OPINION NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: DOWENT FAMILY LLC, a Delaware Limited Liability Company, Debtor and Debtor-in-Possession.	Case No. 2:13-bk-12977 RK Chapter 11 **MEMORANDUM DECISION ON DEBTOR'S MOTION FOR ORDER DISALLOWING CLAIM OF EFPAR DEVELOPMENT, LLC [CLAIM NO. 2]** Trial: Date: December 18 and 19, 2014 Time: 9:00 a.m. Place: Courtroom 1675 255 East Temple Street Los Angeles, CA 90012

The contested matter of the Motion by the Debtor for an Order Disallowing the Claim of Efpar Development, LLC, ECF 215 (the "Claim Objection") in the above-captioned bankruptcy case came on for trial before the undersigned United States Bankruptcy Judge, on December 18 and 19, 2014. Todd C. Ringstad and Christopher A. Minier, of the law firm of Ringstad & Sanders LLP, appeared on behalf of Dowent Family LLC, the debtor and debtor-in-possession (the "Debtor" or "Dowent"). Saul Reiss, of Law Offices of Saul Reiss, P.C., appeared on behalf of claimant Efpar Development,

LLC ("Efpar" or "Claimant"). On February 27, 2015, the parties lodged proposed findings of fact and conclusions of law. ECF 375 and 376. The court has set a further hearing for a post-trial ruling which has been continued from time to time and is currently set for August 25, 2015 at 1:30 p.m.

The court, having considered the testimony and exhibits admitted into evidence by the court in connection with the trial, and having ruled on the parties' respective motions *in limine* and evidentiary objections to the direct trial declarations filed by the parties, and with good cause appearing therefor, the court in this memorandum decision sets forth its findings of fact and conclusions of law.

BACKGROUND

Findings of Fact ("FF") ¶¶ 1-51 were stipulated to by the parties as set forth in the Joint Pretrial Stipulation, which the court hereby adopts as some of its findings of fact.

1. This contested matter arises out of and is related to the voluntary, and currently pending, Chapter 11 bankruptcy case commonly known as *In re Dowent Family, LLC*, United States Bankruptcy Court Case No. 2:13-bk-12977 RK (the "Bankruptcy Case"), filed on February 4, 2013 (the "Petition Date"), in the United States Bankruptcy Court for the Central District of California, Los Angeles Division (the "Court"). This contested matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and (O).

2. Prepetition, the Debtor owned and managed a 3-unit commercial real property located at 3138-3148 West Pico Boulevard, Los Angeles, California 90019 (the "Property"). At all relevant times, Michelle Orh and/or Sahm Orh have been the owners and managing members of the Debtor.

3. At all relevant prepetition times during which the Debtor was trying to sell the Property, the tenant occupancy at the Property was as follows:

A. W&D Marketing, Inc., a California corporation, which is wholly owned by the Debtor's principals, Michelle and Sahm Orh, operated a "99-cent" discount store doing business as "Allmart" (hereafter "Allmart"). The written lease

between Allmart and the Debtor was executed by Sahm Orh on behalf of Allmart. Allmart occupied the majority of the Property (approximately 9,910 sq. ft., of space), and was the Debtor's main tenant and main source of income.

B. Oji Akop Nazari and Warren Akop, who are unrelated to the Debtor and its principals, operated a coin operated laundry at the Property, which did business as "Pico Coin Laundry" (hereafter "Pico Laundry"), pursuant to a written lease agreement with the Debtor. Pico Laundry occupied approximately 3,921 sq. ft., of space at the Property.

C. Pursuant to a written lease agreement between the Debtor and Michelle Orh, the Debtor's principals operated a restaurant known as "BBQ Fiesta" in the third unit at the Property. BBQ Fiesta occupied only a small amount of space at the Property (989 sq. ft.).

4. Desiring to sell the Property, on or about August 18, 2011, the Debtor executed a Commercial, Residential Income and Vacant Land Listing Agreement (the "Listing Agreement") with real estate broker David Wan / Mandarin Realty (collectively "Mandarin"). Mandarin represented the Debtor in all of its prepetition efforts to market and sell the Property.

5. In January 2012, the Debtor entered into a contract to sell the Property to Efpar for $3,800,000 (the "Sale Agreement"). The Sale Agreement required Efpar to deposit $50,000 into escrow, which constituted liquidated damages in the event that Efpar breached the Sale Agreement after the waiver of all contingencies. Efpar made the required $50,000 deposit into the escrow opened between the Debtor and Efpar at Commerce Escrow Co., to accomplish the sale of the Property. In its efforts to purchase the Property, Efpar was represented by real estate broker Julian Torkan / Madison Capital Group (collectively "Madison Capital").

6. Efpar borrowed the $50,000 that it used as an escrow deposit from SR Capital, Inc. ("SR Capital"). Efpar and SR Capital did not enter into any loan agreement or other document(s) reflecting the terms of the loan, and no prepetition documents exist

evidencing the terms of this loan. At no point prior to the commencement of the Debtor's bankruptcy case did Efpar ever inform the Debtor that it had borrowed the funds used to make this $50,000 deposit, or the terms upon which Efpar obtained this financing.

7. Robert Minsky and Iris Chae were the escrow officers at Commerce Escrow Co. ("Commerce Escrow"), primarily responsible for handling the escrow between Efpar and the Debtor.

8. The Sale Agreement required escrow to close within 90 days (*i.e.*, by April 7, 2012). If escrow did not close by such date, paragraph 8.8 of the Sale Agreement provided that:

> "The Closing shall occur on the Expected Closing Date, or as soon thereafter as the Escrow is in condition for Closing; provided, however, that if the Closing does not occur by the Expected Closing Date and said Date is not extended by mutual instructions of the Parties, a Party not then in default under this Agreement may notify the other Party, Escrow Holder, and Brokers, in writing that, unless the Closing occurs within 5 business days following said notice, the Escrow shall be deemed terminated without further notice or instruction."

9. After execution of the Sale Agreement, but prior to the April 7, 2012, escrow closing deadline, Efpar requested certain reductions in the contract purchase price of the Property, and Efpar also requested that instead of financing its purchase of the Property, in part, with a new loan in the amount of $2.5 million as required by the Sale Agreement, that the Debtor instead agree to give Efpar an All Inclusive Trust Deed ("AITD") for a majority of the purchase price.

10. On April 3, 2012, the Debtor sent a letter to Efpar's broker, Madison Capital, and Commerce Escrow, objecting to Efpar's efforts to get the Debtor to agree to reduce the sale price of the Property and to agree to give Efpar an AITD. In this letter,

the Debtor also alleged that Efpar had failed to timely waive its contingencies under the Sale Agreement.

11. Shortly before the deadline for closing escrow, the Debtor and Efpar entered into an Addendum to the Sale Agreement (the "Addendum"), which was fully executed on April 7, 2012. Among other things, the Addendum: (1) reduced the purchase price of the Property to $3,635,000; (2) provided that escrow would release Efpar's $50,000 deposit to the Debtor if the Debtor complied with all of its obligations under the Addendum; (3) extended the escrow closing deadline for 45 days following the execution of the Addendum (*i.e.*, until May 22, 2012); (4) provided for the Debtor to give Efpar an AITD in the approximate amount of $2.5 million for the period of one-year from the closing; and (5) gave Efpar the right to further extend the escrow closing deadline for an additional 45 days upon its deposit of an additional $50,000 into escrow, which would be released to the Debtor upon receipt by escrow.

12. Paragraphs 2 and 3 of the Addendum also provided that:

> "2. Within 3 days of mutual execution of this addendum, Seller shall provide Estoppel Certificates of all tenants occupying space at the subject property.
>
> 3. Within 3 days of mutual execution of this addendum, Seller shall provide a cancellation of the lease agreement between Seller and Sahm (Steve) Orh dba All Mart (Tenant). Said lease cancellation shall be effective immediately. Tenant shall occupy the space from the execution of this Escrow Amendment on a month to month basis as per a licensing agreement to be provided by Buyer. Seller and tenant agree that tenant must vacate the premises within month [sic] from the time which Buyer shall serve notice to vacate. Any adjustments to be prorated at closing."

13. On April 12, 2012, on the Debtor's behalf, Mandarin deposited with Commerce Escrow the following documents:

A. A Cancellation of Lease Agreement (the "Lease Cancellation"), executed by Allmart and the Debtor, that was effective at the close of escrow;

B. A Standard Estoppel Certificate – By Lessee executed by Michelle Orh for BBQ Fiesta;

C. A Standard Estoppel Certificate – By Lessee executed by Sahm Orh for Allmart; and

D. A Standard Estoppel Certificate – By Lessee for Pico Laundry that was not signed;

A dispute exists as to whether or not any of the foregoing documents fulfilled the obligations set forth under paragraphs 2 and 3 of the Addendum.

14. On or about April 16, 2012, David Zander submitted a back-up offer to purchase the Property for $3,660,000, which was memorialized in a written contract (the "Zander Agreement"). The Zander Agreement provided that it was the first back up offer to the Agreement and would become the operative contract for the sale and purchase of the Property upon cancellation of the Debtor's escrow with Efpar. Specifically, paragraph 15.D. of the Zander Agreement provides that "this is the 1st back up offer subject to the cancellation of [Efpar's] escrow #12-57820 with Commerce Escrow Co." The Zander Agreement was not signed at this time by any authorized representative of the Debtor. It was signed by the Debtor's broker only without the knowledge or authorization of the Debtor.

15. The above-described offers of Efpar and Zander to purchase the Property were the highest and best offers that the Debtor had received after the property had been marketed for sale for approximately 8 months by the Debtor's broker.

16. On April 17, 2012, Efpar's principal, Farid Efraim, sent an e-mail to Commerce Escrow stating that the Lease Cancellation was not acceptable to Efpar because it was not effective immediately as provided in the Addendum, and that the Debtor had failed to provide an Estoppel Certificate signed by Pico Laundry.

17. On or about April 23, 2012, Efpar and Dollar Tree Stores, Inc. ("Dollar Tree"), executed a Lease Agreement for Dollar Tree to lease from Efpar approximately 10,000 square feet of space at the Property.

18. Although the Debtor had requested that the Laundry Tenant sign an Estoppel Certificate, this tenant had refused to sign the certificate.

19. On April 24, 2012, the Debtor sent to Commerce Escrow an Estoppel Certificate for the Laundry Tenant that had been signed by Sahm Orh on behalf of this tenant, together with a copy of page 9 of the Debtor's lease with the Laundry Tenant.

