FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

DR. PATERNO B. HOCOG, a.k.a. DR. LARRY B. HOCOG, **Plaintiff,** **vs.** **OKP (CNMI) CORPORATION, et al.** **Defendants.**	**CIVIL ACTION NO. 06-0445(R)** **ORDER PARTIALLY GRANTING DEFENDANTS' MOTIONS TO DISMISS**

This matter was last before the Court on December 7, 2006 on Defendant Brian Chen's ("Chen's") Motion to Dismiss parts of Paterno (Larry) Hocog's "Verified Complaint and Demand for Jury Trial in Rota" (the "Complaint"). OKP (CNMI) Corporation ("OKP") and Yee Chee Keong ("Yee") join the motion. Counsel were as follows: Ramon Quichocho for Plaintiff; Glenn Jewell for Chen; and Maya Kara for Defendants OKP and Yee.

The complaint contains fourteen causes of action.[1] Chen moves to dismiss claims for negligent entrustment, infliction of emotional distress, unjust enrichment, respondaet superior, and punitive damages. OKP and Yee join Chen's motion with respect to these claims. OKP and Yee also move to dismiss Plaintiff's claim for principal-agent liability. In addition, Yee moves to dismiss Plaintiff's claim for breach of contract, fraudulent misrepresentation, and waste.

I. FACTUAL BACKGROUND

Defendant CPA received a grant from the Federal Aviation Administration for a project associated with the Rota International Airport Runway 09/27 Extension – Phase I (the "Project"). CPA conducted a bid for the Project and selected OKP. In response to CPA's alleged concerns

[1] At this time, the Court will not require an answer to the causes of action not addressed in the motion to dismiss (and joinder). *See, e.g., Godlewski v. Affiliated Computer Srvs., Inc.*, 210 F.R.D. 571, 572-73 (E.D. Va. 2002).

regarding OKP's financial capacity, OKP wrote a letter to CPA explaining that the Project would be funded from another division of OKP in Singapore. Defendant OKP Singapore agreed to handle and finance the preparation and purchasing of all machinery and equipment.

CPA and OKP entered into a Construction Contract for the Project. They agreed that OKP could not transfer the Construction Contract or any interest therein, but could secure subcontractors and suppliers with prior written consent from CPA.

On November 3, 2005, Plaintiff and OKP, through Chen, executed a Letter of Intent to excavate backfill materials from Plaintiff's land in Rota. The Letter of Intent provided for a royalty of $0.55 per cubic yard excavated. The finished excavated grade of the property was to make the site suitable for "building development at generally same grade with abutting highway." A storm water and erosion control ponding basin were to be constructed at the lowest corner of the property. Plaintiff was to review and agree to the final grading plan. A licensed surveyor was to ascertain the amount of backfill material extracted from the property. OKP was to be responsible for the cost of all the required surveying, environmental and engineering services, and any legal action arising from OKP's activities on Plaintiff's land.

Chen allegedly promised Plaintiff that Plaintiff would have a chance to approve a final contract on the excavation. This did not occur.

The Letter of Intent was subject to Defendant OKP's securing of the necessary permits for the excavation. Plaintiff alleges that OKP failed to secure the necessary permits.

Defendants allegedly entered Plaintiff's land, used heavy equipment, excavated 132,000 cubic yards of materials, and caused damage to the land. The final excavated grade of Plaintiff's land is allegedly far below the grade of the abutting highway, and the land is allegedly unsuitable for building development. Two ponding basins cover the expanse of the property.

On August 29, 2006, Plaintiff sent to OKP requesting a tally of the amount of material removed and payment. On September 4, 2006, Plaintiff's counsel sent OKP a letter demanding immediate payment and an end to all activity on his land. On September 5, 2006, Plaintiff's counsel asked OKP whether it wanted to restore Plaintiff's land to useable condition or pay for damages and restoration costs.

OKP paid Plaintiff $10,000 and allegedly refused to make additional payment unless Dr. Hocog released all claims against Defendants. Assuming there were 132,000 cubic yards of backfill materials, Plaintiff was entitled to $72,600 for the material alone.

