UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES ESTAKHRIAN and ABDI NAZIRI, on behalf of themselves and all others similarly situated, Plaintiffs, v. MARK OBENSTINE, et al. Defendants.	Case No. CV 11-3480 FMO (CWx) **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

INTRODUCTION

On October 27, 2015, James Estakhrian ("Estakhrian") and Abdi Naziri ("Naziri") (collectively "plaintiffs") filed the operative Second Amended Class Action Complaint ("SAC") against Mark Obenstine ("Obenstine"), Benjamin F. Easterlin IV ("Easterlin"), King & Spalding, LLP ("King & Spalding" or "K&S" and together with Easterlin, the "King & Spalding defendants"), Terry A. Coffing ("Coffing"), and Marquis & Aurbach, P.C. (now called Marquis Aurbach Coffing, P.C.) ("MAC" or "Marquis" and together with Coffing, the "MAC defendants") (collectively, "defendants") asserting claims for: (1) professional malpractice; (2) breach of fiduciary duty; (3) breach of contract; (4) violation of the California Unfair Competition Law, ("UCL"), Cal. Bus. & Prof. Code §§ 17200, et seq.; (5) violation of the California Consumers Legal Remedies Act, ("CLRA"), Cal. Civil Code §§ 1750, et seq.; and (6) fraud. (See Dkt. 373, SAC at ¶¶ 2, 51-77).

The instant matter arises out of a class action that was litigated in Nevada state court, Daniel Watt, et al. v. Nevada Property 1, LLC, et al., Case No. A582541 ("Nevada litigation," "Watt litigation," or "Watt action"). (See Dkt. 490, Court's Order of October 24, 2016, at 2) (citing Dkt. 373, SAC at ¶ 20). On February 11, 2009, plaintiffs filed a class action complaint for breach of contract regarding the purchase of condominium units in what became the Cosmopolitan Hotel ("Cosmopolitan"), located in Las Vegas, Nevada. (See Dkt. 373, SAC at ¶ 20). Plaintiffs sought to "rescind their purchase contracts and to obtain a refund of their escrow deposits[.]" (See Dkt. 490, Court's Order of October 24, 2016 at 2) (citing Dkt. 373, SAC at ¶¶ 14-16 & 20). The Nevada litigation eventually settled in two stages in 2010. (See Dkt. 373, SAC at ¶ 32).

On April 22, 2011, Estakhrian, on behalf of himself and all others similarly situated, filed the instant action against defendants, who are all attorneys who represented the class members in the Nevada litigation. (See Dkt. 1, Complaint at ¶¶ 17-20). The court dismissed the MAC defendants for lack of personal jurisdiction. (See Dkt. 329, Court's Order of July 9, 2015). The court then approved a settlement between the plaintiff class and the King & Spalding defendants and entered judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[1] (See Dkt. 490, Court's Order of October 24, 2016, at 21-22). As such, Obenstine is the sole remaining defendant in this action.

On February 4, 2017, the court certified the following classes with respect to the professional malpractice, breach of fiduciary duty, the UCL, and the CLRA claims: "All individuals who were class members in, i.e. did not opt out of, Daniel Watt, et al. v. Nevada Property 1, LLC, et al., Nevada District Court, Case No. A582541, excluding Sanjay Varma." (See Dkt. 500, Court's Order of February 4, 2017, at 32). The court also certified the following subclass with respect to Estakhrian's breach of contract claim: "[All] class members who entered into a retainer agreement with Defendant Mark Obenstine regarding the subject matter of Daniel Watt, et al. v. Nevada Property 1, LLC, et al., Nevada District Court, Case No. A582541." (Id.). Estakhrian and

[1] The King and Spalding defendants settled for $4.625 million. (See Dkt. 490, Court's Order of October 24, 2016, at 3).

Naziri were appointed class representatives for the class, and Estakhrian was appointed class representative for the subclass. (See id. at 33). The court appointed Chavez & Gertler, the Irvine Law Group, Mehri & Skalet, and the Fay Law Group as class counsel. (Id.).

A bench trial was held on the (1) breach of fiduciary duty; (2) UCL; and (3) CLRA claims.[2] Having reviewed and considered all the evidence presented during the bench trial, and the contentions and arguments of counsel, the court hereby makes the following findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT[3]

1. Cosmopolitan was promoted as a project consisting of a West Tower with more than 1,300 condominium units and an East Tower with more than 700 units. (Dkt. 593, Second Amended Pretrial Conference Order ("PTCO") at ¶ 5.c).

2. Purchasers of units in the Cosmopolitan signed purchase and sale agreements, and made earnest money deposits totaling approximately $250 million or, on average, $140,000 per purchaser. (Dkt. 593, PTCO at ¶ 5.d).

3. The developer of the Cosmopolitan, 3700 Associates LLC, projected that the condominium units would be ready for occupancy in early 2008. (Dkt. 593, PTCO at ¶ 5.e).

4. 3700 Associates LLC defaulted on its construction loan with Deutsche Bank, which then foreclosed on the property in March 2008. (Dkt. 593, PTCO at ¶ 5.f).

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[2] The court previously granted Obenstine's motion for summary judgment as to plaintiffs' claim for monetary damages under the CLRA. (See Dkt. 498, Court's Order of January 29, 2017, at 23). Plaintiffs did not seek class certification of their fraud claim, (see Dkt. 500, Court's Order of February 4, 2017, at 2 n. 1), and the claim was omitted from the proposed pretrial conference order. On December 8, 2017, the court granted plaintiffs' request to dismiss the legal malpractice claim, and to bifurcate the trial with respect to the equitable claims and the breach of contract claim. (See Dkt. 592, Court's Order of December 8, 2017). On March 14, 2019, the court dismissed the breach of contract claim. (See Dkt. 620, Court's Order of March 14, 2019).

[3] Any finding of fact that more correctly constitutes a conclusion of law should be treated as such.

5. Following the foreclosure, Nevada Property 1, LLC ("NP1"), a wholly-owned subsidiary of Deutsche Bank, acquired the property and all rights and obligations under the purchase and sale agreements. (Dkt. 593, PTCO at ¶ 5.g).

6. On August 22, 2008, a purchaser of a Cosmopolitan unit, Carol Muszik ("Muszik"), contacted Ben Easterlin, a partner at the law firm of King & Spalding, LLP, about NP1's refusal to return her earnest money deposit after 3700 Associates LLC filed for chapter 11 bankruptcy. (Dkt. 593, PTCO at ¶ 5.h).

7. On August 29, 2008, Easterlin proposed to Obenstine that they jointly litigate the issues raised by Muszik, referred Obenstine to a blog of Cosmopolitan purchasers, and proposed to hire Donna Billiter ("Billiter") to "organize" the effort. Easterlin sent Obenstine the following email:

> **From**: Easterlin, Ben
>
> **Sent**: Friday, August 29, 2008
>
> **To**: 'mobenstine@centrixcapital.com'
>
> **Subject**: FW: Cosmopolitan info
>
> Mark, if you have time, I recommend looking at this. I just looked at it, and there is a group of people who want their money back at Cosmopolitan. I think we should try to get up another group and go after it. We will have to decide on a couple of things: . . . we need an organizer. I don't know that we could find another Donna. I would like to use Donna, but I am worried that since she is not a purchaser there and would be doing that for a fee she would really be subject to a suit or we might be accused of unethical conduct for having a "runner." It might be that Donna could get Carol Musik [sic] or someone who is a purchaser to be the front person, with Donna directing her and keeping the records.

