IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

LINDA CASS, an individual, NICOLE FITZER, an individual, and GRANDMA'S GROCERY, INC., an Oklahoma Corporation,	)	
Plaintiffs,	)	Case No. 13-CV-483-SPS
v.	)	
BALBOA CAPITAL CORPORATION, a California Corporation,	)	
Defendant.	)	

DEFENDANT, BALBOA CAPITAL CORPORATION'S, MOTION TO DISMISS

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COMES NOW the Defendant, Balboa Capital Corporation ("Balboa"), and pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3), and 12(b)(6) moves the Court to dismiss the claims filed by the Plaintiffs, Linda Cass ("Cass"), Nicole Fitzer ("Fitzer") and Grandma's Grocery, Inc. ("GGI") (collectively, Cass, Fitzer and GGI shall be referred to as "Plaintiffs"), In support hereof, Balboa would show the Court as follows:

INTRODUCTION

Cass and Fitzer are the owners of GGI, an entity who, upon information belief, was created for the purpose of running a grocery store in Quinton, Oklahoma, known as Grandma's Grocery. In 2011, Plaintiffs decided to open a Subway restaurant in their Grandma's Grocery location. As part of the opening of this business, Plaintiffs were required to purchase certain equipment from Doctor's Associates, Inc., to utilize in the new Subway location. As Plaintiffs did not have the initial capital to purchase this

equipment directly, they contacted Balboa, with whom they had another account, for the purposes of financing this equipment.

To that end, on September 12, 2011, Balboa and Plaintiffs entered into an Equipment Financing Agreement (the "Agreement") whereby Balboa agreed to finance the purchase of the equipment for $50,770.96. *See* Agreement, attached hereto as Exhibit "1." The Agreement contemplated that Plaintiffs would be assessed a 1% loan fee and would repay the loan in sixteen (16) quarterly payments of $4,239.34 with $1,412.78 due as a security deposit at signing. Pursuant to the terms of the Agreement, the first payment was due on February 5, 2012. *Id.* Additionally, this Agreement contained forum selection and choice of law provisions. In particular, the Agreement states that "it shall be governed by the law of the State of California" and that "[v]enue for any action related to this Agreement shall be in an appropriate court in Orange County, California..." *Id.*

A dispute subsequently arose as to the payment terms of the Agreement. Plaintiffs contended that their payments under the Agreement were to begin in May, 2012, while Balboa maintained that payments were due to begin in February, 2012, and that Plaintiffs were in default for failing to make payments as agreed. When a resolution could not be reached, Balboa repossessed the subject equipment. Furthermore, on July 12, 2012, Balboa filed a collection action in California state court (the "California Suit") to recover under the terms of the Agreement as well as Personal Guaranties (the "Guaranties") executed by Fitzer and Cass. *See* Guaranties, attached hereto as Exhibit "2."

Subsequent to the filing of the California Suit, on August 9, 2012, Plaintiffs filed a lawsuit in the District Court of Pittsburg County, State of Oklahoma, entitled *Linda Cass,*

et al. v. Balboa Capital, Case No. CJ-2012-00208 (the "Pittsburg Suit"). In the Pittsburg Suit, Plaintiffs alleged that Balboa wrongfully repossessed the equipment and, as a result, Plaintiffs were forced to close the Subway. It was clear that Plaintiffs' goal in litigating these claims in the Pittsburg Suit instead of the California Suit was to attempt to avoid the jurisdiction of the California court. On September 4, 2012, after being served, Balboa timely removed the Pittsburg Suit to the United States District Court for the Eastern District of Oklahoma pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 (the "Federal Suit"). This suit was assigned Case No. 12-CV-00373-FHS.

On September 12, 2012, Balboa moved to dismiss the Federal Suit arguing, among other things, that venue was improper and that Plaintiffs' claims should have been raised in the California Suit. Instead of responding to the motion, Plaintiffs moved to voluntarily dismiss their claims. On October 26, 2012, the Court entered its order granting this voluntary dismissal. *See* Order of Dismissal, attached hereto as Exhibit "3."

