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FILED/ENDORSED

FEB 07 2022

By: E. Macdonald
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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

FRESH HORIZONS LIMITED, a British
Virgin Islands Company,

Plaintiff,

v.

KOTARO SHIMOGORI, an individual;
COMCOPIOUS LIMITED, a Hong Kong,
China Company *doing business as*
ICANPAY; COMCOPIOUS CALIFORNIA,
INC., a California corporation; **ICANPAY**
CALIFORNIA, INC., an FTB suspended
California corporation; **PAN DIGITAL**
NETWORK LIMITED fka COMCOPIOUS
UK LIMITED, a UK limited liability
company; and **DOES 1 through 25**,
inclusive,

Defendants.

Case No. 34-2021-00312814-CU-FR-GDS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS KOTARO SHIMOGORI
AND COMCOPIOUS LIMITED'S MOTION
FOR BOND**

TELEPHONE APPEARANCE

Date: March 29, 2022
Time: 9:00 a.m.
Dept.: 54

BY FAX

Reservation No. 2622828

Complaint Filed: December 17, 2021

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1 Defendants Kotaro Shimogori and Comcopious Limited ("Defendants") request that
2 Plaintiff Fresh Horizons Limited ("Plaintiff") post a bond of \$400,000 pursuant to Code of
3 Civil Procedure ("CCP") §1030 and for a corresponding stay as outlined below.

4 INTRODUCTION

5 Pursuant to CCP §1030, Defendants seek an order requiring Plaintiff, a foreign
6 company, to pay a bond to cover Defendants' fees and costs. This case has questionable
7 merit and should have at least been brought in Hong Kong; and Plaintiff is unfairly using a
8 prior lawsuit's allegations as supposed fact where that prior case privately settled.

9 Specifically, Plaintiff, a Hong Kong-owned company, has been processing tens of
10 millions of dollars for its online gaming business, which operates in a legal grey zone
11 through a British Virgin Islands shell company. Facing difficulties contracting directly with
12 traditional banks, Plaintiff contracted with Defendant Comcopious, Limited, a Hong Kong
13 Company *dba* ICanPay ("ICanPay") in an arms' length business contract (the "Contract")
14 to assist with payment processing. Plaintiff now seeks damages under its Contract with
15 ICanPay; however, the Contract contains a Forum Selection Clause, which requires that
16 all disputes be litigated in Hong Kong (where ICanPay has a principal place of business)
17 under Hong Kong law, which is consistent with Plaintiff's Hong Kong ownership and the
18 Hong Kong passport and Hong Kong utility bill Plaintiff provided upon contracting with
19 ICanPay, as well as the location of evidence due to ICanPay's bank accounts with Hong
20 Kong-based HSBC Bank Plaintiff also attempts to bring unsupported tort claims against
21 other companies and the individual owner. However, Defendants have at least a
22 reasonable possibility in prevailing in this case. In fact, Defendants not only intend to
23 prevail, but will seek to obtain amounts that Plaintiff owes ICanPay. Given that it will be
24 difficult to recover costs and an attorney's fees award from Plaintiff, which is located
25 overseas, Defendants now seek an order requiring that Plaintiff pay a bond of at least
26 \$400,000—to account for \$200,000 in attorney's fees and \$200,000 in costs—and to stay
27 this case pending Plaintiff's payment of the bond.
28



BACKGROUND

Plaintiff is a British Virgin Islands gaming company (Compl. ¶¶5, 17), with Hong Kong ownership. (Declaration of K. Shimogori in Support of Motion for Bond (“Shimogori Decl.”) ¶2.) In fact, Plaintiff listed its Hong Kong ownership on the application to ICanPay (Shimogori Decl. ¶2 & Exhibit A.) Further, Plaintiff provided a Hong Kong passport and a Hong Kong utility bill, providing proof of the identify of ownership. (Shimogori Decl. ¶2 & Exhibit A.) Furthermore, ownership records of Plaintiff also reflect Plaintiff’s Hong Kong ownership. Despite claiming that Defendants run a “sham” that “stole” money, Plaintiff concedes that between May 2019 and 2021, Plaintiff successfully processed tens of millions in transactions with IcanPay (Compl. ¶32), which was acting as Plaintiff’s service provider to process Plaintiff’s high-risk payments in the online gaming market.

