the Pleading Stage Is Inappropriate Because the Court Is Required to Provisionally Consider Extrinsic Evidence In Interpreting the Contract</u>

PNC's motion to dismiss EDCFA's sixth claim for breach of contract must be denied on the basis that the Court is required to at least provisionally consider extrinsic evidence of the parties' intent and in order to determine whether terms of the contract documents are ambiguous and/or reasonably susceptible to EDCFA's proffered interpretation. This is the case even if the relevant contractual language appears to the Court to be unambiguous.

In contrast to many other states, California has a liberal parol evidence rule: It permits consideration of extrinsic evidence to explain the meaning of the terms of a contract even when the meaning appears unambiguous. *Foad Consulting Group, Inc. v. Assalino*, 270 F.3d 821, 826 (9th Cir. 2001). "Because '[n]o contract should ever be interpreted and enforced with a meaning that neither party gave it,' parol evidence may be introduced to show the meaning of the express terms of the written contract. *Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 917 F.2d 272, 277 (9th Cir. 1992); *see also Maffei v. N. Ins. Co. of N.Y.*, 12 F.3d 892, 898 (9th Cir. 1993) ("Under California law, a party may present extrinsic evidence to show that a facially unambiguous contract is susceptible to another interpretation."). The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.*, 69 Cal.2d 33, 37 (1968).[5] Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible." *Morey v. Vannucci*, 64 Cal.App.4th 904, 912 (1998).

The district court "is required to engage in a preliminary consideration of extrinsic evidence offered to prove the intention of the parties, such as 'testimony as to the circumstances surrounding the making of the agreement…including the object, nature and subject matter of the writing…so that the court can place itself in the same situation in which the parties found themselves at the time of contracting.'" *U.S. Cellular Inv. Co., supra,* 281 F.3d at 939 (citing *Pacific Gas & Electric Co., supra,* 69 Cal. 2d at 37). Then, "if the court decides, after considering this evidence, that the language of the contract is 'fairly susceptible to either one of the two interpretations contended for, extrinsic evidence relevant to prove either of such meanings is admissible.'" *Id.* at 939. The Ninth Circuit has very clearly held that it is "*reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and ambiguous on its face*. *Halicki Films, LLC v. Sanderson Sales and Marketing,* 547 F.3d, 1213, 1223 (9th Cir. 2008) (citations omitted) (emphasis added).

Even if the Court were to find that the contracts at issue in this case are unambiguous, under California law, EDCFA "is entitled to introduce extrinsic evidence that the contract means something other than what it says." *See Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 565 (9th Cir. 1988). This is true even in cases where the court believes that there is no doubt as to the meaning of the terms. *Id.* In *Trident Center*, the Ninth Circuit ultimately reversed and a 12(b)(6) motion in favor of the defendant, holding that "we must reverse and remand to the district court in order to give plaintiff an opportunity to present extrinsic evidence as to the intention

[5] *See also, Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391, 139 P.3d 56, 60 (2006); *Aspect Sys., Inc. v. Lam Research Corp.*, 404 F. App'x 136, 138 (9th Cir. 2010).

of the parties in drafting the contract." *Id.* at 569-70; *see also A. Kemp. Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493, 497 n.2 (9th Cir. 1988).

This Court recently applied the *Trident* standard in *Foster Poultry Farms v. Alkar-Papidpak-MP Equipment*, 2011 WL 5838214 (E.D. Cal. Nov. 21, 2011), where a defendant filed a motion to dismiss asserting "breach of contract claim is not supported by the plain language of the purchase agreement." *Id.* at *3. Citing to *Trident*, *A. Kemp Fishers, Inc.* and *Pacific Gas*, Chief Judge Ishii held that even where the plaintiff did not explicitly make an argument that the contract was ambiguous, where the plaintiff sought to introduce evidence as to what the parties agreed, the court was required to "give [plaintiff] and opportunity to present extrinsic evidence as to the intention of the parties in drafting the contract." *Id.* at *5.

Additionally, where the language of a contract leaves doubt as to the parties' intent, the contract is ambiguous and a motion to dismiss must be denied. *Consul Ltd. V. Solide Enters., Inc.*, 802 F.2d 1143, 1149 (9th Cir. 1986); *Monaco v. Bear Sterns Residential Mortg. Corp.*, 554 F.Supp.2d 1034, 1040 (C.D. Cal. 2008); *Martinez v. Welk Group, Inc.*, 2011 WL 90313, at *6-7 (S.D. Cal. Jan. 11, 2011). Where the language of the contract is unclear, a court must look to evidence outside the pleadings. As such, resolution of a disputed meaning of the contract on a motion to dismiss is inappropriate. *WPP Luxembourg Gamma Three Sarl*, 655 F.3d 1039, 1051 (9th Cir. 2011).

Here, the SACC identifies in great detail extrinsic evidence and indicates that such evidence will prove the true intent and purpose of this transaction, the contract terms, and the intent of Section 15.3 of the MLPA specifically, which is the provision that EDCFA alleges was breached. Additionally, EDCFA is prepared to introduce additional extrinsic evidence that may not expressly be covered in its pleading, including but not limited to, testimony from witnesses from EDCFA, CFFA and PNC. Included in this extrinsic evidence would be certain additional documents directly relevant to EDCFA's theories which PNC produced for the first time on September 5, 2012.

PNC would have the court ignore this evidence based on an argument that the Court should find that the contracts, as a whole, and Section 15.3 specifically, are unambiguous. PNC wants the court to skip step one (provisional consideration of extrinsic evidence) and simply find in its favor on step two. A primary case upon which PNC relies, *Wagner v. Columbia Pictures Industries, Inc.*, 146 Cal. App. 4th 586, 592 (2007) (MTD, p.4), clearly held: "the court *must provisionally receive all credible evidence concerning the parties' intentions to determine whether the contract language is reasonably susceptible to the interpretation urged by a party*." *Id.* at 590 (emphasis added).

Based on the clear, binding precedent set forth above, PNC's motion to dismiss EDCFA's breach of contract cause of action must be dismissed because the Court must at least provisionally consider EDCFA's extrinsic evidence.