While the Federal Suit was pending, Balboa obtained default against Plaintiffs in the California Suit. *See* California Default, attached hereto as Exhibit "4." On March 29, 2013, Plaintiffs filed a Motion to Set Aside Default and Default judgment. *See* Motion to Set Aside, attached hereto as Exhibit "5." Following a hearing on this Motion to Set Aside the Court in the California Suit entered its Order vacating the default against Plaintiffs. However, this Default was conditioned on Plaintiffs paying Balboa's attorney's fees and costs incurred in the Pittsburg Suit and Federal Suit. *See* Order Vacating Default, attached hereto as Exhibit "6." To date, Plaintiffs have never paid the required award of fees and costs.

On September 18, 2013, Cass and Fitzer filed Chapter 7 Bankruptcy in the United States Bankruptcy Court for the Eastern District of Oklahoma. On October 24, 2013, while their bankruptcies were still pending, Plaintiffs filed the instant action. On January 8, 2014, Cass and Fitzer received their discharges under 11 U.S.C. § 727. Thereafter, on February 18, 2014, Plaintiffs finally caused the Complaint to be served on Balboa.

Balboa asks for dismissal of Plaintiffs' claims on several grounds. First, pursuant to Fed. R. Civ. P. 12(b)(3), the venue for the instant case is improper because of the clear and unambiguous forum selection clause contained in the Agreement. Second, even absent the forum-selection clause, discretionary considerations under the United States Supreme Court case of *Colo. River Water Conserv. District v. United States*, 424 U.S. 800 (1976), warrant requiring Plaintiffs to assert their claims as counterclaims in the California Suit. Third, neither Cass nor Fitzer have standing to assert claims against Balboa. Finally, pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs' claims for conversion, intentional infliction of emotional distress, tortious interference, negligence, and defamation fail to state a claim upon which relief may be granted. For these reasons, Plaintiffs' claims should be dismissed.

ARGUMENT AND AUTHORITY

I. THIS ACTION SHOULD BE DISMISSED AS VENUE IS IMPROPER IN OKLAHOMA.

A. The Agreement Contains a Forum Selection Clause which Warrants Dismissal.

Fed. R. Civ. P. 12(b)(3) provides that a party may move to dismiss a lawsuit which is brought in an inappropriate venue. In the present case, the terms of the Agreement

required both Balboa and Plaintiffs to bring any claims "related to [the] Agreement" in the appropriate court of Orange County, California. *See* Agreement. Based on this contractual obligation, venue is clearly not proper in this Court and, therefore, dismissal is proper.

"On a Rule 12(b)(3) motion, the Court may consider matters outside the pleadings…" *Prism Corp. v. Buray Energy Int'l*, 2011 WL 5509036 at * 2 (N.D. Okla., Nov. 10, 2011). "A forum selection clause is presumed to be valid and the burden is on the party resisting enforcement to show that enforcement of the clause would be unreasonable under the circumstances." *Id.* "The party resisting enforcement of a forum selection provision carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be unreasonable and unjust under the circumstances." *Id.* (internal quotations omitted).

In the present case, there is no doubt that the forum selection provision contained in the Agreement is valid and binds the parties. The Agreement was signed by Cass on behalf of GGI and the forum selection provision is clearly set forth on page two of the Agreement, which Cass initialed. *See* Agreement. Furthermore, Cass and Fitzer each signed the Guaranties wherein they guaranteed prompt performance "of any and all obligations" of GGI under the Agreement, which includes the obligation to bring suit only in Orange County, California. *See* Guaranties. Based on these documents, Plaintiffs are required to bring all claims related to the Agreement in Orange County, California.

It is also apparent that the Plaintiffs' claims "relate" to the Agreement for the purposes of the forum selection clause. While Plaintiffs' claims are numerous, each one

contains a common theme: they are based upon what Plaintiffs perceive as Balboa's failure to adhere to the terms of the Agreement. Accordingly, it cannot be argued that the Plaintiffs' claims do not relate to the Agreement for the purposes of the forum selection clause. *See, e.g., P&P Indust. Inc. v. Sutter Corp.*, 179 F.3d 861, 871 (10th Cir. 1999) (holding that where an arbitration provision covered all claims "arising out of" or "related to" a contract, the arbitration provision covered tort claims as well).