Importantly, the heart of this dispute is Plaintiff’s Contract with IcanPay, a Hong Kong company. This Contract has a clear Forum Selection Clause that requires this dispute to be brought in Hong Kong under Hong Kong laws. (Compl. ¶¶65-76 & Compl. Exhibit F.) In particular, Plaintiff’s Contract’s Forum Selection Clause states:

12. GOVERNING LAW AND JURISDICTION

12.1 These terms and Conditions and/or the agreement are governed by, and shall be construed in accordance with the laws of Hong Kong, and **all disputes arising out of or connected with these Terms and Conditions and/or the Agreement shall be subject to the exclusive jurisdiction of the competent court of Hong Kong, judging in first instance, and its appellate courts, subject to appeal at Hong Kong’s high Court of Justice.** (Compl. Exhibit F (emphasis added).)

Moreover, IcanPay has been organized under Hong Kong laws for nearly a decade, has longstanding bank relationships in Hong Kong, and conducts business in Hong Kong for legal, practical, and tax purposes; importantly, key business records related to Plaintiffs claims in this case are in the possession of HSBC in Hong Kong. (Shimogori Decl. ¶3.) Further, ICanPay is an entirely separate entity from the other U.S. and foreign Defendants, including individual Kotaro Shimogori. (Shimogori Decl. ¶4.) While Plaintiff compares this case to a prior case against some of the Defendants (the “*Life FX*” case, which settled), Plaintiff omits the distinguishing fact that Life-FX Products, LLC had a self-reported principal



1 place of business in California, in contrast to this case, where the owner of Plaintiff is in
2 Hong Kong, as evidenced by a passport and a utility bill.

3 Although Plaintiff cites to examples of common payment facilitators (e.g., PayPal,
4 Stripe, and Square) (Compl. ¶41), Plaintiff further omits that it did not contract with those
5 payment facilitators due to its legal gray zone gaming offers that it offered from offshore
6 locations. Plaintiff also incredulously argues that ICanPay violated credit card rules and
7 related laws without Plaintiff's knowledge in an aggregate account. (Compl. ¶38.) In truth,
8 Plaintiff was directing ICanPay's actions to process large amounts from Plaintiff's British
9 Virgin Islands shell company, and Plaintiff is guessing wildly about the internal practices of
10 Defendants and whether Defendants have violated credit card rules.

11 Again, while Plaintiff highlights the prior unrelated *Life-FX* case against Defendants,
12 it mischaracterizes that case's allegations as facts, which Defendants contested. (Compl.
13 ¶2.) Plaintiff also attaches a claimed "scam" website, but states it was last accessed in
14 2018 (Compl. ¶35) and likely created by a party to the litigation as settlement leverage.

15 Plaintiff now seeks a little more than \$1.8 million for contract damages, plus
16 unsupported punitive damages, fees, and restitution. (Compl. ¶32 & Prayer.) However,
17 Plaintiff actually owes ICanPay almost \$3.2 million for services; importantly, Defendants
18 do not owe Plaintiff anything. (Shimogori Decl. ¶5.)

19 Defendants expect to prevail in this case for the reasons outlined herein and to
20 recover substantial costs currently estimated at around \$200,000. Specifically, given the
21 high number of processed transactions (\$30-\$50 million worth) that are at the heart of this
22 case, Defendants expect significant costs for a Hong Kong-based forensic accountant,
23 document retrieval from international (and antiquated) banking systems in Hong Kong,
24 document management and production services, technical experts, Chinese translators,
25 depositions, and court filings. (Shimogori Decl. ¶6.)