20. On or about May 10, 2012, the Debtor sent to Efpar a Notice to Buyer to Perform (the "Notice to Perform") that had been signed by Sahm Orh for the Debtor.

21. On May 11, 2012, Efpar's principal, Farid Efraim, sent an e-mail to commerce Escrow and the Debtor's broker, stating that Efpar did not consider the Debtor's Notice to Perform to be valid because: (A) Debtor had not succeeded in providing an Estoppel Certificate that was actually signed by Pico Laundry itself; (B) the Lease Cancellation signed by Allmart and the Debtor was not effective immediately; and (C) the Debtor had not signed a License Agreement.

22. On May 19, 2012, the Debtor's broker, Mandarin, transmitted a License Agreement signed by the Debtor, and a signed copy of the Notice to Perform, to Commerce Escrow.

23. Escrow did not close by May 22, 2012. Efpar did not deposit an additional $50,000 into escrow prior to May 22, 2012. As a result, on May 24, 2012, via e-mail the Debtor's broker sent to Efpar's broker a document entitled "Cancellation of Contract, release of Deposit and Joint Escrow Instructions" (the "Cancellation") that was signed by the Debtor's principal, Sahm Orh. The Cancellation provided that the Debtor cancelled the Sale Agreement and associated escrow for Efpar's failure to close the sale by the May 22, 2012, deadline specified in the Addendum. The e-mail from the debtor's broker to which the Cancellation was attached, stated: Dear Julian, Enclosed please find the cancellation from the seller. If your buyer can put the money [sic] this week to close the

escrow on next Tuesday I still want your buyer to buy this property. Let me know A.S.A.P. Thanks. David Wan." This e-mail and attachment from the Debtor's broker were concurrently copied to Commerce Escrow.

24. On May 25, 2012, the Debtor's broker sent an e-mail to Commerce escrow officer Robert Minsky, with another copy of the Cancellation attached. A copy of this e-mail and attachment were concurrently sent to Efpar's broker. This e-mail provided: "Hi Robert, Attached the [sic] Cancellation Notice for Buyer's signature. Please confirm your receipt of same. Thanks you [sic]. Have a great long weekend! David Wan."

25. Efpar did not close escrow within 5 business days following the delivery of the Cancellation to Efpar, nor did Efpar deposit an additional $50,000 (or any other amount) into escrow during this period.

26. The Debtor did not transmit the Cancellation to Efpar with the intention of canceling the Sale Agreement and/or the escrow between the Debtor and Efpar. Instead, the Debtor sent the Cancellation with the intention of inducing Efpar to close escrow quickly. Both the Debtor and its broker believed at the time that Efpar would need to counter-sign the Cancellation for it to be effective in terminating the Sale Agreement and/or cancelling the escrow.

27. Efpar and its broker also did not believe that the Debtor's transmittal of the Cancellation was effective to terminate the Sale Agreement or the Escrow. Instead, Efpar and its broker believed that it would be necessary for Efpar to counter-sign the Cancellation for it to be effective.

28. On May 29, 2012, Efpar's broker emailed the Debtor's broker and the escrow officer, stating, in relevant part: "Good morning David and Robert: This email is to inform you that the buyer [Efpar] have [sic] no intention of cancelling this escrow. They would like to release $50,000 plus an additional $50,000 and extend the closing of escrow to July 6, 2012."

29. On the advice of its former legal counsel, in order to ensure a prompt sale of the Property in the event that its escrow with Efpar did not close quickly, on May 29,

2012, the Debtor executed the Zander Agreement and an escrow was open shortly thereafter between the Debtor and Zander. At the time of opening escrow, Zander deposited $100,000 into the escrow. The Debtor's broker also informed Zander that the Debtor had transmitted the Cancellation to Efpar on or about May 24, 2012, and provided a copy of the Cancellation to Zander on this day.

30. Despite sending the Cancellation to Efpar and executing the Zander Agreement, the Debtor never intended to terminate the Sale Agreement with Efpar. Instead, the Debtor intended to motivate Efpar to perform under the Sale Agreement and close the sale expeditiously. The Debtor believed that the Cancellation was not effective to terminate the Sale Agreement unless and until Efpar signed the Cancellation (which did not occur).

31. The Debtor and its broker also believed that unless and until Efpar executed the Cancellation, thereby terminating the Sale Agreement and the escrow, the Zander Agreement remained in a backup position subject to the termination of the Debtor's sale to Efpar.

32. On or about June 7, 2012, the Debtor entered into a Second Amendment to the Sale Agreement (the "Second Amendment") with Efpar. At the time of executing the Second Amendment, both the Debtor and Efpar believed that the Debtor's prior delivery of the Cancellation to Efpar did not result in a termination of the Sale Agreement, and that it would have been necessary for Efpar to have signed the Cancellation for it to have been effective to terminate the sale between the Debtor and Efpar.

33. At the time of the execution of the Second Amendment, and during the period of negotiation of the Second Amendment, the Debtor was represented by attorney Jae H. Kim of JHK Law Group (collectively "Kim"). During this time period, Efpar was represented by attorney Damon M. Juha of Freeman, Freemen & Smiley, LLC (collectively "Juha").

34. Among other things, the Second Amendment provided for a new closing

deadline of June 27, 2012, and required Efpar to put a second $50,000 into escrow, with the total $100,000 deposited by Efpar into the escrow to be released to the Debtor.

35. Efpar did subsequently deposit an additional $50,000 into escrow. Efpar borrowed the second $50,000 that it deposited into escrow from SR Capital. Efpar and SR Capital did not enter into any loan agreement or other document(s) reflecting the terms of the loan, and no prepetition documents exist evidencing the terms of this loan. At no point prior to the commencement of the Debtor's bankruptcy case did Efpar ever inform the Debtor that it had borrowed the funds used to make this second $50,000 deposit, or the terms upon which Efpar obtained this financing.

36. The $100,000 that Efpar deposited into the escrow was subsequently released to the Debtor.

37. In light of the Debtor's execution of the Second Amendment with Efpar, on or about June 13, 2012, the Debtor's broker informed Mr. Zander's broker of the Second Amendment and that the Zander Agreement remained a back-up offer that was subject to the cancellation of the Debtor's sale with Efpar.

38. On or about June 14, 2012, Zander initiated litigation against the Debtor, its principals and others in state court seeking, among other things, specific performance of the Zander Agreement. This litigation is known as *David Zander v. Dowent Family, LLC, Sahm Hyub Orh, Michelle Orh, David Wan, Mandarin Realty, Raymond Wan, Efpar Development LLC; and Farid Efraim, et al.,* L.A.S.C. Case No. BC485043 (the "Zander Lawsuit"). In connection with the Zander Lawsuit, Zander recorded two Notices of Pendency of Action (*Lis Pendens),* clouding title to the Property and preventing the Debtor from consummating its sale of the Property to Efpar or anyone else.

39. On or about July 24, 2012, Efpar initiated its own lawsuit against the Debtor, its principals and others in state court also seeking, among other things, specific performance of its Sale Agreement. This litigation is known as *Efpar Development, LLC v. Dowent Family, LLC, Sahm Hyub Orh, Michelle Orh, David Zander, David Wan, Mandarin Realty Corp, Raymond J. Wan, and Does 1 – 50, inclusive,* L.A.S.C. Case No.

BC488919 (the "Efpar Lawsuit"). In connection with the Efpar Lawsuit, Efpar recorded a Notice of Pendency of Action (*Lis Pendens),* further clouding title to the Property and preventing the Debtor's sale of the Property.

40. In the Zander Lawsuit, the Debtor brought a motion to expunge the *Lis Pendens* that had been filed by Zander. On September 28, 2012, Judge Rita Miller of the Los Angeles Superior Court entered an Order denying the Debtor's motion to expunge the Zander lis pendens.

41. Prior to resolution of either the Zander Lawsuit or the Efpar Lawsuit, on the Petition Date of February 4, 2013, the Debtor filed its voluntary chapter 11 bankruptcy petition.

42. On April 16, 2013, the Debtor filed a motion to sell the Property to Efpar [ECF 48], as well as a motion to reject the Zander Agreement [ECF 46].

43. On May 7, 2013, the Debtor's sale motion came on for hearing in the above-captioned Court. The Court determined that the sale of the Property would require an auction before the Court at which both Efpar and Zander would be permitted to bid and overbid, and an order establishing such bidding procedures was entered on June 7, 2013 [ECF 98]. The terms of the sale were that the successful bidder was required to pay the purchase price in cash or cashier's checks to the Debtor's counsel at the conclusion of the sale hearing. Efpar brought cashier's checks to the sale hearing drawn on the account of SR Capital in the total amount of $3,587,500.00 payable to Ringstad & Sanders, LLP Trust Account. Efpar did not inform the Debtor that it was obtaining financing to bring funds to the sale hearing, or the terms of such financing. There is no loan agreement or other contract evidencing the terms on which SR Capital provided this financing to the Efpar.

44. Post-petition, SR Capital has been attempting to collect from Efpar a total of $209,270.83, consisting of a "loan commitment fee" of $179,375.00 (calculated as 5% of the $3,587,500 that Efpar brought to the sale hearing), plus "30 days minimum interest" totaling $29,895.83 (calculated at an annual interest rate of 10% on the

$3,587,500 that Efpar brought to the sale hearing).

45. Zander was the successful bidder at the auction held before the Court, submitting the highest bid of $3,800,000 to acquire the Property. An order approving the sale motion was entered on July 2, 2013 [ECF 106] (the "Sale Order"), which approved the sale of the Property to Zander for $3.8 million.

46. Consistent with the Sale Order, the Debtor and Zander negotiated and executed a new purchase and sale agreement for the Property (the "Postpetition PSA"). The sale of the Property to Zander pursuant to the Sale Order and Postpetition PSA closed escrow on August 1, 2013.

47. On April 12, 2013, Efpar filed a proof of claim against the Debtor's bankruptcy estate, which asserts a partially secured, partially unsecured claim in the amount of $1,878,333.32 based upon "$100,000 deposit taken by Debtor & Breach of Purchase Agt" [Claim No. 2 on the Court's Claims Register] (the "Claim").

48. On April 8, 2014, the Debtor filed a Motion for an Order Disallowing the Claim of Efpar Development, LLC; Memorandum of Points and Authorities; and Declarations of Michelle Orh and Christopher A. Minier [ECF 215] (the "Claim Objection").