(Dkt. 593, PTCO at ¶ 5.i; Exhibit ("Exh.") 65).

8. In his August 29, 2008 email, Easterlin explicitly warned Obenstine of the risk that they might be accused of engaging in unethical conduct for using a "runner" because Billiter would

be receiving a "fee" to "get up another group[.]" (Exh. 65); (Dkt. 605, Reporter's Transcript ("RT") at 166-67 (Obenstine testimony that "Donna" in the August 29, 2008, email referred to Billiter)).

9. As a result of the August 29, 2008 email, Obenstine knew from the inception of Billiter's involvement that she was not a purchaser of a unit in the Cosmopolitan and that she would be paid a "fee" for organizing class members to pursue litigation. (See Exh. 65).

10. In mid-2008, Obenstine and Easterlin were also representing purchasers in an action regarding condominium units in the Trump Tower in Las Vegas, Nevada. (See Exh. 70) (Easterlin email regarding Trump matter and Cosmopolitan); (see e.g., Exh. 65) (August 29, 2008, Email from Easterlin to Obenstine) ("When you look at the blogs, you will see one where someone tells everyone they are in contact with Trump Tower attorneys. I wrote that blog to generate interest and to keep people from pursuing other avenues until we spring into action.").

11. Billiter was also working with Obenstine on the Trump matter. (Obenstine Depo. Vol. I at 212) ("I was working with [Billiter] on the Trump Tower case[.]"); (Dkt. 605, RT at 167) (Obenstine testifying that Billiter was part of the Trump litigation); (Billiter Depo. at 16) (testifying that Muszik was a Trump unit holder and "was involved in our Trump case").

12. In connection with the Cosmopolitan litigation, Billiter adopted the alias, "Kay Jackson," (Billiter Depo. at 8), and used the email lucke.13@live.com, which was associated with her Jackson alias. (See Billiter Depo. at 9-10 ("I used it for the organization of Cosmopolitan"); (Exh. 19 at P0104).

13. On September 14, 2008, Billiter, using her Kay Jackson alias, registered the domain name cosmopolitanownerslv.com in order to start a blog to generate interest in the Cosmopolitan litigation. (Dkt. 593, PTCO at ¶ 5.j; Billiter Depo. at 19-20).

14. Easterlin and Obenstine knew she was using the Kay Jackson alias in connection with her work on the Cosmopolitan litigation.[4] (Billiter Depo. at 15; Obenstine Depo. Vol I at 210-

[4] Except for her communications with Muszik, when communicating with class members, Billiter used her Kay Jackson name and the associated lucke.13@live.com email address. When communicating with Obenstine and Easterlin, she used both her real name and her alias. When referring to email communications in this Order, the court will use the name referenced in the email.

211); (Exh. 41 at P0105) (October 6, 2008, email from "kay jackson" to Obenstine regarding a call with a prospective client, and stating, "Don't forget who I am"); (id. at P0144) (April 21, 2010, "kay jackson" email to Obenstine: "Thanks for the spread sheet. Just a reminder . . . Please make sure you don't give the West tower spread to Sonny ever! He will catch that Kay is not on it. I have provided him with altered spread sheets and lists for the West Tower for the last year with my name and unit number and we don't want to get careless now.").

15. Billiter and Obenstine were actively involved in recruiting clients. (See, e.g., Exh. Exh. 41 at P0104, P0105, P0106, P0107, P0110-11) (November 20, 2008, email from "Kay Jackson" to Obenstine forwarding communications with a potential client in which Jackson represented to the client: "Ben Easterlin with King and Spalding is our lead attorney . . . in partnership with Mark Obenstine out of California."), P0155 & P0157); (Exh. 67) (October 4, 2008, Jackson email to Muszik stating: "Carol, we are moving forward with the action against Cosmopolitan. Mark Obenstine and King and Spalding are on board as well as the Nevada local counsel. Donna asked me to send you the engagegment [sic] letter[.] Please mail the original engagement letter and your retainer check made out to Mark Obenstine Esq[.]"); (Exh. 69) (Billiter emails to Muszik seeking her signed engagement letter); (Exh. 71) (October 28, 2008, Billiter email to Obenstine and Easterlin forwarding Muszik's response to Billiter's attempt to recruit her); (Exh. 96) (December 2008, email from Obenstine to Kay Jackson regarding retention of client); (Exh. 115) (April 8, 2009, email in which Obenstine requested that Billiter "please call [a potential client]. He is still unsigned. You are better at closing the deal with the exceedingly hesitant prospective clients.").

16. On September 26, 2008, Obenstine sent Easterlin an email to set up a call with Billiter to discuss "client retention." (Exh. 41 at P0152) ("Are you available to confer with Donna[?] She would like to confer with us regarding Cosmopolitan client retention.").

17. On October 2, 2008, Easterlin notified Obenstine that King and Spalding had a "clear conflict of interest" and could not openly participate in the Cosmopolitan litigation. The email, sent to Obenstine and Billiter, read as follows:

From: Easterlin, Ben

> To: mobenstine@acentrixcaoital.com; donnabilliter@aol.com
>
> Subject: Cosmopolitan
>
> Date: Thursday, October 02, 2008
>
> I have received bad news. Deutsche Bank is a K&S client. Because Nevada Property 1, LLC is an affiliate of the bank, K&S has a clear conflict of interest that would enable the defendant to disqualify the firm from any litigation involving NP1. Moreover, the firm does not want to damage its relationship with this client. So, I am directed that K&S cannot be part of any engagement letter with any clients and cannot be on any pleadings in any litigation against NP1. If this means that you want to proceed without me, I understand. Of course, I would like to continue if you are agreeable and my involvement would be helpful. In that event, I think we would be talking about filing a class action with [Obenstine] and local counsel on the pleadings, and [Obenstine] hiring K&S to do work for him. He and I have discussed that possibility. The immediate problem I see, though, is signing up people. We have enough to proceed with a class action, but we want more to provide more leverage in discussions with local counsel.

(Dkt. 593, PTCO at ¶ 5.k; Exh. 56).

18. Although Easterlin was aware that he had a "clear conflict of interest," Easterlin continued to participate in the Nevada litigation with Obenstine. (See Dkt. 593, PTCO at ¶ 5.m); (Exh. 41 at P0155) (October 17, 2008, email from Obenstine to Easterlin stating: "Ben – Are you available to confer with Donna and me[?] Donna is interested in providing an update regarding Cosmopolitan.").

19. Obenstine promoted Easterlin's involvement to potential clients, and acknowledged that using Easterlin's "professional brand" was "undoubtedly facilitating client retention[.]" (Exh. 34 at P0572) (January 11, 2009, email from Obenstine to potential client (with Easterlin copied) stating in part: "[f]eel free to contact me or Ben [Easterlin] if you have any questions or concerns"); (Exh 83) (February 20, 2009, email from Obenstine to potential client providing Easterlin's "profession bio" and contact information at King and Spalding); (Exh. 97) (December 2008, email

communication with potential client regarding King and Spalding's involvement); (Exh. 85) ("Ben – Thank you for allowing me to work parasitically off your professional brand and accomplishments. . . . It is undoubtedly facilitating client retention by facilitating the brand of the legal team."); (Exh. 41 at P0104, P0105, P0106, P0107, P0110-11) (November 20, 2008, email from Kay Jackson to Obenstine forwarding communications with potential client in which Jackson represented: "Ben Easterlin with King and Spalding is our lead attorney . . . in partnership with Mark Obenstine out of California."), P0155 & P0157); (Exh. 96) (December 4, 2008, email from Obenstine, with a copy to Easterlin, to potential client attaching engagement letter and providing Easterlin's information, including his "professional bio" and contact information at King & Spalding).