26 Defendants also intend to seek their fees under the contract in this case. Because
27 the contract is subject to Hong Kong law, Defendants will be entitled to their fees as a
28 prevailing party in a contract dispute under Hong Kong law, which is based on the "loser



1 must pay" rule in English civil proceedings.

2 Defendants attempted to meet and confer with Plaintiff on the issues outlined in this
3 motion, but the parties were unable to come to a resolution. (Declaration of Karl S.
4 Kronenberger in Support of Motion for Bond ¶¶3.)

5 ARGUMENT

6 Where there is a foreign plaintiff and the defendant has a reasonable possibility of
7 prevailing, CCP §1030 authorizes a bond requirement and corresponding stay as follows:

8 (a) When the plaintiff . . . resides out of the state, or is a foreign corporation,
9 the defendant may at any time apply to the court by noticed motion for an
order requiring the plaintiff to file an undertaking to secure an award of costs
and attorney's fees which may be awarded . . .

10 (b) The motion shall be made on the grounds that the plaintiff resides out of
11 the state or is a foreign corporation and that there is a reasonable possibility
that the moving defendant will obtain judgment . . .

12 (c) If the court, after hearing, determines that the grounds for the motion have
been established, the court shall order that the plaintiff file the undertaking in
an amount specified . . .

13 (d) . . . If the plaintiff fails to file the undertaking within the time allowed, the
14 plaintiff's action or special proceeding shall be dismissed . . .

15 (e) If the defendant's motion for an order requiring an undertaking is filed not
later than 30 days after service of summons on the defendant, further
proceedings may be stayed . . . upon application to the court . . .

16 See also *Alshafie v. Lallande*, 171 Cal. App. 4th 421, 428 (2009) ("Plaintiffs who reside
17 outside of California may be required to post an undertaking to ensure payment of costs
18 to a prevailing defendant."); *Pittman ex rel. L.P. v. Avish P'ship*, 525 F. App'x 591, 594 (9th
19 Cir. 2013) (affirming bond set at \$50,000 and outlining plaintiff had those assets).

20 The "reasonable possibility" standard is "relatively low." *Wilson & Haubert, PLLC v.*
21 *Yahoo! Inc.*, No. C-13-5879 EMC, 2014 WL 1351210, at *3 (N.D. Cal. Apr. 4, 2014). In
22 other words, a defendant need not show that there is "no possibility" that plaintiff would win
23 at trial, but only that it is reasonably possible that the defendant will win. See *id.*

24 A bond is appropriate here as Plaintiff is a foreign corporation with a Hong Kong
25 owner, and there is a reasonable probability of Defendants' success on the merits because

26 (a) this case should be litigated in Hong Kong under the Contract's Forum Selection
27 Clause, and (b) the law and facts weigh towards Defendants on each cause of action.
28



1 Further, the amount of the requested bond is suitable as Plaintiff has significant funds
2 available from its business transactions, evidenced by the \$30 million+ transactions that
3 were received from Defendants in the last two years.

4 **A. Plaintiff is a foreign corporation.**

5 Plaintiff is a British Virgin Islands gaming company (Compl. ¶¶5, 17), with its owner
6 residing in Hong Kong, which is the same location as the choice of forum clause in the
7 contract. On information and belief, Plaintiff has generated millions in revenue, including
8 based on the amount it concedes it was processing. While Plaintiff has processed tens of
9 millions of dollars and has enough to afford a bond (Compl. ¶32), a bond is also warranted
10 due to the likelihood of Plaintiff refusing to pay Defendants' fees and costs upon
11 Defendants prevailing, opting instead to hide its funds and assets offshore.

