UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: 626 Hospice, Inc., Debtor.	Case No.: 2:22-bk-12904-SK Chapter: 7
Howard Ehrenberg, Chapter 7 Trustee, Plaintiff, v. Bank of America, N.A., Defendant.	Adv. No.: 2:24-ap-01124-NB **MEMORANDUM DECISION GRANTING IN PART AND DENYING IN PART CHAPTER 7 TRUSTEE'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT** Prior Hearings: Date: January 7 and February 11, 2025 Time: 11:00 a.m. Continued Hearing: Date: February 25, 2025 Time: 11:00 a.m. Place: Courtroom 1545 255 E. Temple Street Los Angeles, CA 90012 (or via Zoomgov per posted procedures)

At the Prior Hearings listed above, this Court heard arguments on the motion of the Chapter 7 Trustee ("Trustee") for authorization to file an amended complaint. After hearing further argument at the Continued Hearing, this Court issued an oral ruling

granting in part and denying in part Trustee's motion for leave to amend, and set a deadline for Trustee to file a proposed complaint with further amendments consistent with this Court's ruling. This Court also explained that it would prepare and issue this Memorandum Decision memorializing the reasoning stated orally on the record.

Trustee timely filed a Notice of his proposed "Second Amended Complaint" on March 19, 2025 (*see* adv. dkt. 37, "Proposed SAC"). As directed by this Court, the Proposed SAC tracks the proposed "First Amended Complaint" that Trustee had filed in connection with his motion for leave to amend (adv. dkt. 24, Ex. 1, the "Proposed FAC") except for those modifications necessary to render it consistent with this Court's oral ruling. For the reasons set forth in this Memorandum Decision, a separate order will issue directing Trustee to refile his Proposed SAC as a separate document on the docket (instead of an exhibit to his Notice, adv. dkt. 37). From that point forward it will be the operative complaint.

As set forth below, Trustee is being granted leave to amend only as to his proposed claims for conversion under Cal. Comm. Code § 3420(a)[1] and negligence under the Cal. Comm. Code § 3405.[2] Leave to amend is being denied as to Trustee's

---

[1] Unless the context suggests otherwise, a "chapter" or "section" ("§") refers to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"), a "Rule" means the Federal Rules of Bankruptcy Procedure or other federal or local rule, and other terms have the meanings provided in the Bankruptcy Code, Rules, and the parties' filed papers.

[2] In Trustee's initial proposed amended complaint (the Proposed FAC), only the first claim for relief (for conversion under Cal. Comm. Code § 3420(a)) arises under the California Commercial Code. The second and third claims are non-Commercial Code claims arising under the applicable California statutes codifying the relevant common law principles. *See, e.g.*, Cal. Civ. Code § 1714 (codifying common law principles of negligence liability by providing that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself"); *Vasilenko v. Grace Fam. Church*, 3 Cal. 5th 1077, 1083 (Cal. Ct. App. 2017) (referencing California Civil Code § 1714 in articulating the elements of a cause of action for negligence).

But, as explained below in section "7" of this Memorandum Decision, although the Proposed FAC does not contain a proposed claim for negligence under Cal. Comm. Code § 3405(a), Trustee modified his position in his reply papers and asserted that a negligence claim under the Cal. Comm. Code would be viable. Therefore, this Memorandum Decision also addresses whether Trustee should be given leave to amend to assert such a negligence claim, as he has done in his Proposed SAC.

A note on terminology: In some cases involving claims arising both under the California Commercial Code and other California statutes codifying the relevant common law principles, courts refers to the non-Commercial Code claims as "common law claims." *See, e.g.*, *Mills v. U.S. Bank*, 166 Cal. App. 4th 871, 888, (Cal. Ct. App. 2008) ("it is important to understand that the eighth cause of action

proposed claims for non-Commercial Code negligence and non-Commercial Code aiding and abetting conversion.