Plaintiff seeks to pierce OKP's corporate veil on grounds that "Defendant OKP is the alter ego of Defendant Shareholders" (¶ 48(a)), including Chen, and that OKP was inadequately capitalized so as to work an injustice to Plaintiff.

II. STANDARD FOR RULE 12(b)(6) DISMISSAL

Under Rule 12(b)(6), a complaint may be dismissed if it fails to state a claim upon which relief can be granted. Com. R. Civ. Pro. 12(b)(6). The complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial. *In re Adoption of Magofna*, 1 N.M.I. 449, 454 (1990). The court evaluates the complaint in the light most favorable to the non-movant, and takes its allegations as true. *Cepeda v. Hefner*, 3 N.M.I. 121, 126 (1992).

III. ANALYSIS

A. FRAUDULENT MISREPRESENTATION (Second Cause of Action) and WASTE (Third Cause of Action)

Defendants' chief objection to the Complaint is its failure to specify which defendant undertook which action. For instance, Yee is mentioned by name in only two places in the Complaint: at ¶16 where he is listed as a "party" and in ¶142 where he is listed as an "employee" of OKP. Yee argues that he cannot defend himself against a complaint in which his name is not mentioned in any of the causes of action.

At the hearing, counsel for Plaintiff asserted that it would be a waste of time to write Defendants' names in every applicable paragraph of the Complaint. The Court disagrees. Defendants are a varied group of natural and fictitious persons residing in Saipan and Singapore. Naming individuals is a basic requirement to put defendants on notice as to the conduct alleged against them and allow them to formulate an answer complying with Com. R. 8(b). *See* WRIGHT & MILLER § 1248: "[I]n order to state a claim for relief, actions brought against multiple defendants must clearly specify the claims with which each individual defendant is charged."

Allegations of fraud require an even greater level of specificity to comply with Rule 9(b). *See Bank of Saipan v. Montgomery*, No. 04-0088 (N.M.I. Supr. Ct. October 23, 2006), *Order Dismissing Amended Complaint with Respect to Defendant D. A. Davidson & Co*. The complaint must state the "who, what, when, where, and how" of the alleged fraud. *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). In cases of multiple defendants, allegations of fraud "must identify the time, place, and manner of each fraud plus the role of each defendant in each scheme." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

Plaintiff argues that if the Complaint fails to specify the allegations in a manner that provides sufficient notice, the remedy is not a Rule 12(b)(6) motion, but a Rule 12(e) motion for a more definite statement. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). While a Rule

12(e) motion for a more definite statement might have been more appropriate, a cause of action that is insufficiently vague may likewise be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The causes of action for waste and fraud cannot survive a Rule 12(b)(6) motion if they fail to mention specific acts undertaken by each defendant involved.

B. BREACH OF CONTRACT (First Cause of Action)

Yee argues that Plaintiff has failed to include his name in the breach of contract claim, much less allege that Yee was a party to the Letter of Intent signed by Plaintiff and OKP.

As discussed above, a cause of action cannot survive a Rule 12(b)(6) motion if it fails to mention specific acts undertaken by each defendant involved. This principle is particularly relevant in the context of a breach of contract claim, since a non-party to a contract generally is not bound by the contract and thus cannot breach the contract. *See, e.g. Traffas v. Bridge Capital Investors II*, No. 90-1304, 1993 WL 339293 (D. Kan. Aug. 23,1993), at *3 ("It would be a novel holding for the court to rule that a breach of contract action can be maintained against a person who is not a party to the contract being sued upon . . . A party to a contract cannot sue a person who is not a party to that contract for breach of contract."); *Credit Gen. Ins. Co. v. Midwest Indem. Corp.*, 916 F. Supp. 766, 772 (N.D. Ill. 1996) (a non-party to a contract cannot breach that contract).