49. On April 29, 2014, Efpar filed its Opposition to the Debtor's Claim Objection [ECF 229] (the "Opposition).

50. On May 6, 2014, the Debtor filed its Reply to Efpar's Opposition [ECF 233] (the "Reply").

51. A portion of Efpar's Claim consists of $65,500.00 representing the alleged value of Efpar's principals, Farid Efraim and Keith Parry, expended in Efpar's efforts to acquire the Property and billed at a rate of $250.00 per hour. Efpar does not typically charge for the time of its principals or employees, does not typically charge an hourly rate for the time expended by its principals or employees, and Efpar's principals and employees do not generally keep records of their time expended on any project or matter.

In addition to the stipulated findings of fact, Nos. 1-51 above, the court makes further findings of facts as set forth below

52. On April 12, 2013, Efpar filed a proof of claim against the Debtor's bankruptcy estate, which asserts a partially secured, partially unsecured claim in the amount of $1,878,333.32 based upon "$100,000 deposit taken by Debtor & Breach of Purchase Agt" [Claim No. 2 on the Court's Claims Register] (the "Claim"). *FF ¶ 47; Dowent Trial Exhibit 24*. On April 8, 2014, Dowent filed the Claim Objection. ECF 215; *FF ¶ 48*. On April 29, 2014, Efpar filed its Opposition to the Debtor's Claim Objection. ECF 229; *FF ¶ 49*. On May 6, 2014, Dowent filed its reply to Efpar's opposition. ECF 233; *FF ¶ 50.*

53. The initial Sale Agreement, which was executed on January 9, 2012, provided for Efpar to purchase the Property for $3,800,000, with $1,300,000 in cash and $2,500,000 as a new loan. The Sale Agreement also required a $50,000 escrow deposit, Dowent to provide Efpar with estoppel certificates the existing tenants, and listed the closing date as "90 days or sooner", by April 7, 2012. *Dowent Trial Exhibit D-1; Efpar Trial Exhibit C-1.*

54. The Addendum, executed on April 7, 2012, modified the Sale Agreement and reduced the purchase price to $3,632,000. The Addendum also required Dowent to provide estoppel certificates within three days, listed a closing date of forty five days from the execution of the Addendum, and allowed Efpar to extend the closing by forty five days with an additional deposit of $50,000. *Dowent Trial Exhibit D-3; Efpar Trial Exhibit C-2.*

55. The Second Amendment, which was signed by all parties on June 7, 2012, further amended the Sale Agreement. It listed the closing date as June 27, 2012 and required Efpar to deposit an additional $50,000 within one day. *Dowent Trial Exhibit D-19; Efpar Trial Exhibit C-11*. As the parties expressly acknowledged in the Second Amendment, they entered into the Second Amendment to resolve certain disputes that arose from performance under the prior agreements to sell the Property to Efpar, which

is corroborated by the exchange of email correspondence on behalf of the parties through their real estate professionals and attorneys as well as their principals. *Id; Efpar Trial Exhibits C-4 – C-11.*

56. Dowent has acknowledged at trial that Efpar is entitled to the return of a first deposit of $50,000 on or about January 13, 2012 and a second deposit of $50,000 on or about June 8, 2012, which were made into escrow, and thus, Efpar has general nonpriority (general) claims in these amounts. *See Notice of Lodgment and [Proposed] Findings of Fact and Conclusions of Law in Bankruptcy Case re: Debtor's Objection to the Claim of Efpar Development, LLC [Claim No. 2] ("Dowent's Proposed Findings of Fact"), filed on February 27, 2015,* ECF 375 at 16, *FF ¶¶ 54 and 55*. The court hereby adopts these admissions of Dowent as factual findings.

ANALYSIS

Burden of Proof

Section 501(a) of the Bankruptcy Code provides that a creditor may file a proof of claim. 11 U.S.C. § 501(a). Section 502(a) of the Bankruptcy Code provides that a claim, proof of which is filed under section 501, is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). Section 502(b) provides that, if an objection to a proof of claim is made, the court, after notice and a hearing, shall determine the amount of such claim. 11 U.S.C. § 502(b). Rule 3001(f) of the Federal Rules of Bankruptcy Procedure provides that a proof of claim shall constitute *prima facie* evidence of the validity of and amount of the claim.

As the United States Court of Appeals for the Ninth Circuit has stated, "the allegations of the proof of claim are taken as true" and the claim is considered to be *prima facie* valid so long as "those allegations set forth all the necessary facts to establish a claim and are not self-contradictory. . . ." *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991), *quoting* 3 L. King, *Collier on Bankruptcy* § 502.02, at 502-22 (15th ed. 1991). The burden then shifts to the objector "to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim

themselves." *Id*. However, "the ultimate burden of persuasion is always on the claimant." *Id*.; *accord, In re Consolidated Pioneer Mortgage*, 178 B.R. 222, 226 (9th Cir. BAP 1995) ("If the objector produces sufficient evidence to negate one of more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. The burden of persuasion is always on the claimant.") (citations omitted).

Here, Dowent did not dispute that, assuming the allegations set forth in the claim are taken as true, the claim was sufficient to establish its *prima facie* validity. However, the evidence in support of Dowent's objection to the claim was sufficient to negate the *prima facie* validity of Efpar's claim to revert the ultimate burden of proof to Efpar to establish the validity and amount of its claim by a preponderance of the evidence. As set forth in the findings of fact herein, Efpar has met its ultimate burden of proving the validity of a claim for breach of contract by a preponderance of the evidence, but as discussed herein, it has not proven its claim for damages, except for the specific exceptions noted herein.

Contract Formation

The essential elements of a contract are: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. California Civil Code §§ 1549 ("A contract is an agreement to do or not to do a certain thing.") and 1550 ("It is essential to the existence of a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause of consideration."); *see also, Marshall & Co. v. Weisel*, 242 Cal.App.2d 191, 196 (1966), *citing,* California Civil Code § 1550.

The parties first entered into a contract to sell the Property in January 2012 when they signed the Sale Agreement. *FF ¶ 5; Dowent Trial Exhibit D-1; Efpar Trial Exhibit C-1*. This agreement was a valid contract because (1) the parties were capable of contracting, (2) both parties consented, evidenced by signatures of their respective representatives, (3) the contract had a lawful object — the purchase and sale of real

property, and (4) there was sufficient consideration — Efpar agreed to pay Dowent $3,800,000 for purchase of the property. *Id.*

On April 7, 2012, the parties entered into the Addendum, which altered various terms of the Sale Agreement, including the purchase price and an extension of the closing deadline. *FF ¶ 11; Dowent Trial Exhibit D-3; Efpar Trial Exhibit C-2*. The Addendum was a valid contract because (1) the parties were capable of contracting, (2) both parties consented, evidenced by signatures of their respective representatives, (3) the contract had a lawful object — the purchase and sale of real property, and (4) there was sufficient consideration — Efpar agreed to pay Dowent $3,650,000 for purchase of the property, and the parties agreed to modify the purchase price and extend the time to close the purchase and sale transaction. California Civil Code §§ 1549 and 1550. The Addendum was not only a valid contract on its own under California Civil Code §§ 1549 and 1550, but as a contractual modification under California Civil Code § 1698(a) ("A contract in writing may be modified by a contract in writing."). *See also,* 1 Witkin, *Summary of California Law,* Contracts, § 968 at 1058 (10th ed. 2005 and 2014 Supp.).

57. On June 7, 2012, the parties entered into the Second Amendment. *FF ¶ 32. Dowent Trial Exhibit D-19; Efpar Trial Exhibit C-11.* In the Second Amendment, the Sale Agreement and the Addendum were referred together as the "Amended Agreement". *Id*., ¶ C. The Second Amendment, together with the "Amended Agreement", was then referred to as the "Agreement". *Id.,* ¶ 1. The Second Amendment was a valid contract because (1) the parties were capable of contracting, (2) both parties consented, evidenced by signatures of their respective representatives, (3) the contract had a lawful object — the purchase of real property, and (4) there was sufficient consideration — Efpar agreed to provide an additional deposit into escrow and make other concessions, while Dowent agreed to extend the closing date. *FF ¶ 32. Dowent Trial Exhibit D-19; Efpar Trial Exhibit C-11;* California Civil Code §§ 1549 and 1550. The Second Amendment was not only a valid contract on its own under California Civil Code § 1550, but as a contractual modification of the previously modified contract in the original

contract and Addendum pursuant to California Civil Code § 1698(a). As the parties expressly acknowledged in the Second Amendment, they entered into the Second Amendment to resolve certain disputes that arose from performance under the prior agreements to sell the Property to Efpar, which is corroborated by the exchange of email correspondence on behalf of the parties through their real estate professionals and attorneys as well as their principals and thus demonstrates that the parties were entering into a new contract which modified their prior contracts. *Id; Efpar Trial Exhibits C-4 – C-11.*

The court finds that as of June 27, 2012, the parties had a valid and enforceable contract between the parties consisting of the Sale Agreement as modified by the Addendum and the Second Amendment. California Civil Code §§ 1549, 1550 and 1698(a).

The Sale Agreement as Modified Was Breached by Dowent on June 27, 2012

The *wrongful,* i.e., the unjustified or unexcused, failure to perform a contract is a *breach.* 1 Witkin, *Summary of California Law,* Contracts, § 847 at 935 (10th ed. 2005 and 2014 Supp.), *citing Restatement of Contracts 2d,* §235(2); 23 *Williston on Contracts* § 63.1 (4th ed. 1993 and 2014 Supp.), §63:1 et seq. [other citations omitted]). "Any non-performance of a duty under a contract when performance is due is a breach." *Linden Partners v. Wilshire Linden Associates*, 62 Cal.App.4th 508, 531-532 (1998). "Any breach, total or partial, that causes a measurable injury, gives the injured party a right to *damages as compensation therefor."* 1 Witkin, *Summary of California Law,* Contracts § 852 at 938, *citing inter alia, Borgonovo v. Henderson*, 182 Cal.App.2d 220, 231 (1960).

The Second Amendment to the Sale Agreement called for closing to occur "no later than June 27, 2012, unless otherwise agreed to by Buyer and Seller." *Dowent Trial Exhibit D-19; Efpar Trial Exhibit C-11; see also, FF ¶ 34.* There is no evidence that the parties subsequently agreed to modify the closing date. *See Efpar Trial Exhibit C-16, Proof of Claim, filed on April 12, 2013. with attached copy of Verified First Amended*

Complaint for: (1) Specific Performance & Damages, etc., filed on December 20, 2012; Dowent Trial Exhibit D- 24 (same); see also, FF ¶ 39.