20. Indeed, in one communication, a prospective client emailed Obenstine and Easterlin (with a copy to Kay Jackson at the lucke.13@live.com email address), stating, "I have been speaking with Kay" and "believe that myself and my group of friends are interesting [sic] in joining the law suit with Kay." (Exh. 97 at 2). The prospective client asked several questions, including "[i]s King & Spalding handling the Cosmopolitan case with Mr. Obenstine?" (Id.). After Obenstine asked if the client was available to confer the next day, the client again asked about King & Spalding's involvement: "If I can just ask Mr. Easterlin to reply back with King & Spaldings [sic] involvement with this case, that would mean a lot." (Id. at 1). Easterlin, with Obenstine and "Kay Jackson" copied, responded: "Yes, we will be working with Mark on this case." (Id.); (Easterlin Depo at 150-52).

21. Moreover, Obenstine and Easterlin exchanged drafts of an engagement letter to retain purchasers of units in the Cosmopolitan. (See Exh. 41 at P0154; id. at P0157).

22. Easterlin also advised about the terms of the engagement letters. (See Exh. 41 at P0121) (February 16, 2009, email to Obenstine stating "Mark, [i]f we promised that to people, then we should live up to our promise. But if people are signed up w/o that cap and are not expecting it, we shouldn't include it. That is, no reason to limit ourselves unnecessarily.")).

23. Billiter, almost always using her Kay Jackson alias, contacted owners of units in the Cosmopolitan to determine their interest in joining the Watt class action, (Dkt. 593, PTCO at 5.n;

Billiter Depo. at 8-9; Muszik Depo. at 24-25), and repeatedly urged them to do so. (See e.g. Exh. 41 at P0106-107, P0110-112, Exh. 67, Exh. 69, Exh. 72). She also signed up clients for Obenstine. (Exhs. 96, 83, 41 at P0112, P0113, P0118).

24. In an email dated October 13, 2008, Obenstine confirmed that his correct address was on MacArthur Blvd. in Newport Beach, California. (Exh. 41 at P0106-107)

25. On October 17, 2008, Obenstine emailed Easterlin to set up a call with Billiter to discuss the status of the Cosmopolitan matter. (Exh. 41 at P0155) ("Ben – Are you available to confer with Donna and me[?] Donna is interested in providing an update regarding Cosmopolitan"). Easterlin agreed to use his conference call line for the call with Billiter and Obenstine. (Id.).

26. Billiter misrepresented to putative class members in the Watt litigation that she was a purchaser of a unit in the Cosmopolitan. (Dkt. 593, PTCO at ¶ 5.q).

27. Billiter altered documents to make it appear that "Kay Jackson" owned one of the two units actually purchased by Muszik. (Dkt. 593, PTCO at ¶ 5.o).

28. In her email communications, and on the cosmopolitanownerslv.com blog, Billiter, posing as Jackson, falsely represented to prospective clients that she (Jackson) purchased a unit in the complex and retained attorneys to represent the Cosmopolitan purchasers. (Dkt. 593, PTCO at ¶ 5.p).

29. Billiter never owned or had any interest in any unit in the Cosmopolitan. (Dkt. 593, PTCO at ¶ 5.r).

30. Obenstine knew that Billiter, who was posing as Jackson, was falsely representing that she was a purchaser of a unit in the Cosmopolitan. (See Exh. 41 at P0105) (October 6, 2008, email from "kay jackson" to Obenstine regarding a call with a prospective client, and stating, "Don't forget who I am"); (id. at P0124) (March 4, 2009, email from "Jackson" to Obenstine stating: "Mark, if you are going to provide the email address to title, please remove the email address for 4028. That is Carol Muszik contract. Add her name and unit number but not the email address."); (id. at P0144) (April 21, 2010, "kay jackson" email to Obenstine: "Thanks for the spread sheet. Just a reminder . . . Please make sure you don't give the West tower spread to Sonny ever! He

will catch that Kay is not on it. I have provided him with altered spread sheets and lists for the West Tower for the last year with my name and unit number and we don't want to get careless now.").

31. Billiter, acting as Jackson, sent a retainer agreement to Muszik on behalf of Obenstine.[5] (Muszik Depo. at 35-36; Exh. 67) ("Carol, we are moving forward with the action against Cosmopolitan. Mark Obenstine and King and Spalding are on board as well as the Nevada local counsel. Donna asked me to send you the engagement letter and instructions.") (emphasis added).

32. Muszik complained to Easterlin that "Donna Billiter has been pressuring [her] to sign an engagement letter for the pursuit of Cosmopolitan." (Exh. 70 at 2).

33. Muszik was not aware that Billiter had altered documents or that she was representing herself as the owner of Muszik's unit. Muszik never consented to such alteration or claim by Billiter. (Dkt. 593, PTCO at ¶ 5.s).

34. In February 2009, Billiter, in her Jackson guise, called Estakhrian about the Cosmopolitan. (Dkt. 605, RT at 41-42). The phone call was Estakhrian's first contact with anyone about getting involved in a legal action concerning the Cosmopolitan. (Id. at 42). During the call, Billiter told Estakhrian that she (Jackson) was one of the owners of a unit in the Cosmopolitan, that she had been working very hard to put a team together, and that she had been successful in hiring attorneys including Easterlin, Obenstine, and the MAC firm. Billiter also represented that she "had been able to sign up a whole lot of other people" and that she wanted Estakhrian to join the class action lawsuit. Estakhrian told Billiter that he would think about it and get back to her. (Id.)

35. On February 24, 2009, Estakhrian sent Billiter an email indicating that he was prepared to join the class action lawsuit. (Exh. 141 at 8; Dkt. 605, RT at 43).

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[5] As noted above, Billiter typically did not communicate with Muszik using the Kay Jackson alias. However, in this instance, she sent the email using the Kay Jackson name and email address.

36. Billiter subsequently sent Estakhrian a retainer agreement and requested a deposit of $1000 for costs made payable to Obenstine. (Exh. 141 at 10 Dkt. 605, RT at 43-44).

37. Hundreds of Cosmopolitan purchasers, including Estakhrian, entered into a retainer agreement with Obenstine. (Dkt. 593, PTCO at ¶ 5.t).

38. Approximately 325 West Tower purchasers entered into retainer agreements obtained and/or processed by Billiter. (Dkt. 593, PTCO at ¶ 5.x).

39. Approximately 90 East Tower purchasers entered into retainer agreements obtained and/or processed by Billiter. (Dkt. 593, PTCO at ¶ 5.y).

40. Most or all retained clients agreed to pay $1,000 for costs and to "assign to [Obenstine] a contingency fee" ranging from 12.6% to 28.0% of any recovery. (Dkt. 593, PTCO at ¶ 5.v).

41. Obenstine, King and Spalding, Easterlin, and the MAC firm through its attorney Coffing agreed to work together to prosecute claims against the developers of the Cosmopolitan. (Dkt. 593, PTCO at ¶ 5.l).

42. Before filing the Nevada class action, King and Spalding, MAC, and Obenstine entered into an agreement to share any attorney's fees awarded in connection with the Watt action. (Dkt. 593, PTCO at ¶ 5.bb).

43. King and Spalding, MAC and Obenstine agreed that King and Spalding would not appear on the pleadings and that King and Spalding would be paid from the fees paid to Obenstine. (See Exh. 80 at 1-2) (Easterlin email stating that "[u]nder our proposal, we would proceed on a contingent fee basis with M&A receiving 1/3 of the fees and Mark Obenstine receiving 2/3. Mark Obenstine would pay K&S from his share.").