12 **B. Plaintiff agreed to bring any dispute in Hong Kong under Hong Kong laws.**

13 Where an agreement provides for jurisdiction "exclusively" in the designated forum,
14 or states that any claim arising out of the agreement shall be litigated in the forum, there is
15 a "mandatory" forum selection clause. See *Animal Film, LLC v. D.E.J. Productions, Inc.*,
16 193 Cal. App. 4th 466, 472 (2011); *St., Sound Around Elecs., Inc. v. M/V Royal Container*,
17 30 F. Supp. 2d 661, 663 (S.D.N.Y. 1999) (finding plaintiffs improperly ignored the forum
18 selection clause they had agreed to by bringing suit in the U.S. rather than in Germany). A
19 mandatory forum selection clause is given effect without regard to the parties'
20 "convenience"; the only question is whether enforcement of the clause would be unfair or
21 unreasonable. See *Richtek USA, Inc. v. uPI Semiconductor Corp.*, 242 Cal. App. 4th 651,
22 661 (2015); *Furda v. Superior Court*, 161 Cal. App. 3d 418, 426 (1984) (noting where a
23 forum selection clause requires litigation outside California, California courts will normally
24 stay or dismiss the action without analyzing the "convenience" factors).

25 A forum selection clause is fair and reasonable where the designated forum bears
26 some legitimate or logical relationship to at least one party or the dispute. See *Smith*,
27 *Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 497 (1976); *Cal-State Bus.*
28 *Prods. & Servs., Inc.*, 12 Cal. App. 4th at 1680 ("That a business with transactions in



multiple jurisdictions might insist on one forum . . . is not of itself objectionable.”). It is not relevant that enforcement of the clause would be inconvenient or add to expenses as that is not the test for unreasonableness. *Verdugo, L.P.*, 237 Cal. App. 4th at 147. Importantly, incorporation of a party in Hong Kong provides a “reasonable” connection to Hong Kong. See *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459; 464-68 (1992) (evaluating choice-of-law analysis). Further, fair notice of the clause weighs in favor of reasonableness. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991). The analysis is similar under Hong Kong law, pursuant to the choice-of-law provision. (Shimogori Decl. ¶7 & Exhibit B.)

Notably, if a plaintiff is not a California resident, there is no “strong presumption” in favor of plaintiff’s choice of forum. See *Nat’l Football League v. Fireman’s Fund Ins. Co.*, 216 Cal. App. 4th 902, 157 Cal. Rptr. 3d 318 (2013); *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 754 (1991). From a common sense point of view, if the Plaintiff has Hong Kong ownership, and the bank records are in Hong Kong, then the Plaintiff’s choice of a Hong Kong forum does not make sense. Moreover, the filing of a dispositive motion on forum selection grounds is permissive at the outset but not mandatory. See CCP §410.30(a)-(b); *Morris v. AGFA Corp.*, 144 Cal. App. 4th 1452, 1460-1461 (2006); *Britton v. Dallas Airmotive, Inc.*, 153 Cal. App. 4th 127, 132 (2007); *Global Financial Distributors Inc. v. Superior Court*, 35 Cal. App. 5th 179, 191-192 (2019).

This case should be dismissed pursuant to the Forum Selection Clause, which states that “all disputes arising out of or connected with” the agreement shall be subject to the “exclusive jurisdiction” of Hong Kong courts. (Compl. Exhibit F, Section 12.) This language is a “mandatory” Forum Selection Clause for all claims related to the Contracts (i.e., all claims); and, there is no cognizable argument that the clause is unreasonable or that the Forum Selection Clause was entered into due to fraud, especially in light of the fact that Plaintiff is an experienced foreign business generating millions of dollars.

While Plaintiff compares a prior *Life-FX* case, that case settled after an initial demurrer and motion to dismiss, i.e., there was no trial on the merits. In addition, Plaintiff



omits the key distinguishing fact that Life-FX had a self-reported principal place of business in California, not the British Virgin Islands with Hong Kong ownership as in this case. Further, the account application, and know-your-customers documents (Hong Kong passport and Hong Kong utility bill) are evidence that Plaintiff does business in Hong Kong. (Shimogori Decl. ¶3.) Thus, disregarding the lack of merit to this case, it should be brought in Hong Kong, not California.