1. PROCEDURAL BACKGROUND

On May 10, 2024, Trustee filed a complaint (adv. dkt. 1, the "Original Complaint") against Bank of America, N.A. ("Bank"), seeking to recover $760,357.28 in deposits allegedly diverted from Debtor by Gladwin Gill ("Mr. Gill"). Original Complaint (adv. dkt. 1) at ¶ 4 & 21-24 (p. 2:24–25). On October 25, 2024, this Court granted Bank's motion to dismiss the Original Complaint, but permitted Trustee to file a motion for leave to file an amended complaint. Adv. dkt. 22.

Trustee thereafter filed such a motion seeking authorization to file a proposed amended complaint (adv. dkt. 24, the "Amendment Motion")). Trustee alleges that the primary wrongdoer is Mr. Gill, who was an indirect owner of Debtor, and a consultant to it, who allegedly engaged in a scheme of filing large amounts of false and inflated Medicare reimbursement charges, while siphoning money out of Debtor and leaving it as an empty shell. *See* Amendment Motion (adv. dkt. 24) pp. 3:14–4:2 & Ex. 1 (Proposed SAC) ¶¶ 16-59 (Bates pp. 26–38). Trustee essentially asserts that Bank facilitated this scheme by accepting checks payable to Debtor as deposits into the account of a different entity.

---

concerns a *statutory* cause of action [under the Cal. Comm. Code] for negligence rather than a *common law* claim.") (emphasis in original); *Gil v. Bank of Am., N.A.*, 138 Cal. App. 4th 1371, 1374, (Cal. Ct. App. 2006) ("Appellants contend that the trial court erred in granting Bank's demurrer because … the California Uniform Commercial Code does not supersede common law negligence claims where Bank paid on a check with a missing indorsement …."). But, as illustrated by the examples above, claims that at one time arose under common law have now been codified in California, so they are now statutory, and therefore this Memorandum Decision refers to claims arising under California statutes codifying common law principles as "non-Commercial Code claims" rather than "common law claims."

Another issue of terminology is that the currently proposed amended complaint arguably should be entitled "First" not "Second" amended complaint, because no "First" amended complaint was ever authorized to be filed (the proposed "First" amended complaint was only an exhibit to the motion for leave to file an amended complaint, adv. dkt. 22). But, for consistency, this Court has adopted Trustee's nomenclature and refers to the current proposed amended complaint (the exhibit to adv. dkt. 37) as the "Second" amended complaint, and Trustee is invited to file it as such on the docket (again,for consistency).

2. FACTUAL BACKGROUND

Mr. Gill allegedly controlled Debtor (Proposed SAC (adv. dkt. 24, Ex. 1)) ¶ 5 (p. 2:23–3:1) and caused checks that were payable to Debtor (which was not a customer of Bank) to be deposited, without a signature indorsement,[3] into bank accounts held by another entity (which was a customer of Bank, and which also allegedly was controlled by Mr. Gill). Debtor's name is "626 Hospice, Inc." and the other entity was doing business as "626 Hospice," according to the account information provided by that other entity to Bank.[4]

3. LEGAL STANDARDS

Leave of this Court is required for Trustee to file an amended complaint. *See* Rule 15(a)(2) (Fed. R. Civ. P.) (made applicable by Rule 7015, Fed. R. Bankr. P.). Although this Court is required to "freely give leave when justice so requires," Rule 15(a)(2), "[l]eave need not be granted where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, *constitutes an exercise in futility*, or creates undue delay." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (emphasis added).

Leave to amend is futile if the proposed amended complaint fails to cure the pleading deficiencies, making it subject to dismissal for failure to state a claim upon which relief can be granted. *Gordon v. City of Oakland*, 627 F.3d 1092, 1096 (9th Cir.

---

[3] With respect to the vast majority of the 113 checks at issue, it is true that the back of each check is not signed and instead simply contains the handwritten words "Deposit Only." More precisely, for 99 of the 113 checks, the back of each check contains the handwritten words "Deposit Only." The remaining 14 checks contain minor variations, such as "Hospice Deposit Only," "Deposit," "Endorsed for Deposit Only," "Deposit Only Hospice Inc.," and the like. The back of one check contains no handwriting at all, and the backs of two checks contain unreadable signatures. *See* Proposed SAC (adv. dkt. 24, Ex. 1) at ¶¶ 40 & 45 (p. 6:24–10:7 & 10:23–15:6) (tables itemizing the 113 checks at issue).