Finally, no colorable argument can be made that enforcement of forum selection clause would somehow be unjust or unreasonable under the circumstances. Plaintiffs have already retained counsel in California to represent them in the California Suit. Accordingly, Plaintiffs have shown their capability and willingness to litigate issues in California.

For all of the foregoing reasons, the instant case should be dismissed for improper venue based on the forum selection clause contained in the Agreement.

B. Dismissal is Proper Due to the Pending California Action.

Even in the absence of the forum selection provision contained in the Agreement, dismissal of this action is warranted because of the pending California Suit. As noted above, Balboa filed the California Suit on July 12, 2012, well before the instant action was filed. Furthermore, there is no doubt that pursuant to Cal. Civ. Proc. Code § 426.30(a), the claims brought in this matter by Plaintiffs would be compulsory counterclaims in the California case.

Pursuant to Section 426.30(a), a defendant must file a counter-claim if it is a "related cause of action." A cause of action is "related" for the purposes of this section if

it "arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." *Align Tech. Inc. v. Bao Tran*, 102 Cal. Rptr. 3d 343, 351 (Cal. Ct. App. 2009). In the present case, there is no doubt that Plaintiffs' claims arise out of the same "transaction, occurrence, or series of transactions or occurrences" as Balboa's claims related to default under the Agreement. In both cases, the claims turn upon (1) the terms of the Agreement; (2) the dispute related to the terms of the payment under the Agreement; (3) the subsequent repossession of the equipment under the Agreement; and (4) whether Balboa acted within the bounds of the Agreement. However, despite the fact that the Plaintiffs' claims would be compulsory in the California Suit, it is clear that Plaintiffs are simply trying to avoid the California court's jurisdiction and the award of attorney's fees already granted there by bringing their claims in this Court. This blatant forum-shopping should not be condoned.

The United States Supreme Court in *Colo. River Water Conserv. District v. United States*, 424 U.S. 800 (1976) determined that, in certain instances, where parallel actions are pending in both state and federal court, the federal court should defer to the state Court to resolve the issues between the parties. The decision of whether or not to defer to the state Court action is based on "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* at 817 In determining whether or not to dismiss and defer to a state court, the Supreme Court has listed eight factors which should be considered: (1) whether the state court assumed jurisdiction over any property; (2) whether the federal forum is less convenient for the parties; (3) avoidance of piecemeal litigation; (4) the order in which jurisdiction

was obtained; (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction. *Id.* at 818.

It is clear in the present case that these factors weigh in favor of dismissal. Jurisdiction was clearly obtained by the California court nearly a year and a half prior to the filing of Plaintiffs' claims. Furthermore, Balboa and Plaintiffs have already litigated issues relating the default entered in the California Suit. In addition, by virtue of the Agreement and Guaranties, the claims of the parties are principally governed by California law, not Federal law, and the state court action is more than sufficient to protect Plaintiffs' rights. Finally, there is concurrent jurisdiction between the courts, and deference to the California Suit will help to avoid piecemeal litigation of issues that should be decided together. Accordingly, factors 3, 4, 5, 6, 7, and 8 weigh in favor of deference to the California state court action. The convenience of the parties favors neither forum as Oklahoma is an inconvenient forum for Balboa, while California is an inconvenient forum for Plaintiffs. Accordingly, the only factor that even remotely weighs in favor of keeping the case in Oklahoma is that California has not exercised jurisdiction over any property. However, this factor is wholly insufficient to overcome the great weight in favor of deference.

Furthermore, deferring to the California state court would be consistent with other federal court decisions related to the first-to-file rule applicable between federal courts with parallel lawsuits. Under those cases, federal courts have repeatedly found in favor