Although there was an alleged agreement to establish an additional contract, the only existing contract is the Letter of Intent. It was signed by Plaintiff and Chen, apparently acting on behalf of OKP.[2] As a corporation, OKP is a separate entity from its shareholders and from other corporations with which it may be associated. *See Divco-Wayne Sales Financial Corp. v. Martin*

[2] This does not mean that Chen was necessarily a party to the contract. *See Yellow Book of NY L.P. v. Dimilia*, 729 N.Y.S.2d 286 (N.Y.Dist.Ct. 2001) (a single signature line on a corporation's contract was insufficient to personally bind the individual signatory on behalf of a the corporate party).

Vehicle Sales, Inc., 195 N.E.2d 287, 289 (Ill.App.Ct.1963). Unless the corporate veil is pierced, only OKP can be liable for breach of contract.

In order for shareholders of OKP to be held liable, Plaintiff must plead acts demonstrating shareholders' abuse of the protection of corporate form. For example, under Illinois law, one who seeks to pierce the veil "must seek that relief in his pleading and carry the burden of proving actual identity or a misuse of corporate form which, unless disregarded, will result in a fraud on him." *Divco-Wayne*, 195 N.E.2d at 289.[3] In the absence of allegations that shareholders of OKP either were parties to the contract or misused the corporate form to gain an advantage from the contract, the cause of action against Yee for breach of contract must be dismissed.

C. NEGLIGENT ENTRUSTMENT (Seventh Cause of Action)

Plaintiffs' complaint alleges that (1) Defendant OKP was the owner or controller of the equipment at issue (¶ 103); (2) Defendants Does 1-20 and/or others were using Defendant OKP's equipment in the course of their employment (the Court assumes that the employment was with OKP) (¶ 103); (3) Defendants Does 1-20 were negligent, incompetent and/or reckless (¶ 104); (4) Defendant OKP knew or should have known that Defendants Does 1-20 and/or others are ignorant of the laws of the CNMI and would simply follow any instruction from their employer (¶ 105); (5) Plaintiff suffered damages from Defendants' conduct (¶ 106).

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[3] *See also Newman v. Forward Lands, Inc.*, 430 F.Supp. 1320 (E.D.Pa.1977) (no veil piercing of corporate director where complaint failed to allege any misuse of the corporate form, that individual defendants used corporation as their alter ego, or anything else that would justify disregarding the corporation entity); *Cusumano v. Iota Industries, Inc*., 474 N.Y.S.2d 579 (N.Y.A.D. 2 Dept. 1984) (complaint against individual for breach of contract with corporation failed to state claim for relief where allegations that individual was alter ego of corporation were conclusory); *Raber v. Osprey Alaska, Inc*., 187 F.R.D. 675 (M.D.Fla.1999) (complaint stated claim against former officer of corporation for breach of contract and fraud, even though plaintiff was not in contractual privity with former officer, by alleging sufficient specific facts to assert that corporation was mere alter ego of officer); *Zimpel v. LVI Energy Recovery Corp.* 23 Va. Cir. 423 (Va.Cir.Ct. 1991) (sustaining demur on the basis that a subsidiary was not a proper defendant, as it was not a party to the employment contract, and insufficient facts were pleaded to show that the subsidiary was a mere instrumentality of the parent).

In his memorandum, Plaintiff states that Does 1-20 were foreign citizens who had recently arrived in the CNMI and lacked governmental permits to conduct their activity.

Chen argues that Plaintiff has not alleged facts that state a claim upon which relief can be granted for negligent entrustment pursuant to the Restatement (Second) of Torts, § 307. Section 307 of the Restatement states that: "It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others." The comments to § 307 provide that a defendant "is entitled to act upon the assumption that a human being whom he uses is competent, unless he knows or should know that the particular person whom he uses is incompetent, or is one of a class generally recognized as being incompetent or likely to be so." Cmt. "a."