[4] The checks at issue were made payable to "626 Hospice, Inc." or a variant (the same name without the comma). Mr. Gill deposited 39 of those checks into an account with the last four digits 1578 ("Account 1578"), which was an account opened and maintained by Mr. Gill for an entity known to Bank as "626 Hospice" – specifically, as "California Hospice Management Group, Ltd. *DBA 626 Hospice*." Proposed SAC (adv. dkt. 24, Ex. 1) at ¶¶ 32 & 40 (pp. 6:5–6 and 10:7) (emphasis added). Mr. Gill deposited the remaining 74 checks into an account with the last four digits 3756 ("Account 3756"), also held by California Hospice Management Group, Ltd. – which, as noted above, was doing business as 626 Hospice, according to the information provided to Bank for Account 1578. Proposed SAC (adv. dkt. 24, Ex. 1) at ¶¶ 35 & 40–41 (pp. 6:11–12 & 6:24–10:12).

2010). This Court briefly summarizes the applicable standards (which were recited more fully in this Court's order, adv. dkt. 22, dismissing the Original Complaint).

Most importantly, this Court must construe the complaint in the light most favorable to the plaintiff, and must accept all well-pleaded factual allegations as true. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008); *Knox v. Davis*, 260 F.3d 1009, 1012 (9th Cir. 2001). But this Court is not bound by conclusory statements, statements of law, and unwarranted inferences cast as factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–57 (2007). As the Supreme Court has explained:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is *plausible* on its face." ... A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the *reasonable inference* that the defendant is liable for the misconduct alleged .... Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. [*Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (emphasis added).]

4. OVERVIEW

Trustee cannot assert a claim for non-Commercial Code aiding and abetting conversion, because an essential element of that claim is that the alleged aider and abettor had knowledge of the primary actor's wrongdoing. Trustee had failed to plausibly allege that Bank knew that Mr. Gill was wrongfully diverting funds from Debtor.

Trustee cannot assert claims for non-Commercial Code negligence because, under California authorities, there is no duty running from Bank to a non-customer. Debtor was not Bank's customer.

Negligence under Commercial Code § 3405(b) is different. That statute provides that *any* "person bearing the loss" from another person "paying [an] instrument or taking it for value or for collection" may "recover" from that person if that person failed to exercise "ordinary care" as defined in that statute. Cal. Comm. Code § 3405(b).

At first glance, it appears that Bank exercised ordinary care because it thought that it was accepting a deposit of a check payable to its own customer. The fact that the checks were not manually indorsed is not dispositive because it is common for banks to accept checks for deposit from their own customers without signature indorsements – the act of depositing the check typically substitutes for the signature, even if there is a slight mismatch between the payee's name on the check and the formal name of the payee. *See* Cal. Comm. Code § 3405(c) ("an indorsement is [deemed] made … if the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to the name of that person"). But there is no such deemed indorsement if the customer's employee depositing the check is not "entrusted" with "responsibility" with respect to the check. Cal. Comm. Code § 3405(a)&(b).

In this case, Bank has not established that it is protected by Cal. Comm. Code § 3405 because Bank has not pointed to anything in the Proposed SAC (adv. dkt. 24, Ex. 1) from which it may be reasonably inferred that ***Debtor*** (as distinguished from Bank's other customer doing business under a very similar name) "***entrusted [Mr. Gill] with responsibility*** with respect to the [the deposited checks]" within the meaning of § 3405(a)(3) (emphasis added). Alternatively, Mr. Gill's authority is at least disputed. *See* Amendment Motion (adv. dkt. 24) pp. 12:15–13:2. Therefore, this Court rejects Bank's argument that § 3405 acts as a legal bar to Trustee's claims.