44. On February 11, 2009, MAC, as counsel for the class, filed the Watt action in Nevada state court representing purchasers of units in the Cosmopolitan East and West Towers. (Dkt. 593, PTCO at ¶¶ 5.aa & 5.z).

45. There is no evidence that Obenstine disclosed the fee splitting agreement to his clients – the class members – or otherwise obtained his clients' written approval of the fee splitting agreement. (See, generally, Exh. 4 (West Tower Class Notice); Exh. 6 (East Tower Class

Notice)). There is also no evidence that Obenstine disclosed to the court in the Watt litigation his participation in the case and that he represented hundreds of class members, or that he had a fee splitting arrangement with Coffing and Easterlin.

46. Sunjay ("Sonny") Varma ("Varma") executed a retainer agreement with Obenstine who served as Varma's attorney in the Watt action. (Varma Depo. at 36 ("I had signed an agreement with him, so he was my attorney."); Dkt. 605, RT at 33).

47. Varma was a purchaser of a West Tower unit, (Varma Depo. at 14-15), and served as a class representative in the Watt action. (Id. at 26-27).

48. Billiter withheld her identity from Varma. For example, in an April 21, 2010, email from "Kay Jackson" to Obenstine, Billiter stated: "Just a reminder . . . Please make sure you don't give the West [T]ower spread to Sonny [Varma] ever! He will catch that Kay is not on it. I have provided him with altered spread sheets and lists for the West Tower for the last year with my name and unit number and we don't want to get careless now." (Exh. 50 at CR000609); (Varma Depo. at 60–61) (testifying that he only recently found out that "Donna Billiter is also known as Kay Jackson").

49. Billiter provided Varma with a spreadsheet of Obenstine's clients for the Watt litigation which had been altered to indicate that Billiter, posing as Jackson, owned a unit in the Cosmopolitan. (Exh. 50 at CR000609; Varma Depo. at 81-82).

50. Obenstine continued to sign up and communicate with clients after the Watt action was filed. (See Coffing Depo. at 40; Exh. 34 at P0568); (Exh. 34 at P0570) (March 5, 2009, email from Obenstine to client attaching amended complaint and stating, "We are confident our decision to amend the Complaint will increase the odds of a favorable outcome. Although we cannot offer any guarantees as to outcome, we have concluded these new causes of action strongly support a right of contract rescission."); (id. at P0571) (February 16, 2009, email from Obenstine to client attaching initial complaint).

51. Easterlin and Obenstine both sent periodic updates to their clients – the class members – regarding the status of the Nevada litigation, before and after the action was filed.

(See Exh. 34 at P0569 & P0579); (id. at P0571) (forwarding February 2009, complaint to clients); (id. at P0570) (forwarding amended complaint to clients)).

52. Obenstine reviewed pleadings in the Watt action before they were filed. (Coffing Depo. at 40).

53. Jessica Austin ("Austin") is a legal secretary/paralegal employed by the MAC law firm,[6] (Austin Depo. at 7-8), who worked as a client contact with the lawyers handling the Watt action. (Id. at 13-14).

54. Austin communicated with Obenstine concerning draft documents. (Austin Depo. at 19).

55. Obenstine instructed Austin that he should not be listed as a recipient of emails concerning the Watt action but should instead be blind copied. (Austin Depo. at 61-62). In response to an October 13, 2009, email, Austin sent to opposing counsel with a draft of a joint motion for preliminary approval of the settlement, on which Easterlin and Obenstine were copied, Obenstine replied to Austin: "Jessica, Please recall this message (if possible). Ben and I should be blind-copied whenever email messages are sent to opposing counsel." (Exh. 84; Austin Depo at 61-63).

56. Billiter, in her Jackson guise, worked with Obenstine and the MAC firm on the Watt action, compiling a client list and sending out engagement letters. (Austin Depo. at 32-33; Coffing Depo. at 48-49).

57. Billiter acted with Obenstine's authorization in communicating with Watt class members. (See Obenstine Depo. Vol. I at 103).

58. Obenstine drafted blog posts for Billiter to update class members under her Jackson guise. (See Obenstine Depo. Vol. II at 330-31).

59. On July 1, 2009, plaintiffs filed a motion for class certification in the Watt action, falsely identifying Jackson as the owner of unit 4028 in the Cosmopolitan. (Exh. 78 at MA0005188) (client matrix); (Austin Depo. at 64-67).

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[6] Austin's maiden name is "Plecher." (See Austin Depo. at 61).

60. In September 2009, Obenstine, Easterlin, and MAC considered an offer to settle claims with respect to the West Tower. (Dkt. 593, PTCO at ¶ 5.cc).

61. NP1 paid $113,990,875 to settle the portion of the case relating to the West Tower. The 1,050 West Tower class members who did not opt out of the settlement each received, on average, $108,563. In effect, the class members received a return of 74.4% of their escrow deposits. From the total settlement amount, approximately 10.5% or $14,069,000 was deducted for attorney's fees. (Dkt. 593, PTCO at ¶ 5.ee).

62. Although Austin initially believed that Billiter, in the guise of Jackson, purchased a unit in the Cosmopolitan, when the case settled and the MAC firm received the documents identifying the unit owners, Austin discovered that Jackson was not an owner and reported this to the attorneys she was working with at the MAC firm. (Austin Depo. at 35) ("[W]hen we settled . . . we got the documents from title that had all the unit owners, and when we compared them and entered them into our master mailing matrix, the unit she said she had, she didn't.").

63. The Notice of Proposed Class Action Settlement sent to class members in the Watt action relating to the West Tower did not identify Obenstine as class counsel and did not disclose to class members that Obenstine would be receiving any attorney's fees from the settlement. (See, generally, Exh. 4) (Watt West Tower Class Notice). Instead, it identified only Coffing and Nick D. Crosby of the MAC firm as "Class Counsel," (id. at 2), and stated that "Class Counsel" had "agreed to seek not more than 13.5% of the gross settlement amount as fees and expenses in connection with their representation of the Settlement Class." (Id. at 3). The West Tower Class Notice also did not disclose that any payments would be made to Billiter or that Varma would receive any payment beyond the $5,000 incentive award. (See, generally, id.).

64. Class members were advised to contact "Class Counsel" if they had any questions about the settlement; neither Obenstine nor Easterlin were identified as class counsel. (See, generally, Exh. 4)

65. Billiter, using her Jackson alias, expressed opinions and communicated with class members regarding the settlement, falsely representing that she was a class member and urging them to accept the settlement. (Dkt. 593, PTCO at ¶ 5.dd); (see, e.g., Exh. 41 at P0127)

(September 10, 2009, email from Billiter to Obenstine stating that she "spoke with Terry [Coffing] regarding a settlement offer of 66-70% + attorneys fees and costs[,]" which was "[o]ne that I think I can make happen with the people in our group."); (Exh. 41 at P0129) (October 22, 2009, email from "Kay Jackson" to clients, stating that she is "working hard on getting the settlement done and want[s] to know the concerns of those in the group who do not want to take it"); (Exh. 41 at P0128) (October 24, 2009, email from Kay Jackson to a client who "did not sign on to settle" but stating "I am taking the settlement for a number of reasons" and then providing the purported reasons).