3. The Court Cannot Even Determine What to Call This Transaction Without the Aid of Extrinsic Evidence

To the extent that the above argument is not sufficient to justify denial of PNC's motion as to the breach of contract claim at the outset, EDCFA submits that the very nature of this transaction is ambiguous based on the contract language alone. The Court cannot even identify what this transaction was, and currently is, without examination of extrinsic evidence, let alone determine what the parties intended in isolated provisions in the MLPA and Use Agreements, including Section 15.3 of the MLPA.[6]

At various points in its Motion, PNC asserts that the agreements making up this transaction are "unambiguous." (MTD, p.1, 4, 5, 22). PNC understands that in order for the Court to determine that isolated provisions of the various contracts are unambiguous, the Court must first be able to ascertain the basic nature of the transaction. In other words, the Court must first be able to determine what to call this transaction in order to determine what the law requires. As a matter of

[6] PNC feigns an argument in its Motion that because EDCFA is a non-party to the "Financing Lease" it cannot assert a breach of that lease. (MTD, p.3). This, of course, ignores the allegations in the SACC that EDCFA is a third party beneficiary, which PNC does not dispute in its Motion. (SACC, ¶112). Further, PNC likely makes this argument only in passing because, in a recently filed motion to dismiss DAA's counterclaims, PNC asked the court to read the Use Agreements and "Financing Lease" together, stating: "the DAAs [i.e., fairs], PNC and CFFA likewise share common economic interests under the agreements and must act symbiotically under the agreements to effectuate the transaction." (Dckt. No. 131 p.8-9/14-15). This is what the law requires. *See Burnett v. Piercy*, 149 Cal. 178, 189 (1906); *Harm v. Frasher*, 181 Cal. App. 2d 405, 413 (1960). Here, various provisions of the MLPA refer to the Use Agreements and the Use Agreement incorporates, is subject to, is subordinate to, and refers to the MLPA. Additionally, one cannot even ascertain the term of the Use Agreement without determining "the date on which the Financing Lease terminates in accordance with Section 3 thereof" as set forth in Section 3 of the Use Agreement. Thus, the MLPA and Use Agreements should be read together.

law, the Court cannot find that this transaction is what PNC says it "unambiguous[ly]" is.

Consistent with its position as set forth in numerous documents filed with the Court to date, PNC would have the court believe that it has simply "sued [EDCFA] and others to recover monthly payments due for the *lease* of solar panels." (MTD, p.1) (emphasis added). PNC would have the Court believe, and find as a matter of law, that in a "fully integrated, written agreement[]," CFFA and PNC "entered into the Financing Lease, pursuant to which National City agreed to *lease* solar energy panels to CFFA" and CFFA agreed to make "Rent Payments." (Id., p.1, 2) (emphasis added). As part of the transaction, EDCFA entered into a Use Agreement wherein EDCFA was permitted to use part of the solar panels CFFA leased in exchange for paying CFFA monthly. (MTD, p.2-3). In other words, PNC wants the Court to conclude that the unambiguous nature of this transaction was a simple lease between PNC and CFFA and a sublease between CFFA and the fairs, including EDCFA. As a matter of law, this cannot be.

The very title of the main contract document itself indicates that it is not merely a lease. Instead it is clearly entitled a "Master Photovoltaic Lease-Purchase Agreement." (MLPA, p.1, ¶ 1). While the title alone may not be controlling, the first paragraph of the document states that "Lessor [National City/PNC] agrees to *sell*, transfer and lease to Lessee [CFFA], and Lessee agrees to acquire, *purchase* and lease from Lessor, all Equipment described in each Schedule signed from time to time by Lessee and Lessor." (MLPA, ¶ 1). The MLPA continues: "Each Schedule signed and delivered by Lessor and Lessee pursuant of this Master Lease shall constitute separate and independent lease and *installment purchase* of the Equipment therein described." (Id.) (emphasis added). Essentially, to construe the transaction under PNC's proffered interpretation, the Court would have to use the eraser end of its pencil and erase the word "*Purchase*" from the title of the MLPA and at least the words "*sell,*" "*purchase,*" and "*installment purchase*" from the first paragraph of the MLPA.

As this Court has already pointed out, in some circumstances, whether an instrument is a lease or a security agreement can be significant. (Dckt. 120, p.14) (citing to *Triple C. Leasing, Inc. v. All-American Mobile Wash*, 64 Cal. App. 3d 244, 248 (1976)). Indeed, sales of goods and leases of personal property are different kinds of transactions and are governed by different divisions of the

California Uniform Commercial Code. *C9 Ventures v. SVC-West, L.P.*, 202 Cal. App. 4th 1483, 1493 (2012). In this case, PNC has previously asserted that the MLPA "created a security interest in its favor" and that "enforcement of that security interest is the basis of this action" brought by PNC. (Dckt. No. 83). However, whether a transaction in the form of a lease creates a "security interest" is determined pursuant to California Commercial Code Section 1203. Cal. Comm. Code §1201. Section 1203(a) expressly states: "Whether a transaction in the form of a lease creates a lease *or* security interest is determined by the facts of each case." Id., § 1203(a) (emphasis added).

A lease is defined as "a transfer of the right to possession and use of goods for a term in return for consideration, *but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease*. Unless the context clearly indicates otherwise, the term includes a sublease." Cal. Comm. Code § 10103(a)(10) (emphasis added). At the end of the lease term, the lessee must return the goods to the lessor. The lessor's interest in the goods at the end of the lease term is called the "lessor's residual interest." Cal. Comm. Code 10103(a)(17) (emphasis added).

In its pleadings and its Motion to Dismiss, PNC has called the Master Photovoltaic Lease-Purchase Agreement a "Financing Lease." (See FACC, ¶ 13, MTD, p.2-8). The California Commercial Code defines "Finance lease" as "a *lease* with respect to which...." Cal. Comm. Code § 10103(a)(7). Indeed, "*For a transaction to qualify as a finance lease it must first qualify as a lease.*" Cal. Comm. Code § 10103 (Assem. Com. On Judiciary Aug. 15, 1988) (emphasis added). As indicated above, a lease cannot be a "sale, including a sale on approval or a sale or return, or retention or creation of a security interest." Cal. Comm. Code § 10103(a)(7). A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2401)." Cal. Comm. Code § 2106; *C9 Ventures, supra*, 202 Cal. App. 4th at 1494. In a lease, "*there is no passing of title, there is no sale*." Cal. Comm. Code § 10103 (Assem. Com. On Judiciary Aug. 15, 1988) (emphasis added).