True, Bank might have ***believed*** that Cal. Comm. Code § 3405 applied. According to the allegations in the Proposed SAC itself, Bank accepted for deposit checks that were made out to an entity that, so far as Bank had any reason to know, was its account holder known to Bank as "626 Hospice." Therefore, so far as Bank was aware, the checks did not ***appear*** to require any signature indorsements under Cal. Comm. Code § 3405(c). Nevertheless, the Proposed SAC alleges that, under applicable banking regulations and practices and based on purported "red flags," Bank should have implemented various monitoring functions that would have caught Mr. Gill's

misdeeds. According to Trustee, the Commercial Code makes Bank liable to Debtor (a non-customer of Bank) for accepting the checks for deposit.

Turning to Trustee's proposed Commercial Code claim for conversion, Cal. Comm. Code § 3420(a) ***might*** be interpreted to create a form of strict liability when a Bank elects to accept checks without indorsements, if it later turns out that the person depositing those checks has diverted the checks, as in this case. The parties have not fully briefed that issue. Thus, even supposing that so far as Bank could tell it was doing nothing wrong by accepting checks without signature indorsements, Bank has not established that Trustee's claim under § 3420(a) is barred. Therefore, leave to amend the Complaint to assert that claim is appropriate.

To be clear, this Court is not holding that § 3420(a) actually does create a form of strict liability, only that it ***might***, and therefore Bank has not shown that amending the Complaint to assert a claim under § 3420(a) would be "futile." All rights are reserved for the parties to address the scope of that statute when appropriate.

Having provided the foregoing overview, this Court now turns to a more detailed analysis of the claims and statutes at issue.

5. TRUSTEE'S CLAIM FOR AIDING AND ABETTING CONVERSION BECAUSE HE HAS NOT ALLEGED A PLAUSIBLE BASIS FOR BANK'S "KNOWLEDGE" OF ANY CONVERSION

Trustee's allegations about Bank's actual "knowledge" of any conversion are not plausible. For example, Trustee appears to suggest that Bank should have known that "626 Hospice" was not a registered "dba" of Bank's customer, but Trustee cites no authority that Bank actually did conduct an investigation of its own customer's dba.

In the order granting Bank's motion to dismiss the Original Complaint (adv. dkt. 1), this Court explained that Trustee's allegations pertaining to Bank's liability for aiding and abetting conversion failed to state a claim upon which relief could be granted, because Trustee had failed to plausibly allege that Bank knew that Mr. Gill was wrongfully diverting funds from Debtor. *See* Order (adv. dkt. 22) pp. 5–8. The

Proposed SAC's claim for aiding and abetting conversion fails as a matter of law for the same reasons as set forth in that Order – that is, Trustee still has not plausibly alleged facts supporting a reasonable inference that Bank had actual knowledge that Mr. Gill was diverting Debtor's funds.

6. TRUSTEE'S NON-COMMERCIAL CODE CLAIM FOR NEGLIGENCE FAILS BECAUSE TRUSTEE CANNOT ESTABLISH ANY "DUTY" RUNNING FROM BANK TO DEBTOR

Bank cites authority that "a bank owes no duty to nondepositors to investigate or disclose suspicious activities on the part of an account holder." Opp. (adv. dkt. 29) p. 11:18–20 (citation and internal quotation marks omitted). More broadly, Bank cites many decisions holding that banks do not owe duties to non-customers, and Bank notes important policy concerns including customers' privacy and the efficient processing of banking transactions. *See id.* pp. 11:18–13:2.

Trustee argues that in the "narrow factual circumstances" presented Bank actually did owe a duty to Debtor. *See* Reply (adv. dkt. 30) p. 8:1–3. Trustee attempts to distinguish contrary decisions as involving "a fact pattern other than the one here: where a bank is presented with an *unsigned* check in the name of a payee *where the payee name does not match the account name*." *Id.* p. 7:14–16 (citations omitted, emphasis added).