66. Obenstine was aware that Billiter, in her Jackson guise, was making false representations to members of the Watt class to induce them to accept the settlement. Indeed, Obenstine drafted content for Billiter to send to class members, authorized Billiter to use a false identity in communicating with class members, and approved of Billiter pretending to be a class member when he knew she was not. (See Exh. 89) (Obenstine email proposing language for Billiter, and advising, among other things, that "[i]t is probably important to weave a 'you will be left adrift if you opt-out' theme throughout the message"). In an October 27, 2009, email to Easterlin with a copy to Obenstine about the need to keep Muszik in the dark, Billiter stated: "Please take her under your wing and only let her talk to you. This is really important. If she responds to Sonny or another third party with the unit number 4028 and it is Carol Musik [sic] on the contract then my cover is blown. I have altered all of the spread sheets along with the email addresses Terry just provided to me, Mark, and subsequently to Sonny. It is my name that appears in the place of Carol. Also Carol doesn't know of my alter ego, Kay. She only knows me as Donna and isn't really crazy about me. She only responds favorably to you." (Exh. 104).

67. On December 14, 2009, the Nevada court granted final approval of the portion of the Nevada litigation relating to the West Tower. (Dkt. 593, PTCO at ¶ 5.ff).

68. Obenstine paid Billiter $200 for each retainer agreement she processed and/or obtained from the West Tower for a total of $65,000. (Dkt. 593, PTCO at ¶ 5.hh).

69. As a class representative in the Watt action, Varma received a $5,000 incentive award approved by the court. (Coffing Depo. at 64) (agreeing that Varma "should not have

received any other compensation as a class representative"); (Exh. 4) (West Tower Class Notice at 3).

70. Obenstine admitted that, other than the incentive award, Varma was not entitled to receive any other payment for his efforts on the case. (Obenstine Depo. Vol. I at 64).

71. Although the class notice relating to the West Tower settlement stated that Varma would receive no more than $5,000 for his services as a class representative, (Exh. 4 (West Tower Class Notice) at 3), Billiter stated in an email to Obenstine on September 10, 2009, that Coffing "agreed to work with Sonny's deposit also[.]" (Exh. 41 at P0127). In a subsequent email on December 9, 2009, Billiter told Obenstine that she "spoke with Terry [Coffing] and there won't be any problem paying Sonny [Varma] his $43K. [Coffing] said he would just pay you extra since he is the actual attorney of record and it could flow through you with no problem." (Exh. 41 at P0136; Obenstine Depo. Vol. I at. 87-88).

72. The $43,000 payment referred to by Billiter was to make Varma "whole." It was the difference between the amount he received under the settlement and the amount he paid as the deposit for his Cosmopolitan unit. (Varma Depo. at 84-86; RT at 36).

73. Obenstine subsequently paid Varma over $40,000, purportedly for work on other matters, including during the time period when Varma was a client. (See Obenstine Depo. Vol. I at 64-66).

74. On December 16, 2009, Coffing sent an email to Obenstine and Easterlin advising them that the attorney's fees from the West Tower settlement, excluding costs, totaled $14,419,510. (Dkt. 593, PTCO at ¶ 5.gg). Although the parties had contemplated dividing the fees in three equal parts, Coffing proposed that "the fees be divided as follows[:] $5,600,000 to [the MAC defendants] (in addition to the admin) and $8,809,520 to Mark [Obenstine] and K&S." (Exh. 41 at P0161).

75. After concluding the settlement of the West Tower, Obenstine, Easterlin, and MAC worked together to settle the portion of the litigation relating to the East Tower. (Dkt. 593, PTCO at ¶ 5.ii).

76. Obenstine and MAC agreed to "divide the East Tower Fees on a 50/50 basis," exclusive of costs. (Dkt. 593, PTCO at ¶ 5.ll). Obenstine and MAC memorialized the fee sharing agreement on January 5, 2010, shortly after concluding the settlement of the West Tower, but prior to commencing serious settlement negotiations regarding the East Tower. (Exh. 41 at P0175) (Obenstine email to Coffing (copying Easterlin) stating: "I am in receipt of your letter regarding our recent agreement to amend our fee-sharing agreement with respect to the East Tower Units of the pending Cosmopolitan . . . litigation. This email message shall serve as formal confirmation of our new agreement to divide the East Tower fees on a 50/50 basis exclusive of costs").

77. On January 5, 2010, Obenstine sent Coffing an email confirming the California address to send the IRS Form 1099 for Obenstine's share of the attorney's fees. (Exh. 41 at P0175).

78. NP1 paid $43,635,950 to settle the portion of the Nevada litigation relating to the East Tower. The East Tower class members who did not opt out of the settlement each received, on average, $102,192. The class members received a return of 68.0% of their escrow deposits, less costs, fees, and a $350 escrow cancellation fee. From the total settlement amount, approximately 7.82% or $8,899,000 was deducted for attorney's fees. (Dkt. 593, PTCO at ¶ 5.jj).

79. The Notice of Proposed Class Action Settlement sent to class members in the Watt action relating to the East Tower settlement did not identify Obenstine as class counsel and did not disclose to class members that Obenstine would receive attorney's fees from the settlement. (See, generally, Exh. 6) (East Tower Class Notice). Instead, it identified only Coffing and Nick D. Crosby of the MAC firm as "Class Counsel" and stated that "Class Counsel" had "agreed to seek not more than 7.82% of the principal amount of the earnest money deposit as fees and expenses in connection with their representation of the Settlement Class." (Id. at 3). The East Tower class notice also did not disclose that any payments would be made to Billiter.

80. Class members were advised to contact "Class Counsel" if they had any questions about the settlement; again, neither Obenstine nor Easterlin were identified as class counsel. (See, generally, Exh. 6).

81. On April 6, 2010, the Nevada court granted final approval of the portion of the Nevada litigation relating to the East Tower. This final approval resolved the entire Nevada litigation. (Dkt. 593, PTCO at ¶ 5.kk).

82. Obenstine paid Billiter $200 for each retainer agreement she processed and/or obtained from the East Tower for a total of $19,000. (Dkt. 593, PTCO at ¶ 5.ll).

83. Obenstine received a total of $12 million in attorney's fees from both the West and East Tower Settlements.[7] (Dkt. 593, PTCO at ¶ 5.mm; Obenstine Depo. Vol. II at 357).

84. Obenstine did not directly advise the Watt court that he would be receiving $12 million in attorney's fees from the settlement of the Nevada litigation. (Dkt. 593, PTCO at ¶ 5.pp). Nor is there any evidence that Obenstine or anyone else ever advised the Watt court that Obenstine would or did receive such fees. Indeed, in an email dated May 11, 2010, Coffing confirmed that MAC was the only "official" class counsel even though Obenstine shared in the attorney's fees. (Exh. 41 at P0176).