Chen's chief objection to this claim is that Plaintiff failed to allege that Does 1-20 had a history of negligent or incompetent driving or operating of which OKP knew or should have known. Chen argues that Does 1-20s' ignorance of local laws and willingness to follow any instruction of OKP is insufficient to show Defendants' knowledge of Does 1-20s' alleged incompetence. Chen notes the examples cited in the Restatement—situations where the defendant employs a man who the employer "knows to be of an exceedingly fiery and violent temper" who then attacks and harms the plaintiff, § 307, cmt. "a," ill. "1,"or where the defendant employs a contractor who, to the defendant's knowledge, is "a notoriously incompetent builder," § 307, cmt. "a," ill. "2."

Plaintiff argues that his claim for negative entrustment is based not on § 307 but on §§ 308 and 390. *See Yoo v. Quitugua*, 4 N.M.I. 120 (1994). Section 308 provides:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Section 390 provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Chen argues that Plaintiff's claim fails under all three sections, because he does not adequately allege that OKP knew or had reason to know that the heavy equipment operators were defective in some way **before** the events in question took place.

The Court agrees that all three sections require the defendant to have advance notice that the person at issue is likely to create an unreasonable risk of harm. It is not enough to allege that OKP knew or should have known "that Defendants Does 1-20 and/or others are ignorant of the laws of the CNMI and that [they] will do anything that Defendant OKP instructs them to do or else risk losing their jobs, and would therefore, drive Defendant OKP's vehicles in a negligent, incompetent and/or reckless manner." ¶ 105. Mere lack of knowledge of local laws is insufficient to render a person or operator "likely to create an unreasonable risk." Plaintiff cited no case to support his contention that entrusting an instrumentality to an actor knowing they lack of knowledge of the laws or regulations of a jurisdiction could be sufficient to state a claim for negligent entrustment. Based on Plaintiff's theory, nearly every employer with immigrant workers in the CNMI could be liable for negligent entrustment. Plaintiff has failed to state a cause of action for negligent entrustment against any of the defendants.

D. INTENTIONAL AND/OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (Eighth Cause of Action)

The Restatement (Second) of Torts § 46 (1965) provides a cause of action for intentional infliction of emotional distress as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it for such bodily harm.

Chen argues that Plaintiff has not alleged facts that state a claim upon which relief can be granted for infliction of emotional distress because, under the majority rule, one may not recover for emotional distress caused by damage to property. *See Falcon v. McCue*, Civ. No. 01-0350, Order Granting Defendant's Motion in Limine to Preclude Evidence of Mental Distress, October 14, 2003 ("There is no cause of action for emotional distress caused by the destruction of one's property, nor for emotional distress caused by the observation of damage to one's property.")[4]

Plaintiff counters that the CNMI supreme court has never constricted actions for infliction of emotional distress to preclude distress caused by property damage. *See, e.g., Charfauros v. Board of Elections*, 5 N.M.I. 188, 201 (1998): To maintain a cause of action for the intentional infliction of emotional distress requires proof of four elements: (1) that the conduct complained of was outrageous; (2) that the conduct was intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe.

[4] *See also Biondo v. Linden Hill United Methodist Cemetery Corp*., 280 A.D.2d 570, 571 (N.Y. App. Div. 2001) ("damages may not be recovered for emotional distress caused by an intentional or negligent harm to personal property") (citations omitted); *Tressler v. Priester-Hoover*, 31 Pa. D.&C. 4th 73, 76 (Pa. Com. Pl. 1996) (the negligent infliction of emotional distress cause of action "has never been expanded to permit recovery simply because a party sustains damage to personal property . . . [t]his would be an unprecedented expansion of the cause of action"); *General Accident Insurance Co. v. Black & Decker (U.S.) Inc.*, 697 N.Y.S.2d 420 (N.Y. App. Div. 1999) (there is no cause of action for emotional distress caused by the destruction of one's property) (citations omitted); *Hayes v. Newton Bros. Lumber Co*., 481 So.2d 1123 (Ala. 1985) (as a general rule the law will not permit the recovery of damages for mental distress, where the tort results in mere injury to property) (citation omitted).