Trustee is attempting to expand banks' duties too far. Banks often accept checks without signatures, so Trustee must point to something else that would make the circumstances suspicious enough to warrant an interpretation of California law to impose an implicit "duty" to a non-customer to protect them from potential wrongdoing, at the expense of the customer's privacy and banking efficiency. In addition, the payee name did in fact match the name of the account holder, according to Trustee's own allegations in the Proposed SAC which establish that "626 Hospice" was a dba of Bank's customer, so again there is nothing sufficiently suspicious to warrant an expansion of banks' duties to non-customers.

This ruling (not to expand banks' duties in the current situation) is reinforced by the "economic loss doctrine" cited by Bank. *See* Opp. (adv. dkt. 29) p. 13:3–17. Trustee attempts to distinguish this doctrine as having been applied in other contexts, such as industrial accidents and speculative losses, rather than to the precise dollar amounts that he seeks. *See* Reply (adv. dkt. 30) p. 8:7–22. But this cuts the other way: Trustee is admitting that the damages are purely economic, and Trustee is already pushing the boundaries of tort law by attempting to impose a duty to a non-customer, so the added problem of seeking to expand tort law to recover purely economic losses is an additional reason why Trustee's attempt to expand the law goes too far.

7. TRUSTEE IS GRANTED LEAVE TO AMEND HIS CLAIM FOR NEGLIGENCE UNDER CAL. COMM. CODE § 3405

The analysis under Cal. Comm. Code § 3405 is complicated by the fact that Trustee appears to have changed his position. Initially, in the Amendment Motion (adv. dkt. 24), Trustee conceded that he most likely could not assert a claim for negligence under Cal. Comm. Code § 3405 (as part of his argument that this section does not bar him from asserting a *non*-Commercial Code claim for negligence):

> The Commercial Code does contain a section—CC 3405—that establishes bank liability under certain circumstances, depending on whether the bank acted with ordinary care [*i.e.,* negligence]. CC 3405 discusses liability for contributing to a fraud perpetrated by a bad actor employee who deposits a fraudulently-[i]ndorsed check. At least one court has held that where the underlying facts fall within the scope of CC 3405, a plaintiff must assert a claim for [negligence] liability under CC 3405 and not under California tort theories of negligence….
>
> Here, *[Trustee concedes that he] does not appear to have a viable claim [for negligence] under CC 3405*. None of the Checks were indorsed by California Hospice, therefore the checks were "missing" an endorsement, not "fraudulently endorsed." This distinction determines whether plaintiff must proceed under CC 3405 or under common law negligence principles. [Amendment Motion (adv. dkt. 24) p. 8:24–9:10 (emphasis added).]

But Trustee adopts a more flexible position in his reply papers, taking the approach that, to the extent he might be barred from asserting a non-Commercial Code

claim for negligence, he should be able to assert a Commercial Code claim for negligence (while also asserting that this Court need not decide which applies):

> Different Commercial Code sections address bank liability for fraudulent checks under different circumstances…..
> Here, the potentially relevant section is CC 3405. *If CC 3405 applies completely to the facts here, then Bank of America's negligence liability is analyzed using this section*. If it does not completely apply to the facts, the Trustee's claim arises either wholly or in part from California common law.
> This issue need not be resolved at the Complaint stage. So long as the Complaint alleges duty, breach, causation, and damages—which it does—those allegations are sufficient to support a claim under CC 3405 later if the Court determines negligence arises by statute, and not common law. [Reply (adv. dkt. 30) p. 2:2–15 (emphasis added).]

This Court disagrees with Trustee's assertion that it is not necessary to determine at the pleadings stage whether the facts alleged state a negligence claim under Cal. Comm. Code § 3405. It is Trustee who seeks leave to amend his Complaint, and now is the time for Trustee to assert whatever claims be believes he can assert. Accordingly, this Court will determine whether, under the facts alleged, a Cal. Comm. Code § 3405 negligence claim would be futile. As explained below, this Court is not convinced that such a claim would be futile.