A finance lease "can be thought of as a 'disguised' security agreement, a secured installment sales contract, or a lease 'intended as security.'" *Arriaga v. CitiCapital Commercial Corp.*, 167 Cal. App. 4th 1527, 1536 (2008). Beyond not qualifying as a "lease" given the above, there is no option to purchase set forth in the MLPA. If this were a finance lease, one would expect a "contemporaneous option whereby the user can purchase title to the equipment from the lessor at the end of the lease period for an amount less than the then excepted value of the equipment." *See Id.* (citations omitted). Logically, there is no option to purchase set forth in the MLPA because the contract contemplates that the passing of title, and therefore a sale/purchase, will have already occurred before the end of the contract term.

Here, the MLPA cannot be considered a "lease," and therefore cannot be considered a "financing lease" because title to the equipment transferred to CFFA upon its acceptance of the equipment. (See MLPA ¶ 8.1). There appears to be no dispute between the parties that, under the contract documents, title to the solar equipment passes from PNC to CFFA during the term of the MLPA. PNC has conceded this issue in its Motion, yet continues to call this a financing lease.[7] To the extent this is a secured transaction, the provisions of Division 9 of the California Commercial Code apply and a factual evaluation is necessary in which the court is required to put substance above form. *See Grossman v. Lippson*, 81 Cal. App. 3d 554, 559-60 (1978).

EDCFA submits that without the ability to even determine what to call this transaction, the Court cannot properly dispose of EDCFA's breach of contract claim at the pleading stage, and as a matter of law. The nature of the transaction as a lease, finance lease, lease-purchase, security agreement, is directly relevant to the passing of title which is at issue in EDCFA's Counterclaim, and was a fundamental part of the parties' agreement. Additionally, it must be noted that the contracts contemplate that the fairs, not CFFA, pay for the equipment, meaning that it would make no sense if title was transferred from PNC to CFFA, and not then from CFFA to the fairs, including EDCFA.[8]

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[7] *See e.g.*, MTD, p.1 ("CFFA will retain title to the solar panels during the term of the Use Agreement"); p. 8 ("See Use Agreement, Section 5: 'Title to the Equipment. Title to the Equipment shall be and remain at all times in [CFFA] during the Term of this Use Agreement.')," "it is clear that ownership remains with the Authority during the term of the Use Agreement…."); p.22 ("Title to the solar panels would remain with CFFA during the term of the lease.").

[8] Moreover, there are various other parts of the contract documents that are relevant and ambiguous including Section 4 of the Use Agreement. It does not identify the monthly payments to be made by EDCFA, and instead relies on an "amortization schedule" provided by the Authority. CFFA, however, has provided multiple amortization schedules to EDCFA with variable interest rates stated. Based on the purported "unambiguous" language of the Use Agreement alone, and without extrinsic evidence, the Court cannot even determine what amount the contracts require EDCFA to pay. Additionally, the Lease Schedules are defined in the MLPA as "Initial Leases." To the extent that PNC asserts that this was a long term deal, this definition is at least ambiguous.

(4) PNC's Proffered Interpretation of the Contract and Section 15.3 Leads to An Absurd, and Truly Unjust Result

To the extent that the Court requires additional analysis, the Court should consider the fact that if it interprets the contract as PNC suggests, the contract leads to an overly harsh and truly absurd result which cannot be said to be within the reasonable contemplation of the parties at the time of contracting. PNC knows that if the Court considers the evidence relating to what the parties mutually understood the intent and purpose of the transaction and contracts were at the time they were entered into, the entire premise of its lawsuit is a farce, exposing past and present fraud. The Court cannot construe Section 15.3, and the contemplated refinancing with CREBs, without considering the absurdity that would result under PNC's interpretation of the contract documents as a whole and Section 15.3 in isolation.

Throughout its SACC, EDCFA identifies the absurdity that would result if there is no transfer of the equipment to EDCFA at the end of the contract and if there was no promised refinancing. (See Second Affirmative Defense in Answer and SACC, ¶¶ 42, 56, 58, 60, 91, 123, 124, 134, 135, 137, 142). PNC has taken the extreme position that it receives 7.29% interest over ten years and that no transfer of title from CFFA to the fairs occurs for the consideration paid by the fairs. In this case, PNC cannot feign ignorance, i.e., that it simply loaned money out and had no idea as to what benefit or detriment the fairs would suffer as a result of the financing. PNC researched, analyzed, and knew exactly the amount of the energy savings each fair, including EDCFA, would receive through the use of the equipment and knew exactly how much each fair would gain or lose through the use of the equipment. PNC knew that EDCFA would be at a significant net loss, after the monthly "rent" payment was compared to the energy savings when the interest on the deal was originally anticipated to be ***4.65%***. (SACC, ¶ 60) (emphasis added). Although it never bothered to conduct the analysis again at 7.29%, it knew at the time that it entered into the contract that EDCFA, and seven other fairs, would suffer an even greater loss at that rate. (Id.).

At no point in its twenty-two page Motion does PNC contradict EDCFA's allegations in this regard. At no point does PNC explain to the Court how its interpretation of the contract as being a 10 year lease, with no transfer of title to the fairs, and with no promise of refinancing through the

CREBs, could possibly lead to anything other than an absurd result with PNC receiving a multi-million dollar windfall and EDCFA receiving nothing. Again, as indicated above, PNC has conceded this issue at this stage by failing to address it in its Motion.

On the other hand, EDCFA's proffered interpretation of the contract documents, reflecting the intentions of the parties, makes sense and everyone benefits as the parties contemplated. EDCFA essentially finances the solar equipment permanently installed in its roof over ten years, and PNC gets tax credits from the purchase of the CREBs or gets a prepayment penalty if the CREBs are sold to a third party. Under PNC's interpretation, PNC gets a $4.9 million windfall, and the fairs, including EDCFA, receive no net benefit. As alleged, and as confirmed by PNC's internal emails, plan A was that PNC would purchase the CREBs. Plan B was that the CREBs would be sold to a third party. The parties did not contemplate a Plan C—that if PNC chose not to buy the CREBs, and no third party buyer wanted to buy them, this would be "switched" into a long term commitment wherein EDCFA would suffer a devastating monthly loss.