85. Obenstine acted as counsel for the class in the Watt case. (Obenstine Depo. Vol. I at 153-157).

86. Obenstine was admitted to practice law in California. (Dkt. 593, PTCO at ¶ 5.a).

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[7] During trial, Obenstine testified that he received only $11.1 million and that he had "over-estimated the fees" he received. (See Dkt. 605, RT at 157-58, 160). The court finds Obenstine lacks credibility not only with respect to this issue but as to his entire testimony. For instance, Obenstine testified inconsistently regarding the fees he received in the Watt litigation, the fees he paid Billiter, and her role in the Watt litigation. (See Dkt. 605, RT 171; Exh. 106, Obenstine Depo in Stringfellow & Associates, et al. v. Mark Obenstine ("Obenstine Stringfellow Depo") at 182-83 (testifying that he received $6.5 to $7.0 million in attorney's fees); (id. at 172-175) (testifying that Billiter was a client in the Watt litigation, and that he paid her $7,000 to $8,000 for her help in retrieving documents and maps and as reimbursement for costs she incurred); (id. at 175-76) (testifying that Donna Billiter used Kay Jackson because Kay was her middle name and Jackson was her maiden name, and that he "always referred to her as Kay" and "knew her as Kay"); (Obenstine Depo. Vol. I at 211-12) (testifying that he thought Billiter had a condo unit at the Cosmopolitan); (Dkt. 605, RT at 167-68) (testifying that he "was operating with the belief that [Billiter] was a [Cosmopolitan] purchaser" because she was the one who first provided him with a Cosmopolitan contract and even though it was not signed by her, "she seemed very familiar with the case" but conceding at least that he "wasn't sure [at the time] if she was a purchaser or not"). Indeed, Obenstine was one of the least credible witnesses that has ever appeared before the court.

87. Obenstine was a member of the California State Bar during the relevant time period, from the latter part of 2008 through July 2015. (Obenstine Depo. Vol. I at 38-39).

88. Obenstine had retainer agreements for the Watt litigation sent to his address in California. (Obenstine Depo. Vol. I at 38). The engagement agreement sent by Billiter to Estakhrian identifies Obenstine's address as 4533 MacArthur Blvd., Suite 108, Newport Beach, California, 92660. (Exh. 141 at 11, 20).

89. Obenstine has never been admitted to practice law in Nevada. (Dkt. 593, PTCO at ¶ 5.b).

90. Obenstine and Coffing reached a "mutual agreement" that Obenstine would seek pro hac vice status in the Watt litigation. (Obenstine Depo Vol. I at 40). However, Obenstine never applied for pro hac vice admission, (Dkt. 593, PTCO at ¶ 5.qq);(Obenstine Depo. Vol. I at 40) ("I never got around to it."); id. at 164), or otherwise make an appearance in the Watt action. (Obenstine Depo. Vol. I at 39).

91. Following the settlement of the Watt litigation, Obenstine and Billiter informed Obenstine's clients they were considering filing a second lawsuit, sometimes referred to as "Cosmo Phase Two" or "Project Optimus," to recover the balance of the Cosmopolitan deposits that was not recovered in the Watt action. (Dkt. 593, PTCO at ¶ 5.rr). Billiter and Varma worked with and under the direction of Obenstine to obtain clients for this new litigation. (See, e.g., Exh. 41 at 0142, 0145, 0147).

92. Other attorneys working with Obenstine filed the action, Kristoffer Williamson, et al. v. Deutsche Bank, et al., Case No. A-636407-C, in Clark County, Nevada on March 4, 2011. The Williamson complaint sought the balance of the Cosmopolitan purchasers' deposits plus other compensation. (Dkt. 593, PTCO at ¶ 5.tt).

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CONCLUSIONS OF LAW[8]

I. BREACH OF FIDUCIARY DUTY.

93. "The relation between attorney and client is a fiduciary relation of the very highest character." Neel v. Magna, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 189 (1971) (internal quotation marks omitted).

94. "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages." Oasis West Realty, LLC v. Goldman, 51 Cal.4th 811, 820 (2011).

95. To establish a claim for breach of fiduciary duty in an attorney-client context, plaintiffs must prove that (1) defendant breached the duty of an attorney to act with the utmost good faith in the best interests of his clients; (2) plaintiffs were harmed; and (3) defendant's conduct was a substantial factor in causing plaintiffs' harm. See CACI 4106.

96. "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, together with statutes and general principles relating to other fiduciary relationships, all help define . . . the fiduciary duty which an attorney owes to his [or her] client." Stanley v. Richmond, 35 Cal.App.4th 1070, 1086 (1995) (internal quotation marks omitted); see also Herrera v. Stender, 212 Cal.App.4th 614, 632 (2012) ("Violation of the rules [of professional conduct] can be used . . . to establish a breach of fiduciary duty.").

97. An attorney's fiduciary relationship with a client imposes, among other things, a duty to disclose and a duty of loyalty. See Neel, 6 Cal.3d at 188-89; Gutierrez v. Girardi, 194 Cal.App.4th 925, 932 (2011) (attorney owes a fiduciary duty to client, including "a duty of loyalty).

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[8] Obenstine contests this court's jurisdiction and plaintiffs' standing. (See Dkt. 609, Defendant Obenstine's Memorandum of Points and Authorities Re Bench Trial ("Def. Memo") at 4-5; Dkt. 610, Defendant Mark Obenstine's Proposed Findings of Fact and Conclusions of Law ("Def. Proposed Findings") at 11-14). The court previously rejected these arguments in connection with defendant's motion for summary judgment, (see Dkt. 498, Court's Order of January 29, 2017, at 12-15), and plaintiffs' motion for class certification. (See Dkt. 500, Court's Order of February 4, 2017, at 11-14). In any event, the court finds that plaintiffs have Article III standing.

98. The evidence shows that Obenstine assumed a fiduciary duty to class members by acting as counsel in the Watt action, for instance by entering into retainer agreements with hundreds of Cosmopolitan purchasers, including Estakhrian, and soliciting and communicating with potential and actual class members. (See supra Findings of Fact ("FOF") at ¶¶ 15-16, 19-21, 31, 34-37, 40, 47, 51-52, 75).

99. Plaintiffs have proven by a preponderance of the evidence that Obenstine breached his fiduciary duty to class members in several respects.

100. Obenstine violated California Business and Professions Code § 6152 ("§ 6152") throughout his involvement in the Watt litigation. Section 6152 makes it "unlawful" for any person to solicit another person "to act as a runner or capper for any attorneys or to solicit any business for any attorneys[.]" Cal. Bus. & Prof. § 6152. "A runner or capper is any person, firm, association or corporation acting for consideration in any manner or in any capacity as an agent for an attorney at law or law firm, whether the attorney or any member of the law firm is admitted in California or any other jurisdiction, in the solicitation or procurement of business for the attorney at law or law firm[.]" Cal. Bus. & Prof. Code § 6151(a). Under the statute, "[a]n agent is one who represents another in dealings with one or more third parties." Id. at § 6151(b).

101. The evidence establishes that Obenstine paid Billiter for each class member she "signed up" to join the Watt litigation. (See supra FOF at ¶¶ 7-9, 37-38, 68, 82).

102. Although Obenstine knew from the outset that using Billiter was "unethical" since she would be acting as a "runner[,]" (see supra FOF at ¶¶ 7-9); (Exh. 65) (August 29, 2008, email to Obenstine from Easterlin stating, "I would like to use Donna, but I am worried that since she is not a purchaser there and would be doing that for a fee she would really be subject to a suit or we might be accused of unethical conduct for having a 'runner'") (emphasis added), Obenstine nonetheless used her to retain clients and urge class members to agree to the settlement.

103. As part of the runner/capper scheme, Billiter registered the domain name cosmopolitanownerslv.com in order to generate interest in the Cosmopolitan litigation. (See supra FOF at ¶ 13). She contacted owners of units in the Cosmopolitan to determine their interest in joining the Watt action, (see id. at ¶¶ 14-15, 23, 31-32, 34), and repeatedly urged them to do so.

(See id.). Billiter signed up approximately 415 clients for Obenstine. (See id. at ¶¶ 38-39). For her services as a runner, Obenstine paid Billiter a total of $84,000 ($200 for each client she signed up). (See id. at ¶¶ 68, 82).