Efpar performed under the terms of the contract by depositing an additional $50,000 into escrow. *FF ¶¶ 34-36.* Dowent did not perform under the terms of the contract because it did not convey the Property to Efpar by June 27, 2012, the escrow closing deadline under the Sale Agreement as modified by the Second Amendment. *Id.* It is undisputed that Dowent did not convey the Property to Efpar under the Sale Agreement as modified by the Second Amendment by the deadline or at any time, as shown by the fact that Dowent eventually conveyed the Property to Mr. Zander pursuant to this court's Sale Order entered on July 2, 2013. *Id.; see also, FF ¶¶ 38-43 and 45; Order on Motion by Debtor for an Order: (1) Approving Sale of Real Property Free and Clear of Liens, Interests and Encumbrances, etc. ("Sale Order"), entered on July 2, 2013,* ECF 106; *Efpar Trial Exhibit C-16, Proof of Claim, filed on April 12, 2013. with attached copy of Verified First Amended Complaint for: (1) Specific Performance & Damages, etc., filed on December 20, 2012; Dowent Trial Exhibit D-24 (same); Dowent Trial Brief,* ECF 355 at 10-24 (setting forth Dowent's litigation position at trial that its obligation to perform and convey the Property to Efpar was absolved by its termination of the contract or excused by the doctrine of impossibility due to Mr. Zander's recordation of *lis pendens* in his state court action for specific performance and breach of contract). Therefore, the court finds that Dowent breached the agreement on June 27, 2012 because Efpar performed under the agreement at the time specified for performance while Dowent did not.

Dowent in its trial brief argues that there was no breach and puts forth two primary theories supporting that contention. *Dowent Trial Brief*, ECF 355 at 10-24. First, Dowent argues that the lease was effectively terminated on May 29, 2012 — five days after Dowent sent Efpar the Cancellation. *Dowent Trial Brief*, ECF 355 at 4:10-21 and 11:3-17. Second, Dowent argues that the California law doctrine of impossibility excuses Dowent's performance under the contract. *Id.* at 20:13-24:5. As explained below, the

court has analyzed both of these defenses, determines that both lack merit and rejects them.

Having determined that Dowent breached its contract with Efpar, the court must determine the date of the breach because such date is relevant to measuring damages from the breach, if any, as discussed below. *See* California Civil Code § 3306. Efpar argues that the date of breach was the date the agreement "was rejected in the bankruptcy proceedings." *Efpar Trial Brief*, ECF 357 at 3:4-6 and 11:14-17; *see also, Notice of Lodgment and The Claimant Efpar Development, LLC's [Proposed] Findings of Fact and Conclusions of Law, filed on February 27, 2015,* ECF 376 at 15, ¶ 70 ("The breach of the Purchase and Sale Agreement as Amended by the Second Amendment occurred on July 2, 2013 when this Court entered its order approving the sale of the property to Mr. Zander for $3,800,000.00. Stipulated Fact 45."). Thus, Efpar is referencing the court's order entered July 2, 2013, approving the sale of the Property to Zander. *Id.; FF ¶ 45*; *Sale Order,* ECF 106. The specific language of that order read: "Upon entry of this Order, the prepetition Standard Offer, Agreement and Escrow Instructions for Purchase of Real Estate, dated January 9, 2012, between the Debtor and Efpar, and all addendums, amendments and brokerage commission agreements related thereto, shall be rejected by the Debtor pursuant to Bankruptcy Code § 365(a)." *Sale Order*, ECF 106 at 8, ¶ 21. However, that any contractual obligations that Dowent may have owed to Efpar may have been rejected by operation of the sale order in June or July 2013 for purposes of the Bankruptcy Code does not necessarily preclude any factual finding that the contract between Dowent and Efpar was not breached earlier as the court has determined here as a factual matter based on applicable state contract law. *See* 11 U.S.C. § 365(a) and (g): 3 Resnick and Sommer, *Collier on Bankruptcy,* ¶ 365.10 at 365-78 – 365-79 (16th ed. 2015) ("Rejection and section 365(g)'s deemed breach do not affect the parties' substantive rights under the contract or lease . . . .") (footnotes omitted).

Efpar's proposed date of breach does not appear to the court to be supported by any legal or factual basis, but is calculated to maximize potential damages. *See* California Civil Code § 3306 (measuring "loss of bargain" damages for breach of contract of sale of real property to be the difference between the contract price and the fair market value on the date of the breach). This is further supported by Efpar's prior litigating position that a breach occurred sometime prior to July 24, 2012, the date when Efpar filed its complaint for specific performance and breach of contract against Dowent and its principals, the Orhs, in state court based on Dowent's failure to perform under the Sale Agreement. *See Efpar Trial Exhibit C-16, Proof of Claim, filed on April 12, 2013. with attached copy of Verified First Amended Complaint for: (1) Specific Performance & Damages, etc., filed on December 20, 2012; see also, FF ¶ 39.* Efpar's state court lawsuit was premised on an alleged breach of contract by Dowent in failing to perform the Sale Agreement as modified by the Second Amendment. *Id.* As alleged in Efpar's first amended complaint in the state court action, under the Second Amendment, the parties had agreed to close escrow under the Sale Agreement "no later than June 27, 2012," Dowent on June 25, 2012 made a request to Efpar to extend the escrow closing date of June 27, 2012 by 90 days, Dowent was informed on June 26, 2012 that Efpar was unwilling to extend the escrow closing date and Efpar was at the time of the first amended complaint and all times material ready, willing and able to perform all conditions of the Sale Agreement. *Id.* Thus, Efpar sued Dowent and its principals for specific performance and breach of contract on July 24, 2012. *Id.; FF ¶ 39.* The court also notes that Efpar's principal, Fred Efraim, testified in his direct trial testimony that the date of Dowent's breach was May 25, 2012, by stating in paragraph 33 of his trial declaration that "[a]s a result of the breach of the Purchase Agreement by its purported cancellation on May 25, 2012, the Debtor has caused Efpar damages in the diminution in value of the Property in the amount of $2,290,000." *Declaration of Fred Efraim in*

Support of Claimant Efpar Development, LLC's Claim [ECF 288] ("Efraim Declaration"), at 6, ¶ 33.[1]

For Efpar to now argue that the date of the breach by Dowent under the Sale Agreement is the date of the rejection under the bankruptcy sale motion on July 2, 2013 is somewhat disingenuous because it is contrary to Efpar's prior litigating position in state court as well as the underlying facts as discussed herein, not to mention the declaration of its principal, Mr. Efraim, which is in more in line with the factual evidence in this case showing that the breach occurred on June 27, 2012 when the escrow closing deadline passed and Dowent failed to perform under the Sale Agreement as modified by the Second Amendment.

Dowent on its part does not admit of any breach, but characterizes Efpar's argument as alleging that "breach of the Agreement occurred on approximately June 27, 2012, the escrow closing deadline under the Second Amendment." *Dowent Trial Brief* at 25:3-4. The court also notes that, at Dowent's request, its appraiser expert witness, Bradley Lofgren, valued the Property as of June 27, 2012, the date of the escrow closing deadline under the Sale Agreement as modified by the Second Amendment. *Declaration of Appraiser Bradley E. Lofgren, MAI, filed on November 26, 2014*, ECF 320 at 2, ¶ 5. Thus, Dowent's litigating position is that the date of any breach, assuming *arguendo* that there was a breach, to have been June 27, 2012 was correct.

For the foregoing reasons, the court determines that the date of Dowent's breach of contract under the Sale Agreement as modified by the Second Amendment was June 27, 2012, when it failed to perform by that date which was the escrow closing deadline under the contract.

Calculation of Damages for Breach of Contract

California Civil Code § 3300 provides for damages from breach of contract in general and states: "For the breach of an obligation arising from contract, the measure of

[1] The court acknowledges that at trial it sustained Dowent's objection to Mr. Efraim's testimony insofar the testimony was to value the Property, but the court considers that his statement regarding the time of breach is an admission by Efpar by its agent and principal that the date may be different than its position argued at trial.

damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

California Civil Code § 3306 specifically provides for damages from breach of a contract to convey real property and states: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be [1] the price paid, and [2] the expenses properly incurred in examining the title and preparing the necessary papers, [3] the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, [4] the expenses properly incurred in preparing to enter upon the land. [5] consequential damages according to proof, and [6] interest." With respect to "loss-of-bargain" damages under § 3306, such damages are to be measured by the difference between the contract price and the fair market value on the date of the breach. *Reese v. Wong*, 93 Cal.App.4th 51, 55-56 (2001)(citations omitted).

Under California law, the plaintiff has the burden of proof on damages from a breach of contract. *Amelco Electric v. City of Thousand Oaks*, 27 Cal.4th 228, 243 (2002), *citing,* 4 Witkin, *California Procedure,* § 476 at 570 (4th ed. 1997); *Carpenter Foundation v. Oakes*, 26 Cal.App.3d 784, 799-800 (1972). "It is elementary that a party claiming damage must prove that he has suffered damage and prove the elements thereof with reasonable certainty." *Carpenter Foundation v. Oakes*, 26 Cal.App.3d at 799-800 (citations omitted). Damages for a contract breach must be foreseeable. *Wynn v. Monterey Club*, 111 Cal.App.3d 789, 799 (1980), *citing inter alia, Hadley v. Baxendale,* 9 Ex. 341, 156 Eng.Rep.145 (1854) and California Civil Code § 3300. Contract damages are ordinarily limited to those within the contemplation of the parties when they entered into the contract or to those reasonably foreseeable by them at that time. *Reese v. Wong*, 93 Cal.App.4th at 60. "This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise." *Id., quoting Erlich v.*

Menezes, 21 Cal.4th 543, 550 (1999) (citation omitted).

Efpar is Entitled to Loss of Bargain Damages Based on Fair Market Value of Property at the Time of Breach, which Does Not Include the Dollar Tree Lease in the Calculation of Damages

Efpar contends that it suffered loss-of-bargain damages because the Property was allegedly worth between $5,665,000 and $5,925,000 on the date of the alleged breach, and Efpar contracted to purchase the Property for $3,635,000. *Declaration of Fred Efraim in Support of Claimant Efpar Development, LLC's Claim [ECF 288] (the "Efraim Declaration"*), at 6, ¶¶ 32-33 and 36. Efpar argues that the Dollar Tree Lease substantially increased the fair market value of the Property. *Id.* Efpar submitted the Declaration of Brandon Michaels in Support of Claimant Efpar Development, LLC's Claim [ECF 286] (the "Michaels Declaration") in support of this assertion. *Efpar Trial Brie*f, ECF 357 at 13:4-12; *Michaels Declaration* at 2, ¶¶ 2-6. Mr. Michaels testified that, at the time of the alleged breach of the Sale Agreement, the Property had a fair market value between $5,665,000 and $5,925,000. *Id*. His valuation of the Property assumed that the Dollar Tree Lease was in place. *Id*.