of transferring a matter to the first-filed district where the claims at issue in the second case would have been compulsory counter-claims in the underlying action. *See Laughlin v. Edwards Bus. Machines, Inc.*, 155 F.R.D. 543, 545 (W.D. Va. 1994) (when party filed a second action rather than filing a compulsory counterclaim in the first action, the first suit should normally have priority); *Avaya Inc. v. Mitel Networks Corp.*, 460 F. Supp. 2d 690 (E.D. Va. 2006) (transfer warranted where claims in second suit would have been compulsory counterclaims in first suit); *MCS Music Am., Inc. v. Napster, Inc.*, 2007 WL 726835 at *2 (M.D. Tenn. March 6, 2007) (compulsory counterclaims properly transferred). The rationale for such decisions is apparent. If a party is allowed to avoid a Court's jurisdiction by raising new claims in another forum that should have been raised as compulsory counter-claims in the first forum, a party will have great incentive to shop for a more favorable forum in which to have their own claims heard. Here, that is exactly what Plaintiffs are attempting to do. They are trying to have what should have been compulsory counterclaims in the California Suit heard in Oklahoma so that they have a forum that is more convenient to them, potentially more friendly to local parties, and in which they can avoid an award of attorney's fees and costs given against them. Such forum-shopping should not be allowed and, accordingly, the Plaintiffs' claims should be dismissed pursuant to the Court's authority under *Colo. River Water Conserv.*

II. CASS AND FITZER LACK STANDING TO ASSERT THEIR CLAIMS IN THIS ACTION AND, THEREFORE, DISMISSAL IS PROPER UNDER FED. R. CIV. P. 12(B)(1)

A. Cass and Fitzer's Claims Were Part of their Bankruptcy Estates and, Accordingly, the Trustee of those Estates Had Exclusive Authority to Assert those Claims.

Fed. R. Civ. P 12(b)(1) authorizes the Court to dismiss cases where it lacks subject matter jurisdiction. Furthermore, Courts have routinely held that standing implicates a Court's subject matter jurisdiction. *See Unicredit Bank AG v. Jue-Thompson*, 2013 U.S. Dist. LEXIS 167818, *8 (D. Kan. Nov. 26, 2013). "The doctrine of standing limits who may bring a matter before the federal courts for adjudication." *See Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006). Standing is determined at the time the action is brought and, absent a showing of standing, a claim should be dismissed. *See Id.* at n. 2.

"One of the foundational principles of bankruptcy law is that the bankruptcy estate acquires all legal or equitable interests of the debtor in property as of the commencement of the case." *Satterfield v. City of Tulsa*, 2008 U.S. Dist. LEXIS 1645, *7 (N.D. Okla. Jan. 8, 2008). This estate includes not only tangible property, but also "any legal claims existing, whether or not filed in a court, at the time the bankruptcy petition was filed." *Id.* Accordingly, once bankruptcy is filed, "the bankruptcy trustee stands in the shoes of the debtor, and the trustee alone has standing to file legal claims belonging to the bankruptcy estate." *Id.* at *7, 8.

At the time this action was filed, there is no doubt that Cass and Fitzer's bankruptcy actions were still pending and no order had been entered by the bankruptcy court abandoning the subject legal claims from the bankruptcy estate. Accordingly, the trustee of Cass and Fitzer's bankruptcy estates was the only party with standing to bring these claims against Balboa. Because Cass and Fitzer lacked standing to bring these claims at the time this case was filed, their claims in this action should be dismissed.

B. Even Absent Cass and Fitzer's Bankruptcy Actions, the Claims At Issue, if they are Colorable, Belong to GGI.

In order to have standing to bring a claim, a plaintiff must be able to allege an injury that affects his own rights. *See J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745, 749 (7th Cir. 1993). A plaintiff "cannot rest his claim to relief on the legal rights or interest of third parties." *Id.* Accordingly, it is well settled that, "as a general rule, a stockholder cannot maintain a personal action against a third party for harm caused to the corporation…" *Guides Ltd. v. Yarmouth Group Property Mgmt. Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002). Similarly, "employees generally do not have standing to assert claims of the corporation…" *J.F. Shea Co., Inc.*, 992 F.2d at 749.

While, based on the allegations of the Petition, Cass and Fitzer may be shareholders and employees of GGI, they must have suffered an actionable injury, individually, and not simply in their capacity as a shareholder and/or employee, in order to maintain claims in this case. Plaintiffs' Petition makes clear that the injury was suffered by GGI and that any economic injury that Cass and Fitzer have suffered is solely in the capacity as a shareholder and/or employee. For instance, Plaintiffs' Petition states that the Subway franchise at issue was to be opened in Grandma's Grocery, owned by GGI, and that they used GGI to finance the equipment. *See* Complaint. Additionally, Plaintiffs' allegations all relate to actions that they contend were not warranted under the Agreement and, tellingly, the Agreement was solely between Balboa and GGI. *See Id.* at ¶¶ 10-30. Finally, the damages allegedly suffered by Plaintiffs are based upon the

closing of the Subway; a Subway that was owned by GGI. *See Id.* at ¶¶ 27, 28, 30(f), 31(m), 32(o) and (q), 34(z)(i)(1) and (2), 34(dd), 35(gg) and (ii), and 37(ll).