104. In addition to violating § 6152, Obenstine breached his fiduciary duty to the Watt class members by colluding with Billiter to use the false identity of "Kay Jackson" and to falsely represent that "Kay Jackson," like the class members, was an owner of a Cosmopolitan unit. (See supra FOF at ¶¶ 7, 12-14, 17, 27-31). For instance, in her email communications, and on the cosmopolitanownerslv.com blog, Billiter, posing as Jackson, falsely represented that she (Jackson) purchased a unit in the complex and retained attorneys to represent the Cosmopolitan purchasers. (Dkt. 593, PTCO at ¶ 5.p).

105. Billiter, with Obenstine's knowledge, falsified documents to make it appear that "Kay Jackson" owned a unit that was actually owned by Muszik, another class member. (See supra FOF at ¶¶ 14, 27, 30, 48,); (Exh. 104) (Billiter email to Easterlin and Obenstine regarding Muszik, stating that "[o]n all of the spread sheets I am using her unit number and my name, Katherine Jackson [and a]s long as she doesn't call anyone other than the attorneys I am fine").

106. Such blatant misrepresentations were even made, with Obenstine's knowledge, to Varma, a Watt action class representative. (See supra FOF at ¶¶ 31, 51-52). In April 2010, Billiter told Obenstine: "Just a reminder . . . Please make sure you don't give the West [T]ower spread to Sonny [Varma] ever! He will catch that Kay [Jackson] is not on it. I have provided him with altered spread sheets and lists for the West Tower for the last year with my name and unit number and we don't want to get careless now." (Exh. 50 at CR000609).

107. Plaintiffs' expert on professional ethics, Ellen Pansky, summed up the egregiousness of Obenstine's conduct relating to the use of Billiter as follows:

> What I think is the egregious breach of fiduciary duty in this case is the fact that he used a nonlawyer [Billiter], colluded with her to create a false identity; made direct misrepresentations to his own clients regarding [Billiter], whether that person was a fellow owner of a unit at the Cosmopolitan. He ghostwrote communications that Ms. Billiter sent to the clients in which misrepresentations were made. He

> encouraged her and . . . effectuated a system where she would communicate with his clients in a false and misleading way, including statements that were made to them regarding whether they should opt in or opt out of the settlement. Those acts were so egregious and so seriously in breach of his duties to the clients of candor, of fair dealing, of fealty and loyalty, that it's those things that . . . constitute the extreme breach of ethics.

(Dkt. 605, RT at 142-43).

108. Next, Obenstine breached his fiduciary duty by failing to disclose his fee-sharing agreements. (See supra FOF at ¶¶ 42-43, 45, 48, 63, 74, 76-77, 79, 83; Dkt. 605, RT at 134). The California Rules of Professional Conduct provide that "member[s] shall not divide a fee for legal services with a lawyer who is not a [partner/associate] unless [t]he client has consented in writing thereto after a full disclosure[.]" Cal. R. Prof. Conduct 2-200. At a minimum, Obenstine did not disclose to his clients his fee sharing agreement with Coffing and Easterlin. (See supra FOF at ¶¶ 42-43, 45, 48, 63, 74, 76-77, 79, 83). Nor did he obtain their written approval. (See, generally, id.); (see Dkt. 605, RT at 140-41) (Pansky testimony regarding the Rule 2-200 violation).

109. Obenstine also did not disclose his fee-sharing agreement to the court in the Watt litigation. He failed to disclose to the Watt court that he would be receiving the bulk of the fees awarded – $12 million – from the settlement. See Cal. Bus. & Prof. Code § 6068(d) (It is the duty of an attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact.").

110. Additionally, Obenstine's ruse involving Billiter posing as "Kay Jackson, Cosmopolitan unit owner," carried over to court filings. The motion for class certification in the Watt action falsely identified "Kay Jackson" as the owner of Cosmopolitan unit 4028. (See supra FOF at ¶ 59); see Cal. Bus. & Profs. Code § 6068.

111. In addition to his undisclosed fee-sharing agreement with Coffing and Easterlin, Obenstine represented to both the Nevada court and the Watt class members that Varma would receive no more than $5,000, yet Obenstine actually paid Varma $43,000. (See supra FOF at ¶¶

69-73); (Exh. 41 at P0127) (December 9, 2009, email from Billiter assuring Obenstine that she "spoke with Terry [Coffing] and there won't be any problem paying Sonny [Varma] his $43K. [Coffing] said he would just pay you extra since he is the actual attorney of record and it could flow through [Obenstine] with no problem."). This violated both Cal. R. Prof. Conduct 1-320 ("Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer[.]") and Cal. Bus. & Profs. Code § 6068(d) (It is the duty of an attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact[.]"). This also violated Obenstine's duty of loyalty and duty to disclose to his clients, the class members.

112. Obenstine also breached his fiduciary duty by not disclosing to the class that he was not authorized to practice law in Nevada and/or that he had not otherwise received permission to appear (e.g., pro hac vice status) in the Watt action. (See supra FOF at ¶¶ 89-90); see Cal. R. Prof. Conduct 1-300 ("A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.").

113. Finally, Obenstine breached his fiduciary duty by failing to disclose, and affirmatively concealing, that Easterlin and his firm, King and Spalding, had a conflict of interest. Although Easterlin alerted Obenstine on October 2, 2008, that King and Spalding had a "clear conflict of interest," Easterlin continued to participate in the Watt action with Obenstine. (See supra FOF at ¶¶ 17-22, 51, 60, 74-76); (Dkt. 605, RT at 125-26) (Pansky opining that Obenstine breached his fiduciary duty to his clients "with the concealment of the involvement of other attorneys who had conflicts")).

114. "[D]isgorgement of fees is a recognized remedy for breach of fiduciary duty[.]" Slovensky v. Friedman, 142 Cal.App.4th 1518, 1527 (2006).

115. "[I]n California[,] . . . an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility." Goldstein v. Lees, 46 Cal.App.3d 614, 618 (1975); see Rodriguez v. Disner, 688 F.3d 645, 655 (9th Cir. 2012) ("In sum, under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation."); see id. at 653 ("A court

has broad equitable power to deny attorneys' fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests.").

116. "Cases disallowing compensation entirely generally have involved a serious violation of ethical rules or statutes, such that it can be said the `services [were] rendered in contradiction to the requirements of professional responsibility. . . . Fraud or unfairness on the part of the attorney will prevent [the attorney] from recovering for services rendered; as will . . . acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties.'" Fair v. Bakhtiari, 195 Cal.App.4th 1135, 1167 (2011) (quoting Goldstein, 46 Cal.App.3d at 618) (italics omitted).

117. Here, based on the evidence adduced at trial and after weighing the credibility of witnesses, the court finds that disgorgement of the fees Obenstine received in the Watt litigation is the proper remedy. See Cal. Bus. & Prof. Code § 6154 ("Any contract for professional services secured by any attorney at law or law firm in this state through the services of a runner or capper is void."); see, e.g., Goldstein, 46 Cal.App.3d at 620 (attorney may not recover fees for services performed in violation of Cal. Bus. & Prof. Code § 6068); Slovensky, 142 Cal.App.4th at 1535 ("Disgorgement of fees may be appropriate remedy for an attorney's breach of fiduciary duty"); Jeffry v. Pounds, 67 Cal.App.3d 6, 12 (1977) (discounting fees incurred after violation of Cal. R. Prof. Conduct 5-102).

118. The court finds that Obenstine committed "serious ethical violations," and that his conduct in the Watt litigation was "inconsistent with the character of the profession, and incompatible with the faithful discharge of [his] duties[.]" Fair, 195 Cal.App.4th at 1167.