The court finds that Efpar failed to prove by a preponderance of the evidence consequential damages under California Civil Code § 3306 based on the value of the Property on the date of the alleged breach of contract by Debtor as $5,925,000 to $5,665,000 as it argued at trial. *See Efpar Trial Brief* at 13:4-11; *Efpar [Proposed] Findings of Fact and Conclusions of Law,* ECF 376 at 30:4-6 ("Claimant, Efpar is entitled to the full value of the difference between the value of the Property with the Dollar Tree lease in place and the purchase price of $3,635,000.00. The calculation of damages based on the evidence is $5,795,000-$3,635,000.00=$2,160,000.00."). Efpar has offered only the testimony of a real estate salesperson, Mr. Michaels ("Michaels Declaration" and trial testimony), and the testimony of its principal of Efpar (the Efraim Declaration and trial testimony) in support of its valuation of the Property. The court ruled at trial that it would exclude all Property valuation testimony given by Mr. Efraim

because: (i) he lacked the requisite qualifications as an expert witness on real property valuation under Federal Rule of Evidence 702 to render an opinion on this subject; (ii) Mr. Efraim's offered valuation testimony was not based on sufficient facts or data, nor the product of reliable principles and methods, as required to be admissible under Federal Rules of Evidence 702 and 703 pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 591-594 (1993); and (iii) Efpar failed to produce information and documentation underlying the bases of Mr. Efraim's valuation testimony to Debtor in response to its discovery requests. *Argument of Counsel on Dowent's Motion to Strike Valuation Testimony of Fred Efraim and Court's Ruling*, December 18, 2014 at 3:00-3:06 p.m.

Although the court admitted the expert witness testimony of Mr. Michaels, the court does not accord much weight to Mr. Michaels's valuation opinion because it was not credible or persuasive based on the following circumstances. Mr. Michaels is a California real estate salesperson, and not a licensed broker. *Trial Testimony of Brandon Michaels ("Michaels Trial Testimony")*, December 18, 2014 at 1:32-1:33 p.m. Mr. Michaels testified that he is not a licensed real estate appraiser, has never been a licensed real estate appraiser, and has never had any training or taken any classes in real estate valuation. *Michaels Trial Testimony*, December 18, 2014 at 1:33-1:35 p.m. Mr. Michaels testified that he did not prepare a written appraisal opinion for the Property. *Id.* Mr. Michaels also testified that he did not spend more than one hour preparing his valuation of the Property, and did not personally inspect the Property. *Michaels Trial Testimony*, December 18, 2014 at 1:42-1:44 p.m. Although Mr. Michaels's valuation of the Property was based on income that that was anticipated to be derived from the Dollar Tree Lease, he testified that he relied on a *pro forma* rental income projection that was prepared by Mr. Efraim, he did not independently verify the information contained in the income projection and he did not know whether the *pro forma* income statement was consistent with the actual rent that Efpar would have received under the Dollar Tree Lease. *Michaels Trial Testimony*, December 18, 2014 at 1:35 p.m. and 1:39-1:41 p.m.

Dowent asserts that the Property had a fair market value of $3,620,000 on the date of the alleged breach and submitted in support of this asserted value the Declaration of Appraiser Bradley E. Lofgren, MAI with his Real Estate Appraisal Report of the Property attached thereto. *Lofgren Declaration*, ECF 320. Mr. Lofgren concluded that the Dollar Tree Lease was in line with market rent, and, consequently, did not materially increase the Property's value. *Id*. at ¶¶ 12-15. The court does not necessarily agree with this specific part of Mr. Lofgren's opinion testimony as the court determines that the Dollar Tree Lease is not a proper consideration for valuing the Property in this case as discussed herein.

Mr. Lofgren is a California state licensed appraiser with approximately two decades of experience in the valuation of commercial real property, and he has previously been qualified as a real estate valuation expert in both state and federal court. *Lofgren Declaration*, ¶¶ 3-4, 6, and Exhibits 1 and 2 attached thereto; *Trial Testimony of Bradley Lofgren ("Lofgren Trial Testimony")*, December 19, 2014 at 12:37-12:46 p.m. In preparing his Appraisal Report, Mr. Lofgren personally inspected the Property and he, or members of his team, personally visited each of the real properties that were used to obtain comparable data used in the preparation of the Appraisal Report. *Lofgren Trial Testimony,* December 19, 2014 at 12:36 p.m. and 12:45-12:47 p.m. Mr. Lofgren spent seven to ten days of work in preparing his Appraisal Report of the Property. *Lofgren Trial Testimony*, December 19, 2014 at 12:47-12:48 p.m. Mr. Lofgren prepared his Appraisal Report of the Property using accepted commercial real estate appraisal methodology, and he calculated a market rent for the Property using accepted appraisal methodology. *Lofgren Declaration*, ¶¶ 7 and 11, and Exhibit 3 attached thereto; *Lofgren Trial Testimony*, December 19, 2014 at 12:41-12:47 p.m.

Mr. Lofgren concluded that the fair market value of the Property as of June 27, 2012, the date of the breach of the Sale Agreement, was $3,620,000. *Lofgren Declaration* at 3-4, ¶ 10, and Exhibit 3 attached thereto.

The court finds Mr. Lofgren's testimony with regard to the fair market value of the

Property as of June 27, 2012 to be credible because his valuation opinion was prepared in accordance with generally accepted valuation principles. Moreover, the opinion is consistent with actual market conditions as shown by an actual offer to purchase the Property in the Zander offer. *FF ¶¶ 14 and 15.* Mr. Zander initiated litigation against Debtor on June 14, 2012 in order to obtain specific performance of his offer to purchase the Property for $3,660,000. Mr. Lofgren's testimony, which values the Property at $3,620,000, is credible also because it is close to what the Property was valued through a competitive sales process before Debtor's bankruptcy case was filed and in the proceedings for the asset sale of the Property in this case. *FF ¶¶ 14, 15 and 45*.

The court determines that the Dollar Tree Lease is not a proper consideration in determining the Property's fair market value for purposes of computing damages for breach of contract under California Civil Code § 3306. As stated previously, Section 3306 provides that the proper measure of damages is the difference between the price agreed to be paid and the value of estate agreed to be conveyed "at the time of the breach." The Dollar Tree Lease would have gone into effect only upon sale of the Property to Efpar. Because the Property was never sold to Efpar, the Dollar Tree Lease never went into effect, and was a hypothetical contingency at the time of the breach not warranting inclusion in the computation of damages here. Accordingly, the court determines that for the purpose of calculating Efpar's damages, the value of the Property at the time of the breach does not include any alleged damages attributed to the Dollar Tree Lease.

Similarly, California Civil Code § 3306 provides that the proper measure of damages is the difference between the price agreed to be paid and "the value of the estate" agreed to be conveyed at the time of breach. The term "value" has been interpreted to mean "fair market value." *See, e.g.*, *Reese v. Wong*, 93 Cal.App.4th at 112 ("This court itself has recently described section 3306 as providing for 'loss-of-bargain damages' measured by the difference between the contract price and the fair market value on the date of the breach.")(citation omitted); *Greenwich S.F., LLC v.*

Wong, 190 Cal.App.4th 739, 753 (2010) ("Thus, section 3306 provides that the measure of damages for plaintiff is the difference between the contract price and the fair market value of the property at the time of the breach plus consequential damages."), *quoting* from the legislative history of California Civil Code § 3306; Miller and Starr, *California Real Estate,* § 34.50 (online ed. updated 2015) ("The 'value of the property' is its fair market value, which is measured by the highest price the property would command if offered for sale in the open market with a reasonable time allowed for the seller to find a purchaser who will buy with knowledge of all of the uses to which it may be put."), *citing inter alia, Royer v. Carter,* 37 Cal.2d 544, 550 (1951).

Here, the court does not need to conjure up a hypothetical buyer because there was an actual buyer, Zander, who made an offer to buy the property for $3,660,000 at about the time of the breach on June 27, 2012. *FF ¶ 15*. The parties have agreed as a stipulated fact that Zander's offer, along with Efpar's offer, "were the highest and best offers that the Debtor had received after the property had been marketed for sale for approximately 8 months by the Debtor's broker." *Id.* Based on the above-stated considerations, including evidence of actual market sales activity for the Property and Mr. Lofgren's valuation opinion, since the court determines that the preponderance of the evidence shows that the fair market value of the Property on June 27, 2012 (the escrow closing date under the Second Amendment and the date of Dowent's breach) was $3,660,000 and the Sale Agreement called for a purchase price of $3,635,000, the court thus finds that Efpar suffered "loss-of-bargain" damages in the amount of $25,000 for Debtor's breach of contract under California Civil Code § 3306.

No Award of Damages for "Lost Profits"

Alternatively, Efpar contends that its claim for breach of contract is in part attributed to damages of $1,570,391.00 resulting from lost "potential profits." *Efpar Trial Exhibit C-17-M.* As explained in its Exhibit C-17-M, the asserted damages for lost profits of $1,570,391.29 are based on sale of the Property based on a fair market valuation of the Property with the existing laundromat and restaurant tenant leases and the Dollar

Tree lease in place at $5,753,043.46 subtracting out the project costs for acquisition and sale of the Property of $3,895,000.00 and 5 percent cost of sale of $287,652.17. *Efpar Trial Exhibit C-17-M-2*

As previously stated, California Civil Code § 3306 provides that consequential damages are recoverable for a breach of contract to convey real property. Although lost profits are awardable as consequential damages, lost profits are normally awarded in situations where the buyer bought the property in order to resell it. *Greenwich S.F., LLC v. Wong*, 190 Cal.App.4th at 760 ("As we have recognized, no published California case of which we are aware has awarded lost profits to the buyer as consequential damages under section 3306 for the seller's breach of a real property purchase and sales agreement. Those treatises that suggest lost profits may be awarded in an appropriate case describe the appropriate circumstance as one in which the 'buyer purchased the property for purposes of resale and the seller was aware of the buyer's purpose.'"), *citing* 12 Miller & Starr, *California Real Estate*, §34:45 (3d ed. 2001 and 2008 Supp.). Plaintiffs do not frequently recover lost profits claimed as the result of lost business because it is generally exceedingly difficult to prove that profits would have accrued from the operation of a business in the future. "'The general rule under [California Civil Code §3301] is that '. . . where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative.'" *Greenwich S.F., LLC v. Wong*, 190 Cal.App.4th at 760, *citing Grupe v. Glick,* 26 Cal.2d 680, 693 (1945); *see also, Vestar Development II, LLC v. General Dynamics Corp.*, 249 F.3d 958, 962 (9th Cir. 2001) (interpreting California Civil Code §3301 and refusing to award damages to a real estate developer who sought damages in the form of "future profits that it hoped to earn from the shopping center it had planned to build on the parcel it was attempting to buy."). These principles are consistent with the ones earlier stated that contract damages are ordinarily limited to those within the contemplation of the parties when they entered into the contract or to

those reasonably foreseeable by them at that time. *Reese v. Wong*, 93 Cal.App.4th at 60. "This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise." *Id., quoting Erlich v. Menezes,* 21 Cal.4th at 550 (citation omitted).