C. There is a reasonable possibility of Defendants prevailing on the merits.

There is at least a “reasonable possibility” that Defendants will prevail on each of Plaintiff’s seven causes of action, including because this case stems from the Contract with ICanPay, yet Plaintiff improperly sued multiple other companies and Mr. Shimogori.

1. Defendants intend to prevail on the fraud claim.

The elements of fraud are: (1) a false representation of fact, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996).

Generally, tort remedies are not available for breach of contract claims even if the breach was intentional; the “economic loss rule” requires a plaintiff to recover in contract for purely economic loss due to disappointed expectations, rather than in tort, unless it can demonstrate harm above and beyond a broken contractual promise. See *Robinson Helicopter Co., Inc.*, 34 Cal. 4th at 988-90 (noting harm above contract damages may include, e.g., breaches of contract that lead to personal injury); see also *Erich v. Menezes*, 21 Cal. 4th 543, 553 (1999) (concluding that differences in tort and contract objectives “support a cautious approach” in extending tort recovery in breach of contract cases). In any event, under the rule against double recovery, a plaintiff may not recover for both tort and breach of contract. See *Lazar*, 12 Cal. 4th at 638.

In addition, statements of opinion are not actionable as fraud. See *Graham v. Bank of America, N.A.*, 226 Cal. App. 4th 594, 606 (2014). A statement is an “opinion” if it expresses a belief, is mere “puffery,” or offers the speaker’s view on a matter of judgment, such as on the quality or value of goods or services. See *id.*; see also *Consumer Advocates*

1 *v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361-62 (2003) (representations that
2 satellite television service delivered "crystal clear digital video" and "CD quality audio" were
3 boasts or near meaningless superlatives akin to puffery); *Gentry v. eBay, Inc.*, 99 Cal. App.
4 4th 816, 835 (2002) (statement that positive rating was "worth its weight in gold" was
5 general statement of opinion, not a positive assertion of fact). Likewise, statements about
6 future events are generally not actionable. See *Cohen v. S & S Const. Co.*, 151 Cal. App.
7 3d 941, 946 (1983); *Pacesetter Homes, Inc. v. Brodtkin*, 5 Cal. App. 3d 206, 210-12 (1970)
8 (statements that rental units should rent for certain figures and that purchase would be an
9 excellent investment were non-actionable opinions as to future events).

10 There is no basis for Plaintiff's fraud claim. First, Plaintiff cannot recover for fraud
11 based on the purported breach of the Contract (and at the very least, Plaintiff cannot obtain
12 double recovery). Further, the claimed fraudulent statements are either (1) non-actionable
13 opinion and puffery "regarding the legality, legitimacy, reliability and transparency" of
14 services (i.e., representations made or implied in nearly every service contract), and (2)
15 non-actionable statements of future conduct. (Compl. ¶78, claiming Mr. Shimogori
16 represented that ICanPay is a legal, legitimate, reliable, and transparent credit card
17 processing solution.) Clearly, the crux of Plaintiff's claim is that it relied on statements about
18 the general quality of services; but any such representations constitute non-actionable
19 puffery and opinion. Moreover, Plaintiff has failed to show any justifiable reliance or
20 resulting damages above breach of contract claims. Thus, there is at least a reasonable
21 possibility that Defendants will prevail on this claim.

22 **2. Defendants intend to prevail on the conversion claim.**

23 Conversion is the wrongful exercise of dominion over the property of another; the
24 claim requires: (1) ownership or right to possession of property at the time of conversion,
25 (2) defendant's conversion by a wrongful act or disposition of property rights, and (3)
26 resulting damages. *Avidor v. Sutter's Place, Inc.*, 212 Cal. App. 4th 1439, 1452 (2013).