The Court recently considered this issue in a similar case, *Atalig v. OKP (CNMI) Corp*., in which Chen cited the same cases in support of his argument. As in the instant case, the plaintiff cited no cases to the contrary. Rather, the plaintiff argued that the defendants' alleged actions in those cases were not sufficiently outrageous. After a thorough review of jurisprudence on the tort of infliction of emotion distress, the *Atalig* court found that no cause of action for **negligent** infliction could lie for distress caused solely from the destruction to property.[5] The court granted Chen's motion to dismiss as to negligent infliction.

The *Atalig* court was more willing to allow a cause of action to stand for **intentional** infliction even when the distress was caused solely by harm to property. The court reasoned that the focus of an intentional infliction was not the type of damage but the intent to cause harm. The court cited cases from jurisdictions allowing a cause of action for intentional infliction where the emotional harm was caused solely by destruction of property.[6]

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[5] Jurisdictions are almost unanimous in refusing to extend the tort of negligent infliction to include emotional distress caused solely by harm to property. *See Stechler v. Homyk*, 713 N.E.2d 44 (Ohio. App. 1998) (no recovery for negligent infliction of emotional distress caused by witnessing the destruction of one's property); *Tressler v. Priester-Hoover*, 1996 WL 910160 (Pa. Com. Pl.) (refusing to recognize a cause of action for negligent infliction of emotional distress due to property loss); *McMeakin v. Roofing and Sheet Metal Supply Co. of Tulsa*, 807 P.2d 288 (Okla. App. 1990) (no cause of action may be had for negligent infliction of emotional distress due to property damage); *DeLeo v. Reed*, 2000 WL 38451 (Conn. Super.) (cause of action for negligent infliction of distress caused by property damage not recognized); *Kleinke v. Farmers Co-op., Supply & Shipping*, 549 N.W.2d 714 (Wis. 1996) (cause of action for negligent infliction of distress caused by property damage not recognized); *Butler-Rupp v. Lourdeaux*, 36 Cal.Rptr.3d 685 (Cal. App. 2005) (no recovery of damages for negligent infliction of emotional distress arising solely from property damage or economic injury to the plaintiff); *Ketchmark v. Northern Indiana Public Service Co*. 818 N.E.2d 522 (Ind. App. 2004) (Indiana does not recognize cause of action for negligent infliction based on property damage); *Reeser v. Weaver Bros., Inc*. 560 N.E.2d 819 (Ohio App.1989) (Ohio law does not permit recovery for serious emotional distress which is caused when one witnesses the negligent injury or destruction of one's property); *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997) (not recognizing cause of action for negligent infliction for destruction of property, but reserving decision on whether to accept intentional infliction for property damage); *Roman v. Carroll*, 621 P.2d 307 (Ariz. App. 1980) (no recovery for negligent infliction based on destruction of property); *General Accident Insurance Co. v. Black & Decker, Inc*., 697 N.Y.S. 2d 420 (A.D.2d 1999) (no cause of action for emotional distress caused by property destruction); *Hayes v. Newton Bros. Lumber Co.*, 481 So.2d 1123 (Ala. 1985) (no recovery for mental distress caused by property damage).

[6] *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454 (Alaska 1985) (recognizing cause of action for intentional infliction based on property damage); *Gill v. Brown*, 695 P.2d 1276 (Idaho App. 1985) (recognizing cause of action for intentional infliction based on intentional death of pet). Additionally, damages for emotional distress may be collected under other intentional property torts, *i.e.* conversion or trespass, in many other jurisdictions. *See generally*, 28 A.L.R. 1070 § 7 (2006); 38 Am. Jur. 2d, Fright, Shock, Etc. § 19 (2006).

This Court agrees with the *Atalig* court's finding that a cause of action for intentional infliction can be sustained in the Commonwealth for emotional harm caused solely by the destruction of property. Contrarily, a cause of action for negligent infliction based on property damage must be dismissed.

E. UNJUST ENRICHMENT (Ninth Cause of Action)

Chen argues that Plaintiff has not alleged facts that state a claim for unjust enrichment because the Restatement of Torts does not recognize unjust enrichment as an independent tort cause of action, *see Blystra v. Fiber Tech Group, Inc*., 407 F. Supp. 2d 636, 644 n.11 (D.N.J. 2005),[7] and Plaintiff has not alleged a legal theory outside of tort.