To the extent that Efpar seeks damages for lost profits based on a resale of the Property as set forth in its Trial Exhibit C-17-M, Efpar has failed to show by a preponderance of the evidence that such resale of the Property was anticipated and within the contemplation of the parties at the time the contract was made and that the damages are more than speculative, remote or contingent. *Greenwich S.F., LLC v. Wong*, 190 Cal.App.4th at 758 ("The breaching vendor may be held liable for *profits lost* by the purchaser as a result of the breach, such as through an anticipated resale of the property, if they were within the contemplation of the parties at the time of contracting, they are proven to be more than speculative, remote, or contingent."), *quoting,* 25 *Williston on Contracts,* § 66:81 (4th ed. 2004) (emphasis in original; other citations omitted).

Efpar's computation of damages for lost profits is based on a hypothetical resale of the Property based on the signing of the Dollar Tree Lease, but as stated previously there is no evidence indicating that Dowent or its principals, the Orhs, knew about Efpar's signing of a prospective lease of the Property to Dollar Tree. *See Trial Declaration of Michelle Orh, filed on November 26, 2014,* ECF 323 at 8, ¶27; *Efpar [Proposed] Findings of Fact and Conclusions of Law,* ECF 376 at 14:21-24, [Proposed] Findings of Fact 68 ("Claimant, Efpar did not inform the Debtor of the existence of the Dollar Tree Lease.") and 69 ("No evidence was introduced establishing any duty on the part of Claimant, Efpar to inform the Debtor of the existence of the Dollar Tree Lease."); *Efpar Trial Brief* at 13:14 – 14:18 (arguing that Dowent's argument regarding knowledge of the Dollar Tree Lease is irrelevant). In other words, there is no evidence to support that lost profits from an anticipated resale of the Property, which was contemplated by Dowent at the time the Sale Agreement as modified was entered, and Efpar cites no

such evidence in its proposed findings of fact and conclusions of law. *See Efpar [Proposed] Findings of Fact and Conclusions of Law,* ECF 376 at 28:18 - 35:25, Contested Issue of Law No. 63 (discussing law regarding damages for lost profits, but offering no proposed finding of fact to support award of such). Thus, such "lost profits" damages attributable to the Dollar Tree Lease were not in the contemplation of Dowent or its principals and thus, may not be awarded as reasonably foreseeable damages.

Accordingly, the court determines that Efpar has failed to prove its claim for lost profits by a preponderance of the evidence.

Efpar Is Not Entitled to Damages related to the SR Capital Loan

Efpar contends that a portion of the Claim in the amount of $209,270.83 arising from a "loan commitment fee" of $179,375.00 (calculated as 5% of the claim of $3,587,500.00 that Efpar asserted at the hearing on the sale motion) plus "30 days minimum interest" totaling $29,895.83 charged to Efpar by SR Capital for SR Capital's alleged agreement to make a loan to Efpar. *Efpar Trial Exhibit C-17-K; FF ¶ 43; Trial Testimony of Sean Rahbar ("Rahbar Trial Testimony")*, December 18, 2014 at 2:14-2:16 p.m. No promissory note, written loan agreement or other contract between SR Capital and Efpar evidencing the loan or the terms of the loan were offered as evidence at trial, and there is no written document obligating Efpar to pay the loan commitment fee or minimum interest to SR Capital. *FF ¶ 43; Rahbar Trial Testimony*, December 18, 2014 at 2:19-2:22 p.m. Therefore, based on this record, the court finds Efpar failed to prove the terms of any financing provided by SR Capital to Efpar related to Efpar's attempts to acquire the Property with reasonable certainty by a preponderance of the evidence.

The court finds Efpar failed to prove by a preponderance of the evidence that the amount it claims to owe to SR Capital arose prepetition with a reasonable certainty and is therefore a necessary, unavoidable, and foreseeable consequence of the alleged breach of contract and properly includable as a part of its claim under California Civil Code § 3306. The court finds that this portion of Efpar's claim arose in connection with the postpetition sale of the Property—specifically, this portion of the claim arose in

connection with the cashier's checks that Efpar brought to the postpetition auction of the Property conducted in this court in an effort by Efpar to purchase the Property at the auction in July 2013. *FF ¶¶ 43-44.* That is, Efpar was aware that while it had reached a settlement with Dowent regarding the breach of contract dispute which was submitted for approval by the court in the motion to approve the sale of the Property to Efpar pursuant to 11 U.S.C. § 363, Efpar was also aware that the court ruled that the Property could not be sold without an auction and that Mr. Zander, who also had a breach of contract dispute with Dowent, would be permitted to overbid at the auction. *Id.; Efpar Trial Exhibit C-13.* Thus, Efpar's loan costs were incurred to participate in a competitive auction sale of the Property in July 2013 in which it may not be the successful bidder, and were not necessary, unavoidable and foreseeable consequence of Dowent's breach of contract in June 2012. These loan costs were incurred as part of a transaction separate from Dowent's breach of contract and are not allowable. Furthermore, it is undisputed that Efpar did not inform Debtor that it was obtaining financing to bring funds to the auction sale of the Property by this court, or the terms of such financing. *FF ¶ 43*.

Therefore, the court finds that Efpar failed to prove by a preponderance of the evidence that the loan commitment fee and minimum interest portions of its claim that it contends it owes to SR Capital incurred in or about July 2013 were damages reasonably foreseeable by Debtor at the time of the breach of contract in June 2012.

Efpar Is Not Entitled to Damages for Time Billed by its Principals

Efpar claims consequential damages from Dowent's breach of its contract to sell the Property to it, which include asserted costs with respect to its preparations to enter the Property, including inspection, engineering, due diligence, inspection, environmental assessment and other costs. *Efpar Trial Brief* at 5:5-20; *Efpar Trial Exhibit C-17 and subparts*).

Efpar asserts that a portion of the Claim consists of $65,500.00, which represents the alleged value of the time that Efpar's principals, Farid Efraim and Keith Parry, expended in Efpar's efforts to acquire the Property, which services are billed at a rate of

$250.00 per hour. *FF ¶ 51, Efpar Trial Exhibit C-17-L*. Efpar does not typically charge for the time of its principals or employees, does not typically charge an hourly rate for the time expended by its principals or employees, and Efpar's principals and employees do not generally keep records of their time expended on any project or matter. *FF ¶ 51*. The testimony given by Mr. Efraim at trial to establish these alleged damages was also unclear and inconsistent regarding when and how the time records were prepared by Mr. Efraim and Mr. Parry, and Mr. Efraim testified that he lacked present knowledge regarding certain activities of Mr. Parry reflected on the time records and the dates on which such activities occurred. *Trial Testimony of Farid Efraim ("Efraim Trial Testimony")*, December 18, 2014 at 3:14-3:29 p.m. Mr. Efraim's trial testimony regarding the manner in which the $250 per hour billing rate being charged by Mr. Parry and himself was established, and the identity of the person that kept track of Mr. Parry's time, was also contradicted by his previously given deposition testimony. *Id.* The court considers Efpar's evidence of the basis for the hourly rate and the time allegedly incurred to be unreliable and insufficient, and therefore, the court finds that Efpar failed to prove these claimed damages by a preponderance of the evidence with reasonable certainty. The court further finds that Efpar failed to prove by a preponderance of the evidence that these claimed damages for the so-called "sweat equity" of its principals were reasonable or foreseeable.

In support of its argument that it is entitled to compensation for time billed by its principals, Efpar, in its proposed Findings of Facts and Conclusions of Law, cited various treatises which discuss situations involving uncontroverted evidence. The court does not find this argument of Efpar's to be persuasive because, as discussed above, the testimony and evidence offered by Mr. Efraim and Efpar based on the purported method of time recordation were not reliable or sufficient to prove damages with reasonable certainty, as required by California law.

Other Damages

Efpar claims as damages a variety of expenses that were incurred in association

with the contract to purchase the Property in the Sale Agreement as modified by the Addendum and Second Amendment. Such damages may be included in the calculation of damages as consequential damages under California Civil Code § 3306, but they are still subject to the requirements of reasonableness and foreseeability. *See Stevens Group Fund IV v. Sobrato Development Co.,* 1 Cal.App.4th 886, 892 (1991) (consequential damages "are those which, in view of all facts known by the parties at the time of the making of the contract, may reasonably be supposed to have been considered as a likely consequence of a breach in the ordinary course of events.") *citing,* the California Assembly Committee on Judiciary, Summary of Assembly Bill 1068. Here, because the court has determined that the contractual breach occurred on June 27, 2012, many of the consequential damages incurred by Efpar after that date, which Debtor disputes, should not be allowed because it was not reasonable for Efpar to continue to incur and claim purchase and sale expenses post-breach.

Efpar asserts that its consequential damages include in part $2,600 from a "Deposit on Architectural and Site plans" charged by EJB Designs. *Efpar Trial Exhibit C-17-A*. Exhibit C-17 which is Efpar's schedule of costs related to its performance under the contract to buy the Property shows the date of this cost item was "7/31/12," which probably relates to the check for payment of this item on August 2, 2012. *Efpar Trial Exhibit C-17 and C17-A-3.* The documentation for this cost item indicates that the vendor was providing services for design and drafting for tenant improvements on the Property for the Dollar Tree Lease. *Efpar Trial Exhibit C-17-A.* As discussed previously, Dowent was not aware of the Dollar Tree Lease, and like considering the Dollar Tree Lease in the valuation of the Property at the time of the breach, damages from costs incurred by Efpar in preparing for the Dollar Tree Lease are not reasonably foreseeable to Dowent as the breaching party under California Civil Code § 3306. While Efpar has shown that it paid the deposit of $2,600 for such services on August 2, 2012, it asserts that its damages include $15,000 from the "Balance Due on Architectural and Site plans" charged by EJB Designs. *Id*. The contract required progress payments at various points

in time, but no payments were made other than the initial deposit. *Id*.; *Efraim Trial Testimony*, December 18, 2014 at 3:07-3:10 p.m. There is no evidence any work was ever done, nor is there evidence that any additional payments are due, or Efpar attempted to mitigate its damages because it became aware of Dowent's breach on June 27, 2012 and when it sued Dowent for breach of contract on July 24, 2012. Therefore, the court finds that Efpar has failed to prove by a preponderance of the evidence that these damages were necessary and foreseeable and that it attempted to reasonably mitigated such damages.