27 Normally, money cannot be converted. *McKell v. Washington Mut., Inc.*, 142 Cal.
28 App. 4th 1457, 1491 (2006). Rather, conversion claims involving money are limited to



1 cases where defendants have misappropriated or commingled specific funds held for the
2 benefit of others, e.g., where specific money was held for the plaintiff in an escrow account.
3 See *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP*, 150 Cal.
4 App. 4th 384, 395-96 (2007); *SP Investment Fund I LLC v. Cattell*, 18 Cal. App. 5th 898,
5 907 (2017); *Vu v. Cal. Commerce Club, Inc.*, 58 Cal. App. 4th 229, 235-36 (1997); *Avidor*,
6 212 Cal. App. 4th at 1453 (ruling for defendants as a matter of law because plaintiffs did
7 not have ownership or possessory rights in money at issue).

8 Plaintiff's conversion claim is barred by the economic loss doctrine as the requested
9 damages for conversion are identical to the claimed damages for the breach of contract
10 claims; and Plaintiff cannot obtain double recovery. Further, Plaintiff's conversion claim
11 fails because the money at issue was not a specific sum that Defendants were holding for
12 the specific benefit of Plaintiff; unlike in an escrow situation, Plaintiff did not have ownership
13 or possessory rights over the sums, and the Contract stated that Plaintiff would not be paid
14 unless money was received from the banks. Thus, this claim fails.

15 **3. Defendants intend to prevail on the money had and received claim.**

16 A "common count" for money had and received requires allegations that the
17 defendant is indebted to the plaintiff for a certain sum for money had and received by the
18 defendant for the use of the plaintiff; the claim applies where one person has received
19 money that belongs to another. See *Avidor*, 212 Cal. App. 4th at 1454.

20 Here, the count for money had and received relates to the tort claims that are
21 unfounded. Thus, Defendants also intend to prevail on this claim.

22 **4. Defendants intend to prevail on the Penal Code §496 claim.**

23 Penal Code §496 states:

24 (a) Every person who buys or receives any property that has been stolen or that
25 has been obtained in any manner constituting theft or extortion, knowing the
26 property to be so stolen or obtained, or who conceals, sells, withholds, or aids in
27 concealing, selling, or withholding any property from the owner, knowing the
28 property to be so stolen or obtained, shall be punished . . .

(c) Any person who has been injured by a violation of subdivision (a) or (b) may
bring an action for three times the amount of actual damages, if any, sustained
by the plaintiff, costs of suit, and reasonable attorney's fees.



1 This law is only intended to protect against distinguishable criminal-type scams
2 where defendants knowingly take stolen money from innocent parties and refuse to return
3 it. Plaintiff may try to analogize *Bell v. Feibush*, 212 Cal. App. 4th 1041 (2013), which
4 involved a civil claim under §496 for a consumer who was defrauded; however, that case
5 is drastically different as it involved a default, and the defendant intentionally induced an
6 individual consumer to loan him money based on the false premise that he owned the
7 trademark "Toughlove" and needed the money to settle a lawsuit in what he called the
8 "toughlove" industry; these representations were intentionally false as the so-called
9 toughlove business was a complete scam. *Id.* at 1043-44.

10 By contrast, this case involves a business in a high-risk area knowingly entering into
11 a Contract with ICanPay, a legitimate Hong Kong business, resulting in tens of millions of
12 dollars passing through the Contract during the contractual relationship. Plaintiff's
13 overbroad reading of §496 would allow essentially any aggrieved party to a contract to
14 bring a §496 claim (and seek treble damages and attorney's fees) to recover amounts
15 purportedly due under any contract; Penal Code §496 does not apply to recover money
16 lost in unsuccessful business ventures as is the case here. Thus, Plaintiff's claim will fail.

17 **5. Defendants intend to prevail on the breach of contract claim.**

18 The elements of a cause of action for breach of contract under California law are:
19 (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance,
20 (3) defendant's breach, and (4) the resulting damages to plaintiff. See *E.D.C. Techs., Inc.*
21 *v. Seidel*, 216 F. Supp. 3d 1012, 1015 (N.D. Cal. 2016).