In general, as Trustee argues, a signature is required to indorse a check. *See* Amendment Motion (adv. dkt. 24) p. 7:3–8. But that is not enough because, under the circumstances described in Cal. Comm. Code § 3405, an actual signature is not necessary.

When a check is made out to the depositor, and the check is deposited by the depositor's "employee" – defined to include an "independent contractor" – who has "*responsibility*" for depositing checks, then "*the indorsement is effective* ..." (so long as Bank acted in good faith). Cal. Comm. Code § 3405 (emphasis added). That is so even when the checks at issue were not signed because, under § 3405(c), "an indorsement is [deemed to be] made in the name of the person to whom an instrument is payable [*i.e.,* Debtor] if ... the instrument, *whether or not indorsed*, is deposited in a

depositary bank to an account in a name substantially similar to the name of that person." Cal. Comm. Code § 3405(c) (emphasis added).

This provision (although confusingly worded) makes sense. If a check is made payable to the name of a bank's customer – or an account in a "substantially similar" name – then the customer's act of depositing the check into its own account at the bank is the equivalent of that customer's signature indorsement on the check. Therefore, there is nothing suspicious about a customer depositing checks without a signature indorsement.

Put differently, the analysis under § 3405 has multiple layers. First, it does not ***actually*** apply, because this Court cannot presume under the Proposed SAC that Mr. Gill had "responsibility" for depositing ***Debtor's*** checks, and therefore on the present record § 3405 does not bar Trustee from asserting his claims. But, second, from Bank's perspective, § 3405 ***appeared to*** apply, because Mr. Gill did have "responsibility" for depositing checks payable to the entity whom Bank knew to be doing business as 626 Hospice (California Hospice Management Group, Ltd.), and therefore it seems that Bank ***might*** have done whatever a reasonable bank would do in the circumstances, at least as to a single ordinary deposit.

Nevertheless, Trustee argues that due to the volume and nature of the deposits Bank should have monitored or audited the transactions. The question, therefore, is whether the Proposed SAC plausibly alleges that Bank was negligent within the meaning of Cal. Comm. Code § 3405 by failing to react to what Trustee characterizes as "red flags" and take additional steps that might have uncovered the fraud before accepting some or all of the checks for deposit.

The specific provisions of Cal. Comm. Code § 3405 are as follows, with key portions emphasized:

> (a) In this section:
> (1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

> (2) "Fraudulent indorsement" means (A) in the case of an instrument payable to the employer, a forged indorsement purporting to be that of the employer, or (B) in the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee.
>
> (3) *"Responsibility" with respect to instruments means authority (A) to sign or indorse instruments on behalf of the employer, (B) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition*, (C) to prepare or process instruments for issue in the name of the employer, (D) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (E) to control the disposition of instruments to be issued in the name of the employer, or (F) to act otherwise with respect to instruments in a responsible capacity. *"Responsibility" does not include authority that merely allows an employee to have access to instruments* or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.
>
> (b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, *if an employer entrusted an employee with responsibility* with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, *the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person*. If the person paying the instrument or taking it for value or for collection *fails to exercise* ***ordinary care*** in paying or taking the instrument and that failure contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.
>
> (c) Under subdivision (b), *an indorsement is made in the name of the person to whom an instrument is payable if* (1) it is made in a name substantially similar to the name of that person or (2) *the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to the name of that person*. [Cal. Comm. Code § 3405 (emphasis added).]

Trustee attempts to distinguish Cal. Comm. Code § 3405(c). He argues that:

> While CC 3405(c) does contain the phrase "whether or not endorsed," CC 3405(c) states that that phrase applies to a different factor identified in CC 3405(b), specifically, the factor relating to the name of the account where the check is deposited. [Reply (adv. dkt. 30) p. 3:21–23]

The argument is not persuasive. Section 3405(c) (quoted in full above) states that "*an indorsement is made in the name of the person to whom an instrument is payable if* ... the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to the name of that person." Cal. Comm. Code § 3405 (emphasis added). Trustee ignores the emphasized language.