Efpar asserts that its consequential damages include in part $1,800 from a "Phase 1 Environmental Assessment" performed by Anderson Environmental. *Efpar Trial Exhibit C-17-B*; *Efraim Declaration* at 6, ¶ 35. The evidence offered by Efpar supports the claim as to this cost item, showing that this vendor's services were for environmental assessment incurred in January 2012, after the Sale Agreement was executed, and Debtor does not dispute it. Therefore, the court finds that the claim as to this item is supported by a preponderance of the evidence as necessary and foreseeable, and Efpar has an unsecured general claim in the amount of $1,800 for this expense for environmental assessment.

Efpar asserts that its consequential damages include in part $700 from "Asbestos Testing – 3138 Pico" conducted by USA Environmental. *Efpar Trial Exhibit C-17-C*; *Efraim Declaration* at 6, ¶ 35. The evidence offered by Efpar supports the claim as to this cost item, showing that this vendor's services were for asbestos testing incurred in February 2012, after the Sales Agreement was executed, and Debtor does not dispute it. Therefore, the court finds that the claim as to this item is supported by a preponderance of the evidence as necessary and foreseeable, and Efpar has an unsecured general claim in the amount of $700 for this expense for asbestos testing.

Efpar asserts that its consequential damages include in part $1,000 for "Discovery – Demolition & Restoration" completed by Efraim & Associates, Inc. *Efpar Trial Exhibit C-17-D.* The documentation in support of this cost item, including email messages

offered by Efpar at trial indicated that the work for "destructive tests" and repair was related to the Dollar Tree Lease, which was not known or contemplated by Dowent. *Efpar Trial Exhibit C-17-D.* Efpar offered no evidence to otherwise demonstrate the foreseeability of this expense as contractual damages. Efpar also did not offer any evidence that this invoice was ever paid or that the cost was reasonable because it appears that the work was to be performed by Efraim & Associates, Inc. (email address: @Efraim.biz), a vendor related to it and apparently owned by its principal, Mr. Efraim (email address: 'Fred'(fred@efraim.biz)). *Id.* Therefore, the court finds that Efpar has failed to prove by a preponderance of the evidence that it suffered these damages with a reasonable certainty, or that these damages were necessary and foreseeable.

Efpar asserts that its consequential damages include in part $189.71 owed to Rolls High Reach arising from the rental of a "Scissor lift" for destructive testing. *Efpar Trial Exhibit C-17-E.* As indicated in the discussion of the preceding item, Efpar was incurring expense for "destructive tests" for preparing for the Dollar Tree Lease, which was not in the knowledge and contemplation of Dowent, and thus, not foreseeable. Efpar does not otherwise provide any explanation why the rental expense was foreseeable or necessary to be considered as consequential damages. *See Efraim Declaration* at 6, ¶ 35. Therefore, the court finds that Efpar has failed to prove by a preponderance of the evidence that it suffered these damages with a reasonable certainty, or that these damages were necessary and foreseeable.

Efpar asserts that its consequential damages include in part $350 for "Coring of walls" by Accu-Cut Inc. *Efpar Trial Exhibit C-17-F.* Efpar provides no explanation why these services were required or performed. *See Efraim Declaration* at 6, ¶ 35. It appears that the coring work may be associated with the structural testing for the Dollar Tree Lease, which would indicate that the expenses were not foreseeable and allowable. Efpar provides some documentation that shows that these services were performed on July 6, 2012, which was after Dowent's breach on June 27, 2012, and thus should not have been incurred. *Id*. Therefore, the court finds that Efpar has failed to prove by a

preponderance of the evidence that it suffered these damages with a reasonable certainty, or that these damages were necessary and foreseeable.

Efpar asserts that its consequential damages include in part $600.00 for "Ground Penetrating Radar Testing Field Report - Concrete." *Efpar Trial Exhibit C-17-G.* Efpar provides no explanation why these services were required or what services were performed. *See Efraim Declaration* at 6, ¶ 35. This document does not refer to Efpar as the "Contractor or Person Requesting Testing;" rather the document refers to "d'Escoto West," whose relationship to Efpar is not explained. *Id.* Moreover, Efpar provides no invoices or evidence of payment. *Id.* Therefore, the court finds that Efpar has failed to prove by a preponderance of the evidence that it suffered these alleged damages with a reasonable certainty, or that these alleged damages were necessary and foreseeable.

Efpar asserts that its consequential damages include in part $2,395.00 for "Electrical Engineers" and $2,605.00 for "Balance Due for Electrical plans." *Efpar Trial Exhibit C-17-H.* The vendor for this cost item was Amelect Inc. *Id*. Efpar provides no explanation why these services were required or performed. *See Efraim Declaration* at 6, ¶ 35. Efpar provides no evidence establishing that these alleged damages were foreseeable. The court notes that the invoice provided by Efpar to evidence this claim lists Efraim & Associates, Inc., as the obligor, not Efpar. *Id*. The court further notes that the invoice date was July 25, 2012, which is after Dowent's breach on June 27, 2012 and after Efpar sued Dowent for breach of contract on July 24, 2012. *Id*. Thus, it appears that such services should not have been incurred after these events. Therefore, the court finds that Efpar failed to prove by a preponderance of the evidence that it suffered these alleged damages with a reasonable certainty, or that these alleged damages were necessary and foreseeable.

Efpar asserts that its consequential damages include in part $2,692.00 for work and materials used for electric facilities at the address of the Property at 3138 W. Pico Bl. To the "Department of Water & Power." *Efpar Trial Exhibit C-17-I.* The court finds that these damages were necessary and foreseeable in preparation for Efpar's entry to

the premises once the sale completed. Although Efpar's principal, Mr. Efraim, testified that the work was never performed by the Department of Water & Power, Efpar entered into this contract for services and paid the expense on June 12, 2012 after the Sale Agreement was executed and before Dowent's breach on June 27, 2012. *Efpar Trial Exhibit C-17-I; Efraim Trial Testimony*, December 18, 2014 at 3:13-3:15 p.m. The court finds that Efpar incurred and paid this expense as necessary to proceed with its purchase of the Property. Therefore, the court finds that Efpar proved by a preponderance of the evidence that it suffered these damages with a reasonable certainty and as necessary and foreseeable.

Efpar asserts that its consequential damages include in part $5,000.00 for "Legal services – On Account" provided by "Freeman & Freeman Smiley Esquires" on its schedule of consequential damages on Elfar Trial Exhibit C-17. The court notes that the electronic invoice receipt provided by Efpar to substantiate this claim lists Efraim & Associates, Inc., as the obligor, not Efpar. *Efpar Trial Exhibit C-17-J.* Efpar does not provide a description of services rendered by this vendor other than "Legal Services" in a lump sum amount of $5,000 as shown on the invoice receipt. *Id.; see also, Efraim Declaration* at 6, ¶ 35. There is no indication that the services allegedly performed were related to the Property, and what the nature of the services were, including the specific tasks performed with the time and the name of the performing professionals. *Id.* Efpar has not offered any evidence that the fees were necessary or foreseeable. *Id.* Therefore, the court finds that Efpar failed to prove by a preponderance of the evidence that it suffered these damages with a reasonable certainty, or that these damages were necessary and foreseeable.

Efpar asserts that its consequential damages include in part interest owed to PPI Capital in the total amount of $25,097.26. *Efpar Trial Exhibit C-17* at 1. The court notes that these alleged loan fees were not included on a previous calculation of damages provided by Efpar to this court. *See Dowent Trial Exhibit 26* at 0481. Efpar has provided no evidence that the loan fee was incurred or paid, nor has it provided no loan

documents or other evidence that it obtained a loan from PPI Capital. *See Efraim Declaration* at 6, ¶ 35. Therefore, the court finds that Efpar failed to prove by a preponderance of the evidence that it suffered these alleged damages by a reasonable certainty. Moreover, Efpar has not shown that Dowent had knowledge or contemplation of such expenses by it, and thus, such expenses were not foreseeable and allowable. The court also notes that a portion of the interest claimed by Efpar accrued from and after the Petition Date on February 4, 2013. *Id*. The court concludes that such amounts are not recoverable because these unsecured claims are not entitled to postpetition interest.

The court finds that Efpar has adequately proved by a preponderance of the evidence damages in the total amount of $130,192.00. This allowable amount of damages consists of the following items of damages: $1,800.00 for an environmental assessment *(Efpar Trial Exhibit C-17-B),* $700.00 for asbestos testing *(Efpar Trial Exhibit C-17-C)*, $2,692.00 for expenses to the Los Angeles Department of Water and Power *(Efpar Trial Exhibit 17-I),* $100,000.00 for Efpar's escrow deposits, and $25,000.00 for "loss of bargain" damages. As discussed herein, the court finds that Efpar has failed to prove otherwise by a preponderance of the evidence that any other damages were reasonable or foreseeable or established with reasonable certainty when Dowent breached its contract with Efpar.

As to the amounts claimed by Efpar and allowed by the court, Efpar is entitled to an award of prejudgment interest on such amounts as part of its allowed claim pursuant to California Civil Code §§ 3306 and 3287. *Rifkin v. Achermann,* 43 Cal.App.4th 391, 397 (1996).

B. The Doctrine of Impossibility Does Not Apply in this Case.

Dowent argues that the notice of lis pendens recorded by Zander "rendered it impossible for the Debtor to perform under the Sale Agreement by conveying clear title to Efpar, as required by the Sale Agreement." *Dowent Trial Brief*, ECF 355 at 20:15-22. Dowent correctly points out that "California law has long recognized impossibility of

performance will excuse a party's performance under a contract." *Dowent Trial Brief,* ECF 355 at 20:23-24. The burden of proof in establishing impossibility rests on the defendant asserting it. *Oosten v. Hay Haulers Dairy Employees & Helpers Union*, 45 Cal.2d 784, 788 (1955).