22 Here, Plaintiff will not be able to prove its breach of contract claim (which is alleged
23 against ICanPay) because there is nothing owed to Plaintiff; and in fact, Plaintiff owes
24 money to ICanPay under the Contract. (Shimogori Decl. ¶5.)

25 **6. Defendants intend to prevail on the good faith and fair dealing claim.**

26 A claim for breach of the implied covenant of good faith and fair dealing requires
27 that: "(1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under
28 the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the



1 defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract;
2 and (5) the plaintiff was harmed by the defendant's conduct." *Rosenfeld v. JPMorgan*
3 *Chase Bank, N.A.*, 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010).

4 The plaintiff must allege specific facts establishing "a conscious and deliberate act"
5 by the defendant, which show that the defendant "lacked subjective good faith in the validity
6 of its act or the act was intended to and did frustrate the common purpose of the
7 agreement." *Rosado v. eBay Inc.*, 53 F. Supp. 3d 1256, 1267 (N.D. Cal. 2014); *Nasseri v.*
8 *Wells Fargo Bank, N.A.*, 147 F. Supp. 3d 937, 942 (N.D. Cal. 2015) (quoting *Careau & Co.*
9 *v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990)).

10 Notably, the cause of action requires "something beyond" the mere breach of a
11 contractual duty. See *Terpin v. AT&T Mobility, LLC*, 399 F. Supp. 3d 1035, 1050 (C.D. Cal.
12 2019) (quoting *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d
13 1371, 1394 (1990) (*Careau*)). If the claim's "allegations do not go beyond the statement of
14 a mere contractual breach and, relying on the same alleged acts, simply seek the same
15 damages or other relief" already claimed in a concurrent claim for breach of contract, the
16 claim should be disregarded as superfluous. *Nasseri*, 147 F. Supp. 3d at 943 (quoting
17 *Careau*, 222 Cal. App. 3d at 1395).

18 Here, Plaintiff will not be able to prove its good faith and fair dealing claim (which is
19 alleged against ICanPay) because it cannot show something more than a mere contract
20 breach. Further, as outlined above, there is nothing owed to Plaintiff; and in fact, Plaintiff
21 owes money to ICanPay under the Contract. (Shimogori Decl. ¶15.)

22 **7. Defendants intend to prevail on the unfair competition claim.**

23 Business and Professions Code §17200 *et seq.* provides for injunctions and
24 restitution for "unfair competition" involving California residents in California; the law does
25 not apply extraterritorially. See *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1209 (2011)
26 (holding law did not apply to claims for overtime work performed outside California for a
27 California-based employer by out-of-state plaintiffs); *c.f. Mazza v. American Honda Motor*
28 *Co., Inc.*, 666 F.3d 581, 593-94 (9th Cir. 2012).



1 Plaintiff's claim for unfair competition fails because Plaintiff is a foreign company,
2 and there is no harm in California. Moreover, unlike a consumer overpaying for a defective
3 product, Plaintiff is not seeking true restitution, but only disgorgement and contract
4 damages; the claim is essentially a pretext for inserting inflammatory and extortionate
5 allegations of purported violations of other laws (under which Plaintiff has no valid claim).

6 **8. The claims against the individual and foreign Defendants are improper.**

7 Ordinarily, a company is regarded as a separate and distinct legal entity from its
8 officers, directors, and stockholders. *Leek v. Cooper*, 194 Cal. App. 4th 399, 411 (2011)
9 (noting the corporate form will only be disregarded in narrowly defined circumstances and
10 when the ends of justice so require). To recover on an "alter ego" theory, a plaintiff must
11 allege sufficient facts to show a unity of interest and ownership as well as an unjust result
12 if the corporation is treated as the sole actor. *Id.* at 415. This theory usually only applies
13 where there are few shareholders and facts show they have not respected their
14 corporation's separate identity by, for example: (1) failing to contribute capital, issue stock,
15 or otherwise complete formation of the corporation, (2) using corporate assets as their own,
16 (3) commingling corporate funds with their personal funds, and (4) failing to observe
17 corporate formalities. See Haning et al., *Cal. Practice Guide: Pers. Inj. Ch. 2(II)-J*, ¶2:2020
18 (2018). *C.f. Hasso v. Hapke*, 227 Cal. App. 4th 107, 155 (2014).