Under the plain words of Cal. Comm. Code § 3405(c), Bank was authorized to negotiate a check not containing a signature indorsement, provided the check was being deposited into an account in a name "substantially similar" to the name of the depositor (including a dba of the depositor) by an employee with "responsibility" for depositing those checks. That is precisely what *appeared* to occur here – Mr. Gill caused checks payable to "626 Hospice, Inc." to be deposited into accounts of an entity whose dba was "626 Hospice."[5]

The more important question, though, is whether Bank was negligent by failing to exercise "ordinary care" when it accepted the checks for deposit. "Ordinary care" means

> observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this division or Division 4 (commencing with Section 4101). [Cal. Comm. Code § 3103(a)(7).]

When construed in the light most favorable to Trustee, the Proposed SAC's (adv. dkt. 24, Ex. 1) allegations are sufficient to support a "reasonable inference" that Bank

---

[5] Solely for purposes of this Memorandum Decision, this Court assumes that the names "626 Hospice, Inc." and "626 Hospice" are "substantially similar" within the meaning of Cal. Comm. Code 3405(c). But this Court notes that in *Laurie B LLC v. Wells Fargo Bank N.A.*, 679 F. App'x 598, 599 (9th Cir. 2017) (unpublished disposition), the Court of Appeals for the Ninth Circuit held that whether the names "Laurie B LLC" and "Laurie B" were substantially similar was an issue of fact not appropriate for determination on summary judgment. Consistent with *Laurie B LLC*, all rights are reserved as to the issue of whether the names "626 Hospice, Inc." and "626 Hospice" are substantially similar.

plausibly failed to exercise "ordinary care" with respect to the transactions at issue. Although it may have appeared to Bank that a signature indorsement was not required, Trustee alleges that there were other "red flags" associated with the deposited checks under common regulatory practices and bank procedures, such that it is plausible that Bank did not observe "reasonable commercial standards" by accepting the checks without conducting further investigation. Those alleged "red flags" included the following:

1) The name of the owner of one of the accounts opened at Bank by Mr. Gill was "California Hospice Management Group, Ltd dba 626 Hospice." Proposed SAC (adv. dkt. 24, Ex. 1 ¶ 32 (p. 6:5–6)). But "at no time did [Bank] receive[] … a fictitious business name statement filed by California Hospice indicating that it did business as '626 Hospice,'" *id.* at ¶ 80 (p. 19:10–13) (because no such dba statement was ever filed, *id.* at ¶ 33, p. 6:7–8). Nor did Bank receive "any other evidence that California Hospice did business as 626 Hospice, apart from the signature card of Account 1578, or … any evidence that Debtor had authorized Mr. Gill to deposit the Debtor's checks into Account 1578 and Account 3756." *Id.* at ¶ 80 (p. 19:12–16). It is plausible that, under reasonable commercial standards, including Bank's prescribed procedures or general banking usage, ordinary care might require verification of a purported "dba" in the circumstances presented.
2) Bank knew that Mr. Gill was the signatory on a number of other accounts at Bank, including (A) three accounts held by A&P Healthcare, LLC, (B) two accounts held by National Hospice Management Group dba Boston Healthcare Management, (C) one account held by American Academy of Palliative Care Services, Inc., (D) three personal accounts for Mr. Gill, and (E) a credit card account

for Mr. Gill's spouse, Amelou Gill. *Id.* at ¶ 81 (p. 19:17–28). It is plausible that, under reasonable commercial standards, including Bank's prescribed procedures or general banking usage, ordinary care might require extra scrutiny whenever a single person has signature authority over multiple bank accounts.

3) The total dollar amount of the 113 checks that Mr. Gill presented for deposit was $1,204,809.67. *Id.* at ¶¶ 3 and 46 (p. 2:11–15 and 15:8–12). The vast majority of these checks did not contain a signature indorsement. *Id.* at ¶¶ 40 and 45 (p. 6:24–10:8 and 10:23–15:6) (tables itemizing all the checks). It is plausible that, under reasonable commercial standards, including Bank's prescribed procedures or general banking usage, ordinary care might require extra scrutiny whenever large dollar amounts and/or large numbers of checks without signature indorsements are involved.