Although California does recognize the doctrine of impossibility, the cases cited by Debtor for the proposition that California courts would apply the doctrine of impossibility to the facts of this case are inapposite. The case decided by a California Court of Appeal in *Ringgold v. Baker*, 2003 WL 157534 (2003) involved a successful claim of impossibility against a prospective purchaser by a seller who jointly owned real property with his mother, who also had a one half interest, but died, necessitating probate court approval in order for him to convey marketable title to the prospective buyer, and the court held that performance was excused. The circumstances are factually distinguishable to this case, as are the other cases cited by Dowent. In *McDermott v. Chatfield*, 18 Cal.App. 499 (1912), the county land title records of San Francisco were destroyed in the 1906 earthquake and fire, making it impossible for the seller to convey merchantable title to parcel of land there to the buyer, which is not the situation here. The case of *In re Rigden*, 795 F.2d 727, 735 (9th Cir. 1986) is inapplicable because the trial court never determined the claim of impossibility as a defense to breach on the merits and the case was remanded for consideration of that issue.

Because the alleged obstacle to delivering title to the real property raised by Dowent in this case was the result of a third party lis pendens, or an excuse based on it being prevented by "operation of law." California Civil Code § 1511(1); 1 Witkin, *Summary of California Law,* Contracts, § 839 at 925. "Prevention by court order or process obtained by a *private* litigant, as in the case of an injunction or attachment obtained against the promisor by some third party, is not considered an excuse." *Id.,* § 839 at 925 (emphasis in original), *citing inter alia, Klauber v. San Diego Street Car,* 95 Cal. 353, 357 (1892); *Sample v. Fresno Flume Co.*, 129 Cal. 222, 227 (1900); *Union*

Contracting Co. v. Campbell, 2 Cal.App. 534, 535 (1905); *Webster v. Southern California First National Bank,* 68 Cal.App3d 407 (1977). Under the circumstances here, impossibility should not excuse Dowent from performance because it is not as "it seeks to portray itself, the helpless victim of court orders requiring it to act contrary to its statutory and constitutional obligations" in that Dowent created the legally difficult situation for itself by signing contracts to sell the Property to two different parties at the same time. This resulted in the filing of contract breach lawsuits by both of these prospective purchasers and filing of notices of lis pendens on the Property. *See Webster v. Southern California First National Bank*, 68 Cal.App.3d 407 (1977); *see also,* Schwing, *California Affirmative Defenses,* § 60:12 (online ed. 2015) ("Although impossibility of performance is generally a defense to an action on the contract, the defendant cannot assert the defense if the alleged impossibility arose as a result of the defendant's own acts or omissions. . . .Parties who put it beyond their power to perform their contracts and thereby render performance impossible are guilty of anticipatory breach of contract and, consequently, cannot raise impossibility as a defense.") (footnotes omitted), *citing inter alia, Pacific Venture Corp. v. Huey,* 15 Cal.2d 711, 717 (1940) and *People v. Meyers,* 201 Cal. 115, 119-120 (1932). Accordingly, the court determines that on this evidentiary record, Dowent has not met its burden of proving impossibility as a defense to excuse it from its breach of contract with one of these parties, Efpar.

C. The Parties Did Not Terminate the Sale Agreement to Excuse Dowent's Breach of Contract with Efpar

Dowent argues that its transmittal of a "Cancellation of Contract, Release of Deposit and Joint Escrow Instructions" ("Cancellation") to Claimant on May 25, 2012, was effective to terminate the Sale Agreement under Paragraph 8.8 of the Sale Agreement. *Dowent Trial Brief*, ECF 355 at 10:15-11:17; *Dowent Trial Exhibits 1 (Sale Agreement) and 11 (Cancellation of Contract with email transmittal)*.

Paragraph 8.8 of the Sale Agreement provided that:

> "The Closing shall occur on the Expected Closing Date, or as soon thereafter as the Escrow is in condition for Closing; provided, however, that if the Closing does not occur by the Expected Closing Date and said Date is not extended by mutual instructions of the Parties, a Party not then in default under this Agreement may notify the other Party, Escrow Holder, and Brokers, in writing that, unless the Closing occurs within 5 business days following said notice, the Escrow shall be deemed terminated without further notice or instruction."

FF ¶ 8.

Dowent's termination argument fails for various reasons. Dowent's purported "Cancellation" did not comply with the requirements of Paragraph 8.8 of the Sale Agreement, which provided for written notice and demand to the party in default. The written notice was required to provide that the Closing occur within 5 business days following the notice or that the Escrow would be deemed terminated without further notice or instruction. Dowent's "Cancellation" was defective because the notice itself did not state that the Escrow would be deemed terminated if the Closing did not occur within 5 business days. However, even if Dowent argues that the email dated Thursday May, 24, 2012 from Dowent's real estate agent, David Wan, transmitting the "Cancellation", gave adequate notice, such notice also does not comply with Paragraph 8.8 because it said "Enclose please find the cancellation from seller if your buyer can put the month this week to close the escrow on next Tuesday, I still want your buyer to buy this property. Let me know A.S.A.P." This notice is defective because the email does not say anything about the Escrow being terminated without further notice or instruction if the Closing does not within five business days, as stated by Paragraph 8.8, and Mr. Wan's deadline of "next Tuesday" (i.e., May 29, 2012) is only five calendar days rather than five business days required under Paragraph 8.8 (i.e., Thursday May 31, 2012). *FF ¶ 8; Dowent Trial Exhibits D-1 and D-11*. While Dowent's "Cancellation" is set out in a form cancellation of

contract form and is checked off as unilateral, it does not refer to Paragraph 8.8 of the Sales Agreement or otherwise state the required notice provision from that paragraph. *Id.*

Therefore, the court determines that the evidence shows that Dowent's Cancellation was ineffective to terminate the Sale Agreement because it did not comply with the language of Paragraph 8.8 of the Sale Agreement, which set forth the requirements for a unilateral termination. In any event, Dowent's termination argument also fails because the evidence shows that the parties entered a new and modified superseding sale agreement for the Property with the Second Amendment, which vitiated any purported termination of the Sale Agreement from the purported Cancellation, and therefore does not excuse Dowent from its subsequent breach. Accordingly, the court rejects Dowent's arguments that it is excused from its contractual breach based on termination of its sale contract with Efpar, having failed to meet its burden of proving a defense of mistake to Efpar's claim of breach.

Dowent's further argument, that the Second Amendment to the Sale Agreement is unenforceable due to a mutual mistake of law between the parties is also unavailing because such argument is foreclosed by the court's determinations that the Sale Agreement was not terminated and that the Second Agreement created a valid, enforceable contract between the parties. *See Dowent Trial Brief*, ECF 355 at 11:19-14:20. That is, Dowent argues that "Efpar's breach of contract damages should be disallowed because the Debtor effectively terminated the Sale Agreement and associated escrow, which absolved the Debtor of its obligation to convey the Property to Efpar, and the Second Amendment is unenforceable because it was entered into the mistaken belief that the Debtor had not terminated the Sale Agreement." *Id.,* ECF 355 at 10:9-12. As discussed herein, there was no termination of the Sale Agreement by Dowent unilaterally, and the so-called "mutual mistake" of the parties, Dowent and Efpar, that they had negotiated the Second Amendment based on the assumption that the Sale Agreement had not been terminated was thus no mistake. *FF ¶ 57; see also, Trial*

Declaration of Michelle Orh, ECF 323 at 11, ¶ 41, and 13, ¶ 50. As a factual matter, Dowent and Efpar correctly assumed that the Sale Agreement had not been terminated by Dowent unilaterally and thus, negotiated a new contract in the form of the Second Amendment, which modified and superseded the prior agreements. *Id.*

Dowent points out that the consent of the parties to a contract must be free, mutual and communicated to the other, that apparent consent is not free when obtained by mistake, that if both parties are mistaken, and neither is at fault or both are equally to blame, the mistake may prevent formation of a contract, that a mistake of law constitutes a mistake justifying relief when it arises from a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law, and that generally, a mistake of law occurs when a person knows the specific facts on which his or her rights depend, but is ignorant of the rules of law that the courts will apply to those facts. *Dowent Trial Brief,* ECF 355 at 11:26-12:9, *citing inter alia,* California Civil Code §§ 1565, 1567(5) and 1578(1), *Balistreri v. Nevada Livestock Producers Credit Association,* 214 Cal.App.3d 642 (1989) and *Guthrie v. Times-Mirror Co.,* 51 Cal.App.3d 879, 884-885 (1975). The burden of proving mutual mistake is on the party seeking to avoid enforcement of the contract, and it appears that the standard is clear and convincing evidence. *Burt v. Los Angeles Olive Growers' Association*, 175 Cal. 668, 675 (1917) ("Where so solemn an instrument as a written contract is sought to be reformed for mistake, evidence as to the mistake must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt") (citation and internal quotation marks omitted); *see also,* Miller and Starr, *California Real Estate,* § 34.14 (3d ed. Online ed. Updated 2015). As discussed herein, Dowent has not met this burden of proving its defense based on mistake.

The authorities cited by Dowent regarding mutual mistake are not applicable to the facts here because the evidence not only indicates that the Sale Agreement was not terminated unilaterally by Dowent, but that the parties, Dowent and Efpar, realized at the time they executed the Second Amendment that there were issues arising from the

performance of the Sale Agreement and the Addendum and that they freely negotiated the Second Amendment to resolve those issues and modify and ratify the prior contracts in reaching a new contract in the Second Amendment. *FF ¶¶ 32 and 37; Dowent Trial Exhibit D-9,* Second Amendment.

Accordingly, the court also rejects this additional argument of Dowent for failure to show by a preponderance of the evidence, let alone clear and convincing evidence, that it did not breach the contract with Efpar due to termination or mistake. Because the court rejects these asserted defenses of Dowent, Efpar's claim for breach of contract should be allowed in part as discussed above.

III. CONCLUSION

For the foregoing reasons, the court determines that Dowent's objection to Efpar's claim should be sustained in part and overruled in part and that Dowent's motion for disallowance of the claim should be granted in part and denied in part. Because the court grants the motion in part and denies it in part, counsel for both parties are ordered to meet and confer on a mutually agreeable form of judgment consistent with this memorandum decision and to lodge it within 14 days of the date of entry of the decision if they can. If the parties cannot agree upon a form of judgment after meeting and conferring as required, each party is ordered to submit a separate form of judgment consistent with this decision also within 14 days of entry of this decision. The post-trial hearing on August 25, 2015 is vacated in light of the court's decision.

IT IS SO ORDERED

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Date: August 11, 2015

Robert Kwan
United States Bankruptcy Judge