At the very least, the language used in Section 15.3 of the MLPA is uncertain and ambiguous as to PNC's obligations, requiring examination of extrinsic evidence as to the promise of refinancing. The construction of ambiguous contract provisions is a factual determination that precludes a dismissal on a motion for failure to state a claim. *Reynolds v. Allstate Life Ins. Co.*, 2006 WL 662749, at *2 (E.D. Cal. Mar. 6, 2006). PNC relies on the isolated phrase "in the event that [PNC] is the purchaser of the CREBs" to assert that PNC might not purchase the CREBs, and therefore could not have committed a breach by failing to refinance. (MTD, p.4). Section 15.3, however, does not explain what happens if PNC decides not to purchase and there is no third party buyer of the CREBs, requiring an examination of extrinsic evidence.

PNC asserts that EDCFA is attempting to use extrinsic evidence simply to modify or introduce new terms. (MTD, 5). To the contrary, EDCFA seeks to introduce evidence of the parties' intent through pre and post contract communications, which reveal not only the parties intent and understanding of the deal at the time of contracting, but also, significantly, how the parties were performing the contract before a dispute arose. As stated above, great consideration should be given to this evidence.[9] Accordingly, the Court should ascertain the intent of Section 15.3 as understood by the parties both before, and especially after the contract was entered into, including the parties' performance and interpretation of Section 15.3 before the dispute arose.

Here, as alleged in the SACC, PNC knew, as evidenced by post-contract, pre-dispute communications, that the reason why PNC was getting the premium 7.29% interest rate was because of the intended, short term nature of the transaction. (SACC, ¶ 10). PNC's own documents demonstrate that the purpose of Section 15.3 was to "lock PNC into the CREB issuan[ce] process." Now, post-dispute, PNC will have the court believe that it had no obligations to do anything with the CREBs based on the plain "unambiguous" language of Section 15.3, despite its express understanding as to how this deal was sold to CFFA and the fairs.

C. <u>EDCFA Has Properly Alleged a Cause of Action for Fraud</u>

1. <u>EDCFA Has Not Manufactured a Fraud Claim</u>

PNC asserts the same arguments in its motion to dismiss as to both EDCFA's stand-alone fraud claim (second claim for relief) and its rescission claim based on fraud (eighth claim for relief). (MTD, p.7-12, 21).[10] To support its argument that EDCFA cannot "manufacture a fraud claim based on allegations that contradict the language of Financing Lease," PNC again cites to an non-citable Ninth Circuit decision, *Hudson v. Sherwood Securities Corp*., 1991 WL 275329, *2 (9th Cir. 1991), and again, without identifying an exception as set forth in Ninth Circuit Rule 36-3. EDCFA again submits that this citation should be ignored.

As set forth above, the Court cannot ascertain the meaning and determine the intent of the parties with respect to the overall transaction, and Section 15.3 of the MLPA specifically, without the provisional acceptance and consideration of extrinsic evidence. Additionally, PNC does not argue that Section 15.3, or any other provision of the contract documents, expressly states that PNC

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[9] *See, U.S. Cellular Inv. Co., supra,* 281 F.3d at 937-38 (citing Cal. Code Civ. P. 1856(c)); *City of Atascadero*, 68 Cal. App. 4th 445, 473-474 (1998); *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 296-97 (1970); *Eggert v. Pacific States Sav. & Loan*, 57 Cal.App.2d 239, 242 (1943).

[10] In the second sentence of their argument relating to the fraud claim, PNC misquotes EDCFA's allegation set forth at SACC, ¶ 35. EDCFA does not refer to the MLPA in ¶ 35 and certainly does not call it a "Financing Lease."

has no obligation to refinance or do anything with the CREBs. PNC merely relies on Section 15.3's language "in the event that National City...is the purchaser of the CREBs...." It does not speak to PNC's obligations to refinance in the event that it did not choose to purchase the CREBs. The contracts are silent as to that issue. Accordingly, even if the law was that a fraud claim cannot contradict the obligations in a contract, which EDCFA disputes, the Court cannot determine at this pleading stage whether the allegations in the fraud claim contradict the obligations in the contract documents.[11]

Additionally, an instructive case on EDCFA's fraud claim is *Gentry v. Kelley Kar Company*, 193 Cal. App. 2d 324 (1961). In that case, the plaintiffs sued defendant car company for damages for fraud in inducing them to execute a lease of an automobile. The court found that "there were substantial differences between the terms of the transaction, as represented by appellant's employees, and the terms of the transaction as set forth in the lease. Also, there were substantial differences in the terms of the transaction as shown by the work sheet and terms of the transaction as set forth in the lease." *Id.* at 335. "The evidence was sufficient to support the findings to the effect that appellant falsely represented the terms of the transaction. The trial court could reasonably conclude that such representations constituted fraud." *Id.*

The parol evidence rule expressly allows evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud. Cal. Code Civ. Proc. § 1856 (g). Section 1860 indicates that for the "proper consideration of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret." Code Civ. Proc. § 1860. Additionally, where the validity

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[11] The only other case PNC cites to, *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1059 (E.D. Cal. 2010), appears to have been cited solely for the proposition that a court may disregard allegations in the complaint if contradicted by facts established by exhibits attached to the complaint. The JPA agreement relating to the cross-claim against EDCFA was the only exhibit attached. More importantly, no "fact" has been established by any exhibit or document referred to therein. As set forth above, the contract language, and especially an isolated portion, cannot be interpreted without extrinsic evidence of the intent and purpose of the transaction.

of the agreement is the fact in dispute, the section does not exclude evidence relevant to that issue. Cal. Code Civ. Proc. § 1856 (f).

EDCFA submits that extrinsic evidence must be considered to determine the meaning of Section 15.3, and PNC's exact obligations regarding refinancing and CREBs. Even if Section 15.3 is read to give PNC discretionary power as to whether to buy the CREBs, EDCFA has alleged much more than simply that Section 15.3 obligated PNC to buy the CREBs. EDCFA has alleged that this transaction was supposed to be short term in nature. EDCFA points out that the three separate "leases," Lease Schedules Nos. 2006-1, 2006-2, and 2006-3, are expressly defined in the Master Lease-Purchase Agreement to be 'Initial Leases.' (SACC, ¶ 17). Moreover, EDCFA alleges, that pursuant to Section 4.8 of the MLPA, "The Use Agreements entered into by the fairs, including EDCFA, were entered into 'with respect to the Initial Leases....'." EDCFA alleges that it "would not have executed the Use Agreement had it know that if the CREBs were not purchased by PNC and could not be sold to a third party, PNC would 'switch' the nature of this financing from 'interim' to long term and insist on recovering the premium interest rate over the entire 10 year term of the contract." (SACC ¶ 146).