Based on all of the foregoing, it is clear that the claims at issue properly belong to GGI and not Cass or Fitzer. Any damages Cass and Fitzer have suffered are either lost profits from the close of the business (which they would be entitled to as shareholders of GGI) or are lost wages from the close of business (which they would have been entitled to as employees of GGI). Accordingly, because the law prohibits employees or shareholders from bringing claims which belong to a corporation, the claims of Cass and Fitzer should be dismissed.

III. PLAINTIFFS HAVE FAILED TO STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED AND, THEREFORE, DISMISSAL IS PROPER UNDER FED. R. CIV. P. 12(B)(6).

A. Standard of Dismissal.

When reviewing a motion to dismiss, the Court must take as true all of the challenged pleading's factual allegations together with all reasonable inferences that may be drawn therefrom. *See Curtis Ambulance of Fla. v. Bd. of County Commrs. of Shawnee, KS*, 811 F.2d 1371, 1374 (10th Cir. 1987). While the pleading standard of Fed. R. Civ. P. 8 does not require "detailed factual allegations" it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.*, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The two rules underlying this standard are that (1) a court does not need to accept allegations that are

legal conclusions as true and (2) only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 1949-50.

To this end, the Supreme Court outlined a two-step process for evaluating a motion to dismiss. First, a court should "identify[] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and second, assume the veracity of any well pleaded allegations and determine whether they plausibly give rise to an entitlement to relief. *Id.* As to the test of plausibility, the Court noted that there need be more than simply any set of facts which ***could*** give rise to the claims asserted. Instead, the facts must be sufficient to "nudge" the claim "across the line from conceivable to plausible." *Id.* at 1951.

B. Plaintiffs' Claims for Conversion, Intentional Infliction of Emotional Distress, Tortious Interference, Negligence, and Defamation Fail to State Claims Upon Which Relief May be Granted.

In addition to the grounds for dismissal noted above, Plaintiffs' claims for conversion, intentional infliction of emotional distress, tortious interference, negligence, and defamation fail to state claims upon which relief may be granted and are subject to dismissal under Fed. R. Civ. P. 12(b)(6).

It is important to note that both the Agreement and the Guaranties contain choice of law provisions determining that California law governs. *See* Exhibits "1" and "2." While Plaintiffs' claims are not for breach of contract, but for torts related to the Agreement, determination of Plaintiffs' tort claims is closely related to the Agreement because they necessarily involve interpretation of the Agreement and whether Balboa's actions were justified thereunder. Accordingly, in such circumstances, the choice of law

provision covers Plaintiffs' tort claims as well and California law applies. *See Matson Logistics LLC v. Smiens*, 2012 WL 2005607 at *4 (D. Minn. June 5, 2012) ("A narrowly tailored contractual choice of law provision applies to contract claims as well as tort claims 'closely related' to the terms of the contract.") [1] As will be shown below, Plaintiffs' claims are insufficient as a matter of law.

1. Conversion.

In order to prove conversion, Plaintiffs must allege that: (1) they have a right to possession of the property at the time of conversion; (2) that Balboa converted the property by wrongful act or disposition of property rights; and (3) damages. *See Haro v. Ibarra*, 103 Cal. Rptr. 3d 340 (Cal. Ct. App. 2009). Furthermore, conversion requires a showing that the converter has applied the property to its own use. *Id.*

In the present case, Plaintiffs' conversion claims not only fail to establish the elements of conversion under California law, they also fail the plausibility test of *Iqbal*. Plaintiffs do not allege that Balboa converted the equipment financed under the Agreement. Instead, Plaintiffs allege that Balboa converted the very Subway business itself by allegedly failing to compromise the dispute and allegedly drafting payments under the Agreement from the wrong account. *See* Complaint at ¶ 30(e). Such a claim is simply nonsensical. There are no allegations that Balboa actually took over the Subway business and began running it by themselves. Indeed, by Plaintiffs' own admissions, the Subway was closed by them following repossession of the equipment, not by any take-

[1] The Guaranties not only contain their own choice of law provisions, but by virtue of the fact that they obligate Cass and Fitzer to the terms of the Agreement, California law governs their claims as well.

over of the Subway by Balboa. *Id.* at ¶ 27. For these reasons, Plaintiffs' claims are insufficient to state a cause of action for conversion.