In sum, when considering the substantial dollar amount of the checks presented for deposit, the absence of a signature indorsement on most of the checks, and the presence of the other alleged "red flags" set forth above, this Court cannot find that granting Trustee leave to amend as to his § 3405 negligence claim would be futile. Of course, this Court expresses no views at this stage about what actually would constitute reasonable commercial standards for Bank. The only point is that Trustee has plausibly alleged that those standards ***might*** have been violated. *Cf. Shane Smith Enter., Inc. v. Bank of Am.,* N.A., 2007 WL 1880201 at *7 (E.D. Ark. 2007) (noting allegations that "Bank of America's fraud filter system generated notices indicating 'Large Deposit-Low Average Balance' and 'New DBA Watch,'" but also noting the "neither party has presented evidence as to the reasonable commercial standards prevailing in [the bank's jurisdiction] or anywhere else for banks opening fictitious name accounts and then accepting large deposits into those accounts").

8. TRUSTEE IS GRANTED LEAVE TO AMEND HIS CLAIM FOR CONVERSION UNDER CAL. COMM. CODE § 3420(a)

Cal. Comm. Code § 3420(a) provides:

> The law applicable to conversion of personal property applies to instruments. *An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment*. An action for conversion of an instrument may not be brought by (1) the issuer or acceptor of the instrument or (2) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a copayee. [Cal. Comm. Code § 3420(a).]

This statute can be interpreted to apply a form of strict liability when a Bank elects to accept checks without indorsements, if it later turns out that the person depositing those checks has diverted the checks, as in this case. *See, e.g.*, *In re McMullen Oil Co.*, 251 B.R. 558, 569 (Bankr. C.D. Cal. 2000) (explaining that under Cal. Comm. Code § 3420, "a check is converted by a bank if (a) the bank receives the check without negotiation from a person not entitled to enforce the check, or (b) the bank obtains payment on the check for a person not entitled to receive payment," and that under the statute, a "bank may be liable for conversion when it permits the deposit of a check into a third party's account without the indorsement of the payee.").

Trustee summarizes the theory of the Proposed SAC (adv. dkt. 24, Ex. 1) as follows:

> After the Debtor received the Checks, some person stole them. That person is unknown, but was not Yeota Christie [Debtor's CEO and Director]. As soon as that theft occurred, the person who physically possessed the check, and all subsequent persons who may have touched that check, was no longer a "Holder" as that term is used in CC 1201(b)(21). When California Hospice ultimately obtained the Checks and presented them to Bank of America for deposit into Account 1578 and Account 3756, it was not a holder, either. The Checks were not made out to it. Because the Checks were not [i]ndorsed, Defendant received the Checks with the same rights California Hospice had to them—none. [Motion for Leave to Amend (adv. dkt. 24), p. 7:25–8:4.]

Bank has not established, at this stage, that Trustee's claim fails as a matter of law. Therefore, Trustee has shown that he is entitled to leave to amend with respect to his claim under Cal. Comm. Code § 3420.

Put another way, this Court cannot determine that giving leave to amend would "constitute[] an exercise in futility …." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (emphasis added). Of course, all of Bank's rights are reserved to assert whatever defenses it may deem appropriate, and Bank remains free to challenge the validity of both the underlying theory of the Proposed SAC (adv. dkt. 24, Ex. 1) and this Court's preliminary interpretation of how the statute ***might*** impose a form of strict liability (which is solely for purposes of determining whether to grant leave to amend the Complaint).

9. CONCLUSION

For the foregoing reasons, a separate order will issue (A) granting in part and denying in part Trustee's motion for leave to amend and (B) directing Trustee to file the Proposed SAC (attached to adv. dkt. 37) as a separate document on the docket.

###

Date: July 7, 2025

Neil W. Bason
United States Bankruptcy Judge