EDCFA has also alleged that Section 15.3 of the MLPA states that CFFA "**shall have the option** to prepay the principal component...." (SACC, ¶ 16) (emphasis added). The extrinsic evidence will demonstrate that PNC understood that the intent of this provision was to "lock [PNC] into the CREB issuance process. (Id. at ¶ 16, 49). EDCFA alleges that "PNC failed to disclose that if PNC chose not to purchase the CREBs, and if PNC was unable to sell to a third party buyer, and if the Authority or the fairs were unable to sell the CREBs to a third party buyer, that PNC would insist on recovering the 'premium,' 'interim' interest rate for the entire 10 year term." (Id., ¶ 67). EDCFA further alleges that "At the time these representations were made, EDCFA is informed and believes that the representations were false in that PNC had no present intention to purchase the CREBs, and had no present intent to fulfill the representations made by the sales representatives that this was only to be short term financing event [sic] to the extent that the CREBs could not be sold to a third party buyer." (Id., ¶ 68). See also, SACC, ¶¶ 13-17.

PNC also claims that there was no misrepresentation regarding the ultimate ownership of the equipment. According to PNC, there can be no misrepresentation relating to ultimate ownership of the equipment because there is nothing in the Use Agreement that states that CFFA's ownership of the equipment will continue after termination of the Use Agreement. (MTD, p.8). The disturbing part of this argument is that Section 5 of the Use Agreement was changed by PNC, its lawyers, and CFFA *so that CREBs could be utilized to refinance the transaction*. (SACC, ¶¶ 40, 41) (emphasis added). In other words had there been no need for, or contemplation of, the refinancing with CREBs, title to the equipment would transfer to the fairs as set forth in the prior, equivalent contract from the PV project. (Id.). PNC and its sophisticated lawyers knew, or should have known, that the fairs would have no incentive to enter into this transaction without a promise of transfer of the equipment at the end of the contract term. (*See id.*, ¶ 42). Neither PNC nor CFFA conveyed this information to the fairs, including EDCFA, although both entities knew that without a transfer of title, there would be no incentive for the fairs to enter into the transaction in the first place. (Id.).

The fundamental problem is that EDCFA has no enforceable contract with CFFA relating to the transfer of the equipment at the end of the contract term. It simply has a letter from an ex-employee. It is not signed by CFFA's board of directors. PNC knew and currently knows that without a promise of transfer of title, the fairs get no benefit from the transaction.

2. EDCFA Is Not Required to Allege that CFFA Was PNC's Agent Or Authorized to Speak on PNC's Behalf

PNC next argues that because "EDCFA has not alleged that CFFA was PNC's agent, or that CFFA was authorized to speak on PNC's behalf" EDCFA has not stated a claim for fraud. (MTD, p.9). PNC cites to no authority supporting this proposition, and instead, cites to case law relating to the sufficiency of allegations of agency and joint venture relationships, apparently on the presumption that such allegations are required in the first place. PNC's arguments in this regard are misplaced. The law is clear that EDCFA is not required to prove either that CFFA was PNC's agent or that CFFA was authorized to speak on PNC's behalf.

"The law is well settled that 'representations made to one person with intention that they will be repeated to another and acted upon by him and which are repeated and acted upon to his injury gives the person so acting the same right to relief as if the representations had been made to him directly.'" *Simone v. McKee*, 142 Cal. App. 2d 307, 313-314 (1956) (citing *Strutzel v. Williams*, 109 Cal. App. 2d 512, 515 (1952)). A "fraudulent misrepresentation is no less actionable because made to a third person who is intended to and does relay the information to the person who relies." *Odell v. Frueh*, 146 Cal. App. 2d 504, 508 (1956). EDCFA's SACC satisfied this pleading requirement. (SACC, ¶¶ 25, 69). If the law were otherwise, PNC could protect itself from liability for fraud through the use of a straw man. Fortunately, this is not the law.

PNC's next argues that because EDCFA admitted that it received PNC's documents during litigation, it could not have been induced by misrepresentations contained therein. This is a narrow construction of the allegations. EDCFA is clearly alleging that these statements were made by "the lead PNC sales representative on the deal, William Garnett III, who was in charge of pitching the financing to the Authority and the fairs, and communicating PNC's position to those entities." (SACC, ¶ 10). A reasonable inference from the allegations should be drawn in EDCFA's favor that because PNC was speaking through Garnett, and Garnett was conveying PNC's position to CFFA and the fairs, the documents indicating Garnett's understanding that "everyone" at PNC knew that PNC was getting a premium interest rate as an interim rate only, are evidence of what he was selling to CFFA and the fairs. The same can be said of the recently produced email from Cliff Svoboda to Ralph Martinez. If the court disagrees, EDCFA is prepared to make additional allegations on amendment if the Court finds that further allegations are necessary.

3. <u>EDCFA's Fraud Claim Is Not Time-Barred</u>

PNC next asserts that EDCFA's fraud is time-barred. (MTD, p.10). As with many of PNC's arguments, this argument is factually and legally flawed, especially related to the claims of fraud based on the lack of refinancing. EDCFA did not assert the discovery rule as an exception to the general rule defining the accrual of its fraud cause of action pertaining to the fraud based on the refinancing, and therefore, did not need to "plead around" the statute of limitations in this regard. Instead, EDCFA alleges that its fraud claim pertaining to the lack of refinancing did not originally accrue until EDCFA sustained damages in 2011. (SACC, ¶ 79). EDCFA's allegations as to the date of accrual of the fraud claim relating to the lack of refinancing are consistent with the very case law PNC cites.