2. Intentional Infliction of Emotional Distress.

In order to prove intentional infliction of emotional distress under California law, Plaintiffs must allege: (1) extreme and outrageous conduct made with the intent of causing, or with reckless disregard of the probability of causing, emotional distress; (2) the Plaintiffs actually suffered such extreme emotional distress; and (3) causation. *See Wilson v. Hynek*, 144 Cal. Rptr. 3d 4, 11 (Cal. Ct. App. 2012). Furthermore, California courts have dismissed claims for intentional infliction of emotional distress where nothing more than a creditor/debtor relationship existed between the parties. *Id.* at 12.

As an initial matter, any claim for intentional infliction of emotional distress is simply not capable of being asserted by GGI, an entity which is not capable of experiencing emotions. Accordingly, GGI's claims for emotional distress should be dismissed. As to the claims of Cass and Fitzer, it is clear that such claims are not actionable under California law because the claims arise out of nothing more than a debtor/creditor relationship.

In the case of *Wilson v. Hynek*, the Plaintiffs sued for emotional distress because the defendants made various allegedly coercive statements to convince the Plaintiffs to use their home as collateral for a loan, then subsequently foreclosed. *Id.* at 6. The court found that, as a matter of law, these allegations were insufficient to state a claim for emotional distress because none of the events alleged would be considered outrageous. *Id.* at 12. More particularly, the court noted that there were no allegations that the

defendants "threatened, insulted, abused or humiliated the [plaintiffs]" and, accordingly, no claim could be raised. *Id.* The instant matter is no different. The sum total of Plaintiffs' allegations against Balboa is that (1) they repossessed property that Plaintiffs allege they had no right to take; and (2) they allegedly made statements to convince Plaintiffs to make payment on an admittedly valid obligation. These facts simply do not rise to the level of outrageous conduct as a matter of law. There were no threats, insults, abuse or humiliation. Furthermore, the conduct at issue, though Plaintiffs allege it was wrongful, is nothing more than a dispute based on a creditor/debtor relationship. Accordingly, as a matter of law, Plaintiffs fail to plausibly state a claim for intentional infliction of emotional distress. *Id.*

3. Tortious interference.

Under California law, in order to show tortious interference, Plaintiffs must allege: (1) that a valid contract existed between them and a third party; (2) that Balboa knew of this contract; (3) that Balboa undertook some act designed to induce a breach of this contract; (4) that the contract was actually breached; and (5) resulting damage. *See Hahn v. Diaz-Barba*, 125 Cal. Rptr. 3d 242, 258 (Cal. Ct. App. 2011). The elements for interference with prospective economic advantage are identical, except it must be shown that there was an economic relationship between Plaintiffs and some third-party with the probability of future economic benefit. *See Plummer v. Day/Eisenberg, LLP*, 108 Cal. Rptr. 3d 455, 465 (Cal. Ct. App. 2010).

As an initial matter, the claims for tortious interference are not properly assertable by Cass or Fitzer. This is because the harm claimed from Balboa's alleged tortious

interference is the loss of contracts with Subway and suppliers for Grandma's Grocery, as well as loss of potential future relations between those individuals. As has already been shown, the contract with Subway was conducted through GGI, not Cass and Fitzer individually. Similarly, any contracts with grocery suppliers for Grandma's Grocery would have been through GGI as well, the owner of Grandma's Grocery. Accordingly, Cass and Fitzer have not established plausible claims for tortious interference since they were not party to any of the contracts that were allegedly interfered with.