19 Plaintiff states conclusory allegations to assert an alter ego theory of liability against
20 the individual Defendant Kotaro and other companies to connect them to the contracting
21 entity ICanPay. However, this is a breach of contract case where any conduct was between
22 ICanPay and Plaintiff only. Ultimately, the facts and law are insufficient to show a unity of
23 interest or failure to observe corporate formalities. Moreover, there is no unjust result for
24 requiring that Plaintiff bring a breach of contract claim (pursuant to the Forum Selection
25 Clause) against the entity that entered into the Contract with Plaintiff in Hong Kong. Thus,
26 Plaintiff will not prevail in its claims against these other Defendants (nor will it be successful
27 in its claims against ICanPay for the reasons stated above).

28 **D. The amount of the requested security is appropriate.**



1 The requested bond of \$400,000 is warranted. This case has questionable merit
2 and should have at least been brought in Hong Kong; and Defendants anticipate
3 recovering a high amount for costs, including for document production and technical
4 experts (which costs will be high given the large amount of processed transactions totaling
5 about \$30-50 million dollars), plus costs for depositions and court filings.

6 In addition, the Contract provides for Hong Kong law to apply to this dispute. See
7 also *Nedlloyd Lines B.V.*, 3 Cal. 4th at 464-68 (noting California courts treat choice-of-law
8 provisions similar to forum selection clauses, applying the law of the location designated
9 in a contract unless there is "no reasonable" basis for the selection or the law is contrary
10 to a fundamental policy of California); *Applera Corp. v. MP Biomedicals, LLC*, 173 Cal.
11 App. 4th 769, 792 (2009) ("Defendant should pay attorney fees to plaintiff as the prevailing
12 party as determined under Swiss law.") In any event, there is at least a reasonable
13 possibility of application of Hong Kong law given the Contract.

14 Under Hong Kong law, the legal fees of the prevailing party will be paid by the losing
15 party, in accordance with the "loser must pay" costs rule under English law. See *Westlaw*,
16 *Litigation and enforcement in Hong Kong: Overview, Practical Law Country Q&A 0-520-*
17 *6543*. The Hong Kong court, though, retains the discretion on the amount of costs to award
18 (which includes both legal fees and out of pocket costs). See generally, *Hong Kong Order*
19 *62, rule 3, RHC*. This case will involve a significant amount of discovery, the deposition of
20 international parties, potentially translators, and significant e-discovery, and an array of
21 expert witness; it is estimated that litigation of this matter to the end would result in
22 approximately \$200,000-\$500,000 in legal fees, based on the experience of ICanPay's
23 counsel in similar matters litigated in California. (Kronenberger Decl. ¶2.)

24 As such, the bond is appropriate given Defendants' reasonable possibility of
25 prevailing in this case and then being unable to recover from a foreign Plaintiff (i.e., an
26 online gaming company operating in a high-risk area based in the British Virgin Islands);
27 and the bond is within a reasonable amount that Plaintiff should be able to cover.

28 **E. A Stay is Warranted**

Pursuant to CCP §1030(e), the Court may order a stay in this case until 10 days after the motion is denied or, if granted, until 10 days after the required undertaking has been filed and the defendant has been served with a copy of it.

Here, a stay is warranted to ensure that Plaintiff does not impose additional fees and costs on Defendants in this meritless litigation prior to posting a bond.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Court require Plaintiff to post a bond of \$400,000 and corresponding stay.

Respectfully Submitted,

DATED: February 7, 2022

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