EDCFA agrees with PNC that, as a general rule, the statute of limitations begins to run at the time of accrual, "when, under substantive law, the wrongful act is done or the wrongful result occurs, and the consequent liability arises." (MTD, p. 10) (citing *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999)). Relying on *Norgart*, PNC claims that the alleged failure to refinance constitutes the "wrongful result" that triggered the running of the statute of limitations, and EDCFA became aware that PNC had not refinanced with CREBs on December 31, 2007." (MTD, p.11). PNC concludes that EDCFA's cause of action therefore accrued on December 31, 2007. (Id.). PNC states: "it is not the discovery of *damages*, but the first discovery or suspicion of the *wrong*, that triggers the statute of limitations." (MTD, p.12). This may be true of the discovery rule, but there is was no need for EDCFA to assert the discovery rule to toll the statute of limitations as to the fraud relating to the refinancing, which did not begin to run until 2011.

In the sentence immediately following the *Norgart* excerpt cited by PNC, the decision states: "In other words, it sets the date *as the time when the cause of action is complete with all of its elements*." *Norgart, supra*, 21 Cal. 4th at 397 (emphasis added). *Norgart* cites to *Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 178 (1971) for the proposition that "[i]n ordinary...actions, the statute of limitations...begins to run upon the occurrence of the last element essential to the cause of action." *Norgart, supra*, 21 Cal. 4th at 397. Consistent with *Norgart*, California law is clear that "[w]hen damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained." *City of Vista v. Robert Thomas Securities, Inc.*, 84 Cal. App. 4th 882, 887 (2000). Damages are an element of intentional misrepresentation and fraud, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing. *Id.* (citing *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1239 (1995); *Vu v. California Commerce Club, Inc.*, 58 Cal. App. 4th 229, 233 (1997)). Thus, PNC's focus on the "discovery or suspicion of the wrong" is misplaced as to the fraud claim relating to the refinancing.

EDCFA alleges that PNC's acts did not result in immediate damage to EDCFA, and alleges why it did not begin sustaining actual damages until 2011. (SACC, ¶ 79).[12] Consistent with the

[12] Note, there is a typo in the SACC. In the phrase "After this litigation commenced, EDCFA began demanding the higher payment," "CFFA" should replace "EDCFA."

aforementioned case law regarding accrual of fraud claims, EDCFA clearly alleges that its fraud cause of action relating to the lack of refinancing did not accrue prior to 2011 because it did not sustain damages until that time. A reasonable inference should be drawn in its favor that accrual of the fraud claim did not occur until 2011.[13]

Relating to the discovery rule as to mistake, the Court previously indicated that EDCFA was required to "specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite due diligence." (Dckt. No. 120).[14] EDCFA alleges that CFFA sent EDCFA letters in July 2006 and July 2008 indicating that after the termination of the lease agreement, EDCFA would own the equipment. (SACC, ¶¶ 20, 30). EDCFA also alleges why it was reasonable for EDCFA to have not discovered the lack of title transfer provision. (Id., ¶¶ 35, 36, 38, 39-42, 132, 139-144). EDCFA asserts that it has met its pleading burden in this regard.

As to PNC's argument that the fraud claim is barred because EDCFA should have read the contract, the law is also clear that "[n]egligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation was intentional rather than negligent." *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1240 (1995); *see also Seeger v. Odell, supra*, 18 Cal.2d 409, 414-415 (1941)).

D. <u>EDCFA Has Stated a Claim For Negligent Misrepresentation</u>

EDCFA alleges that PNC's former sales representatives made a negligent misrepresentation regarding an existing material fact—i.e., that this transaction was to be an interim, construction rate loan, and that it was to be short term. Further, EDCFA alleges that if PNC failed to disclose that if it chose not to purchase the CREBs, and if PNC was unable to sell to a third party buyer, and if the

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[13] As to the fraud based on lack of title provision, PNC continues to assert that there was an "agreement" between CFFA and EDCFA "contained in the cover letter concerning post-lease ownership." (MTD, p.8). EDCFA disagrees. EDCFA has alleged that CFFA sent EDCFA letters in July 2006 and July 2008 indicating that after the termination of the lease agreement, EDCFA would own the equipment. (SACC, ¶¶ 20, 30). To the extent that these cover letters did constitute an "agreement" relating to post-lease ownership, as PNC submits, there certainly was no reason for EDCFA to suspect that ownership would not transfer pursuant to this separate "agreement" between CFFA and EDCFA as of at least July 2008.

[14] It should be noted that EDCFA's previous Counterclaim did not assert the fraud claim or the rescission based on fraud claim.

Authority or the fairs were unable to sell the CREBs to a third party buyer, that PNC would insist on recovering the "premium," "interim" interest rate for the entire 10 year term. (SACC, ¶ 82). Thus, a reasonable inference should be drawn that EDCFA alleges a claim for negligent misrepresentation because it alleges a negligent misrepresentation based on a statement of existing material fact. It is therefore not "based entirely on purported promises regarding future actions" as PNC submits. (MTD, p.13).[15]

E. EDCFA Has Sufficiently Alleged Clear And Unambiguous Promises By PNC Under its Promissory Estoppel Claim

EDCFA's promissory estoppel claim alleges clear and unambiguous promises by PNC. EDCFA alleges that "PNC, through its representatives, William Garnett III and Cliff Svoboda, made multiple, clear promises to the Authority and EDCFA, or to the Authority to be relayed to EDCFA, both before and after the execution of the [MLPA] and Use Agreements that this 'interim' financing would be refinanced through the sale of CREBs, lowering the effective interest rate to be paid by EDCFA from 7.29% to 0-2%. (SACC, ¶ 87). "After PNC decided not to purchase the CREBs in 2007, Mr. Garnett made repeated assurances to the Authority and EDCFA, or to the Authority to be relayed to EDCFA, in 2007-2008 that PNC had arranged for a buyer for the CREBs in Bank of America, and that the transaction would be refinanced through the sale of CREBs to Bank of America, and thereby lower the interest rates to be paid by the fairs." (Id.). Moreover, the CREB applications, approved and prepared by PNC's lawyers, make additional statements relating to the refinancing. (SACC, ¶ 14, ¶ 15, ¶ 50). It was clearly PNC that promoted the idea of CREBs and their benefits. (SACC, ¶ 24). EDCFA makes further allegations of clear, unambiguous promises by PNC. (SACC, ¶¶ 11, 48, 50, 11).