Plaintiff responds that his unjust enrichment claim sounds in quasi-contract rather than tort. Chen argues that a party may not recover for *quasi*-contract when there is an *actual* contract governing the terms of the relationship between parties,[8] since there is no need to resort to the legal fiction of a quasi-contract.[9] As Plaintiff points out, however, the written agreement is only between Plaintiff and OKP. The unjust enrichment claim may be directed at defendants who were not signatories to the contract. Plaintiff also notes that the letter of intention did not memorialize the entire understanding between the signatories, as they had agreed to draw up a final contract at a later time.

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[7] *Blystra* states that the doctrine of unjust enrichment "rests upon the equitable principle that one shall not be permitted to unjustly enrich himself at the expense of another or to receive property or benefits without making compensation therefore." It does not exclude the tort of unjust enrichment. Plaintiff points to sources recognizing the tort: *Glass v. Minnesota Protective Life Insurance Company*, 314 N.W.2d 393, 397 (Iowa 1982) (citing Smith v. Stowell, 125 N.W.2d 795, 799-800 (Iowa 1964) and RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. b (1981)) (finding that plaintiff might prove a right to recover on a theory of unjust enrichment and stating that "[i]n the present case plaintiff stated a cause of action for unjust enrichment.").

[8] *See, e.g., Ridgelake Apartments v. Harpeth Valley Utilities Dist.*, 2005 Tenn. App. LEXIS 210, *27 (Tenn. Ct. App. 2005) ("'it is a general rule of law that an implied contract or quasi-contract will not be imposed in circumstances where an express contract or agreement exists'") (quoting *Scandlyn v. McDill Columbus Corp.*, 895 S.W.2d 342, 349 (Tenn. Ct. App. 1994) (other citations omitted)).

[9] *See White v. Microsoft Corp.*, 2006 U.S. Dist. LEXIS 67565, *37 (S.D. Ala. 2006) (because there was an express contract between the parties on the subject, "it is unnecessary to indulge the legal fiction of implying such a contract to avoid an inequitable outcome").

The Court agrees that Plaintiff cannot recover both unjust enrichment damages and breach of contract damages against OKP for the same act.[10] Nevertheless, the Letter of Intent does not limit the scope of damages available in the event of a breach. Plaintiff is entitled to pursue a contractual remedy or any other remedy which the law affords, and may set forth as many alternative theories as he wants.[11] If Plaintiff recovers breach of contract damages for breaches to the Letter of Intent, he may still pursue damages for unjust enrichment for any actions OKP may have taken that were outside of the scope of the Letter of Intent. Further, Plaintiff may maintain an unjust enrichment claim against those defendants who were not signatories to the Letter of Intent. Through such a claim, Plaintiff is pleading recovery in quasi-contract as an alternative to recovery in tort.[12] Because the right to proceed on a theory of unjust enrichment is limited to situations in which the tortfeasor has benefited from his or her wrongful act,[13] Plaintiff will have to specifically allege the benefits derived by each defendant.

F. PRINCIPAL AGENT LIABILITY: ACTUAL AUTHORITY (Twelfth Cause of Action)

Plaintiff alleges that CPA delegated and conferred authority upon defendant OKP and that OKP was acting within the scope of that agency when it is alleged to have engaged in the conduct that gives rise to the Complaint. OKP argues that Plaintiff fails to allege that CPA was the agent or employee of either OKP or Yee. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (An employer/principal is liable for the negligence of its employees and/or agents unless they were acting outside the scope of their employment during the course of events that gave rise to the cause

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[10] *See, e.g., Tate v. Mountain States Tel. and Tel. Co*., 647 P.2d 58 (Wyo. 1982) (plaintiff may seek a remedy *ex contractu* and *ex delicto* without electing between the two, but only one recovery will be allowed).