II. UCL CLAIM.

119. Plaintiffs' UCL claim is premised on the violations underlying the breach of fiduciary duty claim.[9] (See Dkt. 373, SAC at ¶¶ 67-72). Among other things, plaintiffs alleged that Obenstine violated the UCL by violating § 6152. (See id. at ¶ 70).

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[9] The UCL claim was also premised on plaintiffs' legal malpractice claim, (see Dkt. 373, SAC at ¶¶ 67-72; id. at ¶ 70), but plaintiffs dismissed this claim, with the court's approval, prior to trial.

120. The UCL prohibits "unfair competition," broadly defined as "any unlawful, unfair or fraudulent business act or practice[.]" Cal. Bus. & Prof. Code § 17200; Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 180 (1999). Since the UCL is written in the disjunctive, "[e]ach prong of the UCL is a separate and distinct theory of liability[, with each] offer[ing] an independent basis for relief." Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009). "The UCL's scope is broad." Kasky v. Nike, Inc., 27 Cal.4th 939, 949 (2002).

121. With respect to the unlawful prong, § 17200 "borrows violations of other laws and treats them as unlawful practices that the [UCL] makes independently actionable." Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000) (internal quotation marks omitted).

122. "It is well established that a [UCL] claim may be based on violation of a statute that the plaintiff could not directly enforce with a private action." Herrera, 212 Cal.App.4th at 632 (violation of rule of professional conduct can form the basis of liability for breach of fiduciary duty and violation of the UCL).

123. "Any contract for professional services secured by any attorney at law or law firm in this state through the services of a runner or capper is void." Cal. Bus. & Prof. Code § 6154(a).

124. "In any action against any attorney . . . under [the UCL] any judgment shall include an order divesting the attorney . . . of any fees and other compensation received pursuant to any such void contract." Cal. Bus. & Prof. Code § 6154(a).

125. As discussed above, plaintiffs established by a preponderance of the evidence that Obenstine violated § 6152 by paying Billiter to act as a runner/capper in connection with the Watt litigation. See supra at ¶¶ 100-103. In other words, Obenstine engaged in unlawful conduct in the Watt litigation. See Cal. Bus. & Prof. § 6152 (Section 6152 makes it "unlawful" for any person to solicit another person "to act as a runner or capper for any attorneys or to solicit any business for any attorneys[.]").

126. Similarly, as discussed above, the evidence established that Obenstine violated § 6068. See supra at ¶¶ 109-111.

127. Obenstine also violated the UCL by violating the California Rules of Professional Conduct, see supra at ¶¶ 108, 111-112, including Cal. R. Prof. Conduct 2-200 (fee-sharing), Cal. R. Prof. Conduct 1-300 (providing that "[a] member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction"); Cal. R. Prof. Conduct 1-320 ("[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer").

128. "There are innumerable ways" in which "injury in fact" and "lost money or property" can be shown, including when plaintiffs "surrender in a transaction more, or acquire in a transaction less, than [they] otherwise would have[.]" Kwikset Corp. v. Super. Ct., 51 Cal.4th 310, 323 (2011). Here, the class members in the Watt litigation had an ownership interest in the common fund from which the attorney's fees were paid. See Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1326 (9th Cir. 1999), cert. denied, 529 U.S. 1066 (2000) (noting that class members pay attorney's fees out of a common fund such that they "lose money out of [their] own pocket[s] to the extent that it is paid to the class's lawyers"). Thus, the $12 million in fees Obenstine received directly diluted the compensation paid to the class.[10]

129. Under the UCL, "[p]revailing plaintiffs are generally limited to injunctive relief and restitution." Cel-Tech, 20 Cal.4th at 179 (citing § 17203).

130. "[D]isgorgement is a broader remedy than restitution[,]" and "may include a restitutionary element, but is not so limited." Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1145 (2003) (internal quotation marks omitted). "Restitutionary disgorgement, which focuses on the victim's loss, may be recovered under the UCL." SkinMedica, Inc. v. Histogen Inc., 869 F.Supp.2d 1176, 1184 (S.D. Cal. 2012). "This is typified in situations where the disgorged money or property [came] from the prospective plaintiff in the first instance." Id.; Korea Supply, 29 Cal.4th at 1144-45 ("[A]n order for 'restitution' [i]s one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in

[10] The same is true with respect to the $43,000 paid to Varma.

interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person.") (internal quotation marks omitted).

131. Plaintiffs can "seek restitutionary disgorgement of the attorney's fees Obenstine received from the Nevada litigation" as a UCL remedy. (See Dkt. 498, Court's Order of January 29, 2017, at 20).

132. Under the circumstances, the court finds that restitutionary disgorgement of the $12 million in attorney's fees Obenstine received in the Watt litigation is the appropriate remedy.

133. Plaintiffs also seek injunctive relief, specifically an order enjoining Obenstine from undertaking, directly or indirectly, any further actions inconsistent with his legal and professional duties as a California attorney. However, plaintiffs have failed to show that they will suffer irreparable harm or that injunctive relief is warranted under the relevant case law.

III. CLRA CLAIM.

134. The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer[.]" Cal. Civ. Code § 1770(a). Unlawful practices include "[m]isrepresenting the source, sponsorship, approval, or certification of . . . services" and "[m]isrepresenting the affiliation, connection, or association with, or certification by, another." Id. at §§ 1770(a)(2), (a)(3).

135. The CLRA "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." Cal. Civ. § 1760.

136. Obenstine's conduct, as set forth above, violated the CLRA.

137. While plaintiffs' seek the $12 million in legal fees Obenstine obtained in the Watt litigation as "damages and/or restitution[,]" (see Dkt. 608, Plaintiffs' Proposed Findings at 22), the court finds that restitution in the sum of $12 million is the proper remedy since plaintiffs' CLRA damages claim was previously dismissed. (See Dkt. 498, Court's Order of January 29, 2017, at 23 (granting motion for summary judgment with respect to plaintiffs' claim for monetary damages

under the CLRA); see also Cal. Civ. Code § 1780(a); Gonzalez v. CarMax Auto Superstores, LLC, 845 F.3d 916, 918 (9th Cir. 2017).

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT judgment shall be entered in favor of plaintiffs on their breach of fiduciary duty, UCL, and CLRA claims. Defendant Obenstine shall pay plaintiff class members the amount of $12 million.[11]

Dated this 26th day of March, 2019.

/s/
Fernando M. Olguin
United States District Judge

[11] All three equitable claims seek the same restitutionary relief.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES ESTAKHRIAN, Plaintiff, v. MARK OBENSTINE, et al., Defendants.	Case No. CV 11-3480 FMO (CWx) **JUDGMENT**

Pursuant to the Court's Findings of Fact and Conclusions of Law, filed contemporaneously with the filing of this Judgment, IT IS ADJUDGED THAT:

1. Judgment shall be entered in favor of plaintiffs on their claims for (1) breach of fiduciary duty; (2) violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq.; and (5) violation of the California Consumers Legal Remedies Act, Cal. Civil Code §§ 1750, et seq.

2. Defendant Mark Obenstine shall disgorge and pay as restitution to the class members the amount of twelve (12) million dollars he received as attorney's fees in the Watt litigation.

3. Subject to any allocation for attorney's fees and costs to be determined at a later date, each class member's share of the net monetary award shall be computed based on the pro rata recovery each class member received from the Watt settlement.

Dated this 26th day of March, 2019.

/s/
Fernando M. Olguin
United States District Judge