The foregoing is distinguishable from the alleged promise in *Laks v. Coast Fed. Sav. & Loan Assn.*, 60 Cal. App. 3d 885 (1976), cited by PNC. In *Laks*, the court found that the initial paragraph

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[15] PNC's argument that the negligent misrepresentation claim is deficient because it does not allege direct misrepresentations by PNC to EDCFA fails for the same reasons as stated above with respect to the fraud claim. The same should be said for the statute of limitations argument, which, as with the fraud claim, accrued when damages are sustained—in this case 2011. *City of Vista, supra,* 84 Cal. App. 4th at 887.

of the letter from the bank "states it is a conditional commitment." *Id.* at 891. Additionally, the court found that the factors PNC cites to would not "necessarily make the offer conditional if missing." *Id.* at 891. The court stressed the fact that so many important conditions were absent "further emphasizes the conditional nature of the letter and strengthens the argument that the parties were still in the negotiation stage." *Id.* EDCFA adequately alleged when the representations were made and how the deal would be refinanced—i.e., through the sale of CREBs, with an interest rate of 0-2%. There is no obligation for EDCFA to allege "whether the deal would be refinanced for some fairs, or which fairs would participate" as PNC suggests. If the Court disagrees, EDCFA is prepared to plead additional facts demonstrating that the promise was clear and unambiguous.

F. <u>EDCFA Has Sufficiently Alleged a Claim Under the False Claims Act</u>

1. <u>EDCFA and El Dorado County Counsel Have Standing to Bring a Claim</u>

PNC seeks to have the Court narrowly construe the California False Claims Act. The Act, however, expressly states that the act "shall be liberally construed and applied to promote the public interest." Cal. Gov. Code § 12655(c). "The Legislature designed the CFCA to prevent fraud on the public treasury and it should be given the broadest possible construction consistent with that purpose." *San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.*, 182 Cal. App. 4th 438, 446 (internal quotations and citations omitted). "In other words, the CFCA must be construed broadly so as to give the widest possible coverage and effect to the prohibitions and remedies it provides." *Id.* (quotations and citation omitted). In light of these mandates, EDCFA first addresses the standing issue.

PNC erroneously argues that a claim under the Act may be only brought by the state of California, a political subdivision thereof, or a private person who sues on behalf of the state or political subdivision. (MTD, p. 16 (citing Gov. Code § 12652(a)-(c)). Section 12652 expressly requires the "prosecuting authority" of a political subdivision to "diligently investigate" violations and allows "the prosecuting authority of a political subdivision" to bring a claim. Gov. Code § 12652(b)(1); *State ex. Rel. Hindin v. Hewlett-Packard Co.*, 153 Cal.App.4th 307, 313 (2007). "Political subdivision" includes any "county." Cal. Gov. Code § 12650 (b)(5). " 'Prosecuting authority'" expressly refers to "county counsel." Cal Gov. Code § 12650(b)(7). "Political subdivision funds" means "funds that are the subject of a claim presented to an…***agent*** of a political subdivision or where the political subdivision provides, or has provided, or will reimburse any portion of the money, property or service requested or demanded." § 12650(b)(6) (emphasis added). "Claim" includes demands for money "whether or not the…political subdivision has title to the money or property" if it is "presented to an…***agent***…of a political subdivision." Gov. Code § 12650(b)(1) (emphasis added).

EDCFA has alleged that it is an agent of the County of El Dorado by statute under California Government Code sections 25905 and 25906. It is also an agent of the County pursuant to an Agency Agreement between EDCFA and the County. EDCFA's monies are deemed to be County monies, and all claims made against EDCFA are deemed to be claims made against the County. (SACC, ¶¶ 2, 98). In other words, EDCFA has alleged that PNC has made a claim involving "Political subdivision funds." The Act's purpose to protect the public treasury is therefore triggered.

It should be noted that EDCFA has been consistent in asserting that it is both a non-profit corporation and that it was formed under Government Code sections 25905 and 25906, and by way of an Agency Agreement with the County. (SACC, ¶ 2). The very first sentence of Section 25905 states: "The board of supervisors may contract with a nonprofit corporation or association for the conducting of an agricultural fair, as agent of the county." Thus, EDCFA is literally both a non-profit corporation and an agent of the County.[16]

The SACC alleges that the "prosecuting authority of the County of El Dorado, having been associated herein as counsel for EDCFA, brings this claim on behalf of the County of El Dorado and also by and through its agent, EDCFA." (SACC, ¶ 109). The False Claims Act does not contain a statutory requirement that the "prosecuting authority," i.e., county counsel, must bring a claim under the Act in the name of the political subdivision. The Act also does not prevent county counsel from

[16] The Court has recently determined that EDCFA's allegations were sufficient to draw a reasonable inference that it was exempt from complying with the claims presentation requirements of the Government Claims Act on the basis that CFFA could not demonstrate that EDCFA did not qualify as a "local public entity" as a matter of law. (See Dckt. 138, p.12). Also, it should be noted that PNC has again misquoted the SACC by arguing in its motion that EDCFA has alleged that it is " 'a county' but only 'for 42 U.S.C. § 1983 purposes.'" (MTD, p.16).

bringing a cause of action through its agent, especially where the party is deemed an agent by an express provision of the Government Code, and especially where the political subdivision's funds are stake.[17] Presumably, given the fact that a claim can also be brought by a qui tam plaintiff, the Legislature did not expressly include such a requirement as to claims brought by the prosecuting authority of a political subdivision. Furthermore, in this very scenario, it would appear to defeat the purpose of the statute (i.e., to protect public funds) to find a lack of standing and require the very same County Counsel to expend additional resources, i.e., more County monies, to bring a separate lawsuit under the County's name based on the same underlying facts.

Therefore, EDCFA has alleged that a claim for money was made to its agent, EDCFA, that funds of the County will reimburse the money demanded, and that the "prosecuting authority," i.e., County Counsel, has brought this claim. EDCFA and County Counsel have adequately alleged standing, especially given the liberal construction to be given to the statute and interests it protects. EDCFA therefore submits that PNC has not demonstrated, as a matter of law, that EDCFA and County Counsel lack standing to bring their claim.

2. <u>Falsity</u>

EDCFA has properly pled falsity. PNC simply regurgitates its previous arguments and asserts that the Court should find that as a matter of law "EDCFA cannot prove that PNC made a false claim." (MTD, p.18). For reasons previously stated, EDCFA disagrees. But, more importantly, proof of falsity is not required at the pleading stage. A reasonable inference should be drawn in EDCFA's favor that it has properly pled a claim under the False Claims Act.