[11] *See* Am. Jur. 2d, Contracts § 710; *Miller v. Allstate Ins. Co*., 573 So. 2d 24 (Fla. Dist. Ct. App. 3d Dist. 1990); *Morriss v. Barton*, 190 P.2d 451 (Okla. 1947); *Loehrke v. Wanta Builders, Inc*., 445 N.W.2d 717 (Wis. Ct. App. 1989).

[12] *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365, 122 Cal. Rptr. 732 (2d Dist. 1975).

[13] In contrast to the liability for harms imposed by the law of torts, liability for unjust enrichment is based on benefits. REST (3D) RESTI § 2 cmt. a.

of action); *Ito v. Macro Energy, Inc.*, 4 N. Mar. I. 46, 57 (1993). Rather, the reverse is alleged.

At the hearing, counsel for Plaintiff stated that Plaintiff is not opposed to dismissing this claim against all Defendants other than CPA.

G. RESPONDEAT SUPERIOR (Thirteenth Cause of Action)

Plaintiff states that ¶ 140-143 contain facts sufficient to support a cause of action under respondeat superior. Chen moves to dismiss Plaintiff's claim for "respondeat superior" on grounds that respondeat superior is not an independent cause of action but a theory extending liability from one tortfeasor to another. *See Sheridan v. City of Des Moines*, No. 00-90024, 2001 WL 901267, (S.D. Iowa, Aug. 08, 2001) at *13 ("[p]laintiff's Count 12 pleads respondeat superior. Since that is not a claim for relief, but assertion of an agency principle, the Court need not address it").

The *Atalig* court addressed the same argument, and held that respondeat superior is not a tort or cause of action, but a theory of vicarious liability. To use this theory against an employer, a plaintiff must allege facts constituting the tortious conduct of the employee **and** the relationship between the employee and employer (as well as other facts constituting respondeat superior).

At the hearing, counsel for Plaintiff agreed that respondeat superior was a theory rather than a cause of action. He stated that Plaintiff was not opposed to dismissing this cause of action against Yee.

H. PUNITIVE DAMAGES (Fourteenth Cause of Action)

Plaintiff has requested punitive damages in conjunction with his actions for breach of contract, waste, conversion, infliction of emotional distress, as well as in a separate cause of action for punitive damages.

Chen moves to dismiss Plaintiff's claim for punitive damages on grounds that punitive damages are not a claim but a form of relief that must be based on a claim.[14] The Court agrees that punitive damages are not a cause of action per say. They may be appropriate, however, if the defendant's allegedly evil motive or reckless indifference to the rights of others rises to the level of outrageousness. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1979). Plaintiff has pleaded that Defendants deliberately abused and destroyed Dr. Hocog's land for their own profit by converting Dr. Hocog's land into a mini-"Grand Canyon," by excavating, moving, and removing valuable materials without just compensation. Viewing these allegations in a light most favorable to Plaintiff, punitive damages may be appropriate. While the Court dismisses the separate cause of action for punitive damages, it does not dismiss the requests for punitive damages in conjunction with his actions for waste, conversion, and infliction of emotional distress. [15]

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[14] *See Bishop v. GNC Franchising LLC*, 403 F. Supp. 2d 411, 425 (W.D. Pa. 2005) (punitive damages "do not constitute an independent cause of action . . . [p]laintiffs cannot maintain an independent cause of action for punitive damages . . . [t]herefore, the Court will dismiss plaintiffs' claim for punitive damages [] with prejudice") (citations omitted); *Doe v. Colligan*, 753 P.2d 144, 145 n. 2 (Alaska 1988) (punitive damages do not constitute a cause of action but are a form of relief).