More importantly, however, the tortious interference claims lack any allegation that Balboa ***intentionally*** interfered with Plaintiffs' contractual rights. *See Hahn* 125 Cal. Rptr. 3d at 258 (must show that the defendant undertook some act designed to interfere with a contract). Instead, Plaintiffs appear to allege that any breach of the contracts in question was merely incidental to the actions of Balboa in repossessing the equipment. In other words, Balboa did not intend to interfere with these contracts, instead it only intended to repossess the equipment and, as a result, these contracts were breached. These allegations are insufficient as a matter of law to state a claim for tortious interference and Plaintiffs' claims should be dismissed.

4. Negligence.

As with negligence claims in Oklahoma, pursuant to California law, negligence is not properly pled if there is no duty owed to the Plaintiff or if there is no breach of any duty. *See Thomas v. Stenberg*, 142 Cal. Rptr. 3d 24, 30 n. 4 (Cal. App. Ct. 2012). Furthermore, whether a duty exists is a pure question of law for the court. *Id.* at 29.

In the present case, Plaintiffs allege a breach of three duties: (1) a duty to properly notify them of due dates for payments; (2) a duty to provide receipts of payment received; and (3) a duty to draft payments from Plaintiffs' account properly. These duties, if they exist, do not arise from the ether but, instead, must arise from some contractual relationship between the parties. Accordingly, Cass and Fitzer, again, have no standing to bring this claim as these duties, if they exist at all, are between GGI and Balboa directly. Accordingly, Cass and Fitzer's claims should be dismissed.

Secondly, as to the claims of GGI, the Petition is completely devoid of any allegations that the Agreement contained any duty to remind GGI of when its payments were due. Furthermore, the Petition is completely devoid of any allegations that Balboa was required under the Agreement to furnish receipts of payment. Accordingly, GGI's claims for negligence should be dismissed to the extent they are purported to exist upon a duty to notify it of the due date of its payments or a duty to provide any receipt.

5. Defamation.

In order to prove defamation, Plaintiffs must show that (1) Balboa published statements; (2) that those statements were false; (3) that those statements were about the Plaintiffs and (4) that Balboa failed to use reasonable care to determine the truth or falsity of its statements. *See Hecimovich v. Encinal School Parent Teacher Org.*, 137 Cal. Rptr. 3d 455, 470 (Cal. App. 2012). The Plaintiffs' claims fail to meet these requirements.

Plaintiffs' only allegations related to defamation are contained in paragraph 29 of the Petition which states:

> Not only did the Plaintiffs lose money from the Subway closing, but the controversy of the fast food chain in their small town closing created by the Defendant has also caused the sales at Grandma's Grocery and Simple Simon pizza to diminish because of the defaming rumors that Grandma's Grocery and Simple Simon pizza were also closed.

Complaint at ¶ 29. As an initial matter, there are no allegations in the Petition that would establish that Plaintiffs have any interest in Simple Simon pizza and that any alleged defamation as to Simple Simon pizza would have caused Plaintiffs any harm. Additionally, as already established, to the extent the injury was suffered by Grandma's Grocery, that injury is sustained by GGI only (by virtue of its ownership of Grandma's Grocery) and Cass and Fitzer may not bring a personal cause of action for the same.

Finally, and perhaps most importantly, Plaintiffs' claims are completely lacking in any allegation that Balboa actually published any statement. Instead, Plaintiffs' claims only show that, because the Subway closed, rumors circulated in the town that Grandma's Grocery and Simple Simon's pizza closed as well. There is no allegation that Balboa purposefully set out to tell the residents of Quinton, Oklahoma that Grandma's Grocery and Simple Simon's pizza were closing. For these reasons, Plaintiffs' Petition fails to state a claim for defamation.

CONCLUSION

Based on the foregoing, it is clear that Plaintiffs' claims should be dismissed. The Agreement states that this case must be brought in the appropriate court of Orange County, California. Furthermore, the presence of a previous state court action in California with nearly identical operative facts weighs in favor of the Court dismissing this action and requiring Plaintiffs to bring their claims in California. Even if this case

were properly brought, it is clear that Plaintiffs have not stated viable causes of action. Neither Cass nor Fitzer have standing to bring any claims, and the claims for conversion, intentional infliction of emotional distress, tortious interference, negligence and defamation are not properly pled. For all of the foregoing reasons, Balboa asks that the Plaintiffs' claims be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served using the CM/ECF system on the following counsel of record this 11th day of March, 2014:

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