G. <u>EDCFA Has Standing to Assert a Cal. Bus & Prof. Code 17200 Claim</u>

As set forth above, EDCFA has properly alleged the basis for a fraud claim, and therefore, its UCL claim should survive as well based on the fraudulent prong of the UCL. If for some reason the fraudulent prong is unavailable to EDCFA, EDCFA has also alleged that PNC's conduct was "unfair, deceptive…and likely to deceive members of the public." (SACC, ¶ 122). PNC does not

[17] PNC's argument that EDCFA does not allege that El Dorado County has authorized it to bring this claim is a red herring. Authorization to bring a claim in this lawsuit should be implied based on the fact that El Dorado County Counsel is counsel of record for EDCFA in this case.

assert that this allegation is deficient or that its conduct was not unfair or deceptive. Instead, PNC claims that EDCFA does not have standing because there are no allegations that EDCFA "lost money or property as a result of such unfair competition." (MTD, p.19). PNC is again in error legally and factually.

The California Supreme Court has recently clarified the "lost money or property" requirement under Cal. Bus. & Prof. Code § 17204. In *Kwikset Corp. v. Super. Ct.*, the Court held that there are "innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would have otherwise been unnecessary." 51 Cal. 4th 310, 323 (2011). The same allegations that suffice to establish economic injury will generally show injury in fact as well. *Id.* at 326.

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, "for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Kwikset, supra*, 51 Cal. 4th at 327 (citing *Lujuan v. Defenders of Wildlife*, supra, 504 U.S. at 555, 561 (1992)). The California Supreme Court held: "It suffices that a plaintiff can allege an 'identifiable trifle'…of economic injury." *Kwitset, supra,* 51 Cal. 4th at 330, n.15 (citation omitted). An assertion that a purchase would not have been made but for a misrepresentation is sufficient to allege causation and economic injury. *Id.* at 330.

Here, a fair reading of EDCFA's Counterclaim indicates that EDCFA has alleged an economic injury and injury in fact caused by the unfair competition. EDCFA has pled that it was required to surrender more (pay excess interest) and acquire less (mere use of the property rather than ownership). EDCFA's present property interest in the solar equipment has been diminished—it reasonably believed it would ultimately acquire title to the equipment under the financing arrangement. EDCFA has alleged deprivation of money. EDCFA alleged that PNC's unfair and deceptive conduct "results in…$253,901 in excess interest from EDCFA, and a loss in excess of $144,000 for EDCFA after energy savings are recognized over the entire term of the loan, in addition to attorneys' fees required to defend against PNC's lawsuit." (SACC, ¶ 124). EDCFA has also alleged at various points in its Counterclaim that it would not have entered into this transaction had it known that title to the equipment would not transfer at the end of the lease term and that the deal would not be refinanced. Thus, EDCFA entered into a transaction, costing money, that would have otherwise been unnecessary. EDCFA paid money for the mere "use" of equipment when it believed it would ultimately "own" the equipment. EDCFA has also expressly alleged that it suffered damages *as a result of* PNC's unfair, deceptive, and fraudulent business practices made in violation of 17200. (SACC, ¶ 125). Thus, EDCFA has properly alleged causation as well. Certainly, EDCFA has alleged an identifiable "trifle" of economic injury sufficient to survive the pleading stage.

PNC seeks to have this Court require a higher pleading standard than necessary to establish standing, requiring apparent proof of out-of-pocket expenses. The California Supreme Court has declined "to write the out-of-pocket loss damages rule into section 17204's standing definition." *Kwikset, supra*, at 335. It has now made clear that standing under section 17204 does not depend on eligibility for restitution or damages. *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 336-337 (2011).[18]

H. EDCFA Has Properly Alleged Rescission Based on Fraud and Unilateral Mistake

EDCFA asserts that it has stated a claim for fraud, and therefore, has also stated a claim for rescission based on fraud. (SACC, ¶ 146). PNC makes no additional arguments in its Motion as to the rescission claim based on fraud, other than the arguments relating to the stand alone fraud claim. As for rescission based on unilateral mistake, whether there was a mistake is an issue that cannot be determined at this motion to dismiss stage. *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 525 (2002) (court may consider extrinsic evidence in determining whether a mutual mistake has occurred that demonstrates lack of mutual consent); *Cedars-Sinai Medical Center v. Shewry*, 137 Cal. App. 4th

[18] See also, *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 789 (2010) ("That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them."); *see also Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1178-79 (9th Cir. 2012) (citing *Kwikset Corp.* and *Clayworth*).

964, 985 (2006) (same). Recently, in relation to EDCFA's cross-claim against CFFA for rescission based on mistake, this Court found: "Since El Dorado alleges the Use Agreement should be rescinded on grounds of mistake, CFFA has not demonstrated that El Dorado will not, as a matter of law, be able to introduce parol evidence at trial." (Dckt. No. 138, p.14).

As to the argument that the rescission claim based on mistake is time barred, EDCFA submits that it sufficiently alleged the discovery rule in its amended pleading so that an inference should be drawn in its favor that its claim is not barred by the statute of limitations. (SACC, ¶ 139-144).

I. <u>The Declaratory Relief Claim Alleges More than Just Relief Based on Rescission</u>

PNC seeks dismissal of the declaratory relief claim on the basis that it is duplicative of EDCFA's rescission claim. (MTD, p.22). The declaratory relief claim, however, seeks more than just rescission. It seeks "a judicial determination of the respective rights and duties of EDCFA and PNC under the Use Agreement, under the Master Photovoltaic Lease-Purchase Agreement, and under the various other contract documents involved in this transaction." (SACC, ¶ 159). EDCFA also asks for a declaration that PNC is liable to EDCFA for any sums, damages, or losses, including reasonable attorneys' fees and costs, in an amount proven at trial. (Id.). Therefore, although it may be that, given the other claims brought by EDCFA, declaratory relief is unnecessary, at this stage the claim has been properly pled.

III. <u>CONCLUSION</u>

For all of the foregoing reasons, EDCFA respectfully requests that the Court issue an order denying PNC's motion to dismiss in its entirety. To the extent that any part of the Motion is granted, EDCFA hereby expressly requests leave to amend to cure any insufficiencies.

Dated: September 10, 2012

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