[15] A breach of contract by itself is not sufficient to warrant an award of punitive damages. *Barnes v. Gorman*, 536 U.S. 181 (2002); *Chambers v. NASCO, Inc*., 501 U.S. 32 (1991) (applying Louisiana law); *Reeves v. Alyeska Pipeline Service Co*., 56 P.3d 660 (Alaska 2002); *J.J. White, Inc. v. Metropolitan Merchandise Mart*, 107 A.2d 892 (Del. Super. Ct. 1954); *Cain v. Tuten*, 60 S.E.2d 485 (Ga. App. 1950); *Graf's Beverages of Illinois, Inc. v. Tauber*, 366 N.E.2d 150 (Ill. App. 2d Dist. 1977); *Clark-Peterson Co., Inc. v. Independent Ins. Associates, Ltd*., 514 N.W.2d 912 (Iowa 1994); *Stull v. First American Title Ins. Co*., 745 A.2d 975 (Me. 2000); *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437 (Miss. 1999); *Rocanova v. Equitable Life Assur. Soc. of U.S*., 634 N.E.2d 940 (N.Y. 1994); *Schell v. Kaiser-Frazer Sales Corp*., 274 N.E.2d 315 (Ohio App. 1971); *Weaver v. Austin*, 200 P.2d 593 (Or. 1948); *Reliance Universal, Inc. of Ohio v. Ernest Renda Contracting Co., Inc*., 454 A.2d 39 (Pa. Super. 1982); *Biegler v. American Family Mut. Ins. Co*., 621 N.W.2d 592 (S.D. 2001); *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663 (Tex. 1995), reh'g of cause overruled, (Sept. 14, 1995); *Norman v. Arnold*, 57 P.3d 997 (Utah 2002); *Weiss v. United Fire and Cas. Co*., 541 N.W.2d 753 (Wis. 1995); *General Auto Parts Co., Inc. v. Genuine Parts Co*., 979 P.2d 1207 (Idaho 1999); *Decker v. Browning-Ferris Industries of Colorado, Inc*., 947 P.2d 937 (Colo. 1997).

V. CONCLUSION

The motion to dismiss the cause of action for negligent entrustment is GRANTED. This cause of action is dismissed with respect to all defendants.

The motion to dismiss the cause of action for negligent infliction of emotional distress is GRANTED with respect to all defendants, while the motion to dismiss the cause of action for intentional infliction of emotional distress entrustment is DENIED. Plaintiff is ordered to allege specific acts supporting a claim for intentional infliction of emotional distress entrustment against each Defendant. This ruling does not in any way affect Defendants' ability to challenge the sufficiency of allegations under the elements of intentional infliction of emotional distress.

The motion to dismiss the cause of action for unjust enrichment is DENIED. Plaintiff is ordered to specify whether he is pleading unjust enrichment as an alternative to the contract theory, or whether the claim pertains to actions outside of the scope of the Letter of Intent. With respect to all Defendants except OKP, Plaintiff is ordered to allege specific acts of misuse of the corporate form that would justify piercing the corporate veil.

The motion to dismiss the cause of action for respondaet superior is GRANTED with respect to all defendants. This does not preclude Plaintiff from alleging this theory in conjunction with an independent tort.

The motion to dismiss the cause of action for punitive damages is GRANTED with respect to all defendants. This does not preclude Plaintiff from alleging this theory in conjunction with an independent tort. Plaintiff may not recover punitive damages for the breach of contract claim.

The motion to dismiss the cause of action for principal agent liability is GRANTED with respect to all defendants except CPA. Plaintiff is ordered to specifically allege an agency relationship between CPA and a defendant perpetrating an independent tort.

Yee's motion to dismiss Plaintiff's claim against Yee for breach of contract, fraudulent misrepresentation, waste and principal agent liability is GRANTED. In order to maintain the cause of action for breach of contract, Plaintiff must allege specific acts of misuse of the corporate form that would justify piercing the corporate veil. As to any defendant who has not moved for dismissal based on Plaintiff's lack of specificity as to which Defendant undertook which action, the Court *sua sponte* orders a more definite statement describing their actions.

The Court grants Plaintiff 30 days from the date of this order to file an Amended Complaint in accordance with this order. Plaintiff may not introduce new matters without leave of Court to amend.

So ordered this 22th day of December, 2006.

/S/_____

JUAN T. LIZAMA, Associate Judge