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Jurisdiction	U.S.A.
Tribunal	U.S. District Court for the Central District of California
Date of the decision	04 October 2010
Case no./docket no.	CV 09-05962 MMM (CWx)
Case name	*Golden-Legion Automotive Corp. et al. v. LUSA Industries, Inc.*

Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment

Margaret M. Morrow, United States District Judge

Plaintiffs, Golden-Legion Automotive Corporation and Forerunner Automotive Corporation, filed this action on August 14, 2009. Their complaint alleges claims for breach of contract, as well as common counts for open book account, accounts stated, and quantum meruit.[1] On October 15, 2009, defendant answered the complaint and asserted counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, and intentional interference with contractual relations.[1] Defendant filed an amended answer on March 4, 2010, asserting additional counterclaims for conversion and trademark infringement.[2] Plaintiffs have now moved for partial summary judgment on their first cause of action for breach of contract and defendant's counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, and intentional interference with contractual relations.[3] Defendant opposes plaintiffs' motion. 1

I. Factual Background

Unless otherwise noted, the facts recited below are undisputed. 2

A. The Alleged Exclusive Sales Agency Agreement

Plaintiffs Golden-Legion Automotive Corporation and Forerunner Automotive Corporation are manufacturers and distributors of replacement auto body parts.[4] Golden-Legion has its principal place of business in Taiwan.[5] Charles Rao is the founder and principal of defendant LUSA 3

[1] Complaint, Docket No. 1 (Aug. 14, 2009).
[2] First Amended Counterclaim («Counterclaim»), Docket No. 21 (Mar. 4, 2010). Forerunner is a manufacturing facility that is majority owned by Golden-Legion. (Opposition to Motion for Partial Summary Judgment («Def.'s Opp.»), Exh. 9, Docket No. 32 (Sept. 20, 2010).)
[3] Motion for Partial Summary Judgment («Pls.' Motion»), Docket No. 26 (Sept. 6, 2010).
[4] Plaintiffs' Statements of Undisputed Facts («Pls.' Facts»), Docket No. 28 (Sept. 6, 2010), ¶ 1; Declaration of Felix Woo in Support of Motion for Partial Summary Judgment («Woo Decl.»), Docket No. 27 (Sept. 6, 2010), Exh. A Deposition of Charles Rao («Rao Depo.») at 12:20–25.
[5] Def.'s Opp. at 5.

Industries.[6] LUSA is a distributor of aftermarket auto body parts located in Santa Barbara, California.[7] Rao negotiates of all of LUSA's business transactions; no other representative of the company is authorized to negotiate on LUSA's behalf.[8]

The business relationship that gives rise to this dispute dates back to 1980 or 1981, when Rao began doing business with Golden-Legion's former principal, Legion Liao, through Liao's former company, Legion Enterprises.[9] Liao formed Golden-Legion in 1997.[10] Between 1997 and 2009, LUSA acted as Golden-Legion's agent for the sale of collision or late model automotive parts in the United States and Canada.[11] 4

The parties dispute the terms of LUSA's agency agreement with Golden-Legion. LUSA asserts that, beginning in 1997, LUSA and Golden-Legion entered into an agreement pursuant to which LUSA was to act as Golden-Legion's exclusive sales agent in the United States and Canada.[12] Specifically, it contends that the purported agreement required Golden-Legion to transact all business in those countries through LUSA.[13] LUSA maintains that the original agreement lasted for five years, from 1997 to 2002, and that it was renewed for two subsequent five-year terms, 2002–2007 and 2007–2012.[14] Rao asserts that agreements were negotiated in Taiwan, where he traveled three to six times a year to meet with Liao and Golden-Legion's senior management.[15] 5

Rao contends that LUSA's compensation under the agreements was determined on a case-by-case basis before the goods were shipped,[16] and that Golden-Legion sent LUSA invoices via email confirming the commission LUSA was to receive.[17] 6

LUSA alleges that Golden-Legion was not permitted to contact U.S. and Canadian customers directly, and that it was required to provide product to LUSA at a discounted price.[18] LUSA, by contrast, purportedly had no minimum purchase or sales requirements and could sell other manufacturers' aftermarket auto parts to its customers.[19] Similarly, LUSA's customers were 7

[6] Pls.' Facts ¶ 2; Rao Depo. at 10:1–5.
[7] Def.'s Opp. at 5.
[8] Pls.' Facts ¶ 3; Rao Depo. at 21:24–22:12.
[9] Defendant's Statement of Genuine Issues of Facts («Def.'s Facts»), Docket No. 32 (Sept. 20, 2010), ¶ 1; Rao Depo. at 12:5–10.
[10] Def.'s Facts ¶¶ 1–2; Pls.' Facts ¶ 4.
[11] Def.'s Facts, ¶ 7; Declaration of Dean Y. Kajioka in Support of Opposition to Motion for Summary Judgment («Kajioka Decl.»), Docket No. 32 (Sept. 20, 2010), Exh. 1 (Deposition of Simon Chen («Chen Depo.») at 22:1–20.
[12] Pls.' Facts ¶ 4; Rao Depo. at 11:13–17, 28:5–29:2; Declaration of Charles Rao («Rao Decl.»), Docket No. 32 (Sept. 20, 2010), ¶¶ 4–5.
[13] Pls.' Facts ¶ 4; Rao Depo. at 11:13–17, 28:5–29:2.
[14] Def.'s Facts ¶ 5, Pls.' Facts ¶ 7; Rao Depo. at 15:13–15, 40:15–41:3, 46:20–47:7.
[15] Def.'s Facts, ¶¶ 3–4; Rao Decl., ¶ 5.
[16] Pls.' Facts ¶ 8; Rao Depo. at 16:13–17:14.
[17] Def.'s Facts, ¶ 10; Rao Depo. at 34:8–35:6; Opposition, Exh. 3 (sample invoices).
[18] Pls.' Facts ¶¶ 9, 11; Rao Depo. at 18:8–19:4, 19:11–20:18, 22:13–19.
[19] Pls.' Facts ¶¶ 10, 12; Rao Depo. at 35:25–36:8, 37:1–25, 92:20–24.

not required to buy automobile parts from LUSA or Golden-Legion exclusively. Rather, they could purchase auto parts from Golden-Legion's competitors.[20]

There is no dispute that the agency agreements between LUSA and Golden-Legion were oral and were never reduced to writing. Nor was any document prepared memorializing the terms of the agreements and signed by the parties.[21] The only writings the parties exchanged were the invoices sent by email; these invoices do not contain the terms of Golden-Legion and Rao's sales agency relationship.[22] 8

B. Breach of the Purported Exclusive Agency Agreement

In 2009, Golden-Legion's board installed a new management team to replace Liao.[23] In June 2009, Rao traveled to Taiwan to meet with Golden-Legion's new management, and was presented with a «Commission Proposal»[24] that offered LUSA a sales agency relationship at a set commission rate.[25] Rao asserts that the proposal, which would have permitted Golden-Legion to contact customers in the United States and Canada directly, was contrary to the 2007 exclusive agency agreement.[26] 9

Rao declined to sign the Commission Proposal. On June 24, 2009, he sent an email asking that Golden-Legion honor the existing agreement while a new contract was being negotiated.[27] Thereafter, Rao failed to respond to emails from Golden-Legion asking whether he intended to sign the Commission Proposal, and testified that he believed the parties already had an agreement in place and that Golden-Legion had breached that agreement.[28] He did not communicate this view to Golden-Legion, however.[29] 10

C. LUSA's Alleged Non-Payment of Golden-Legion Invoices

At approximately the same time that Rao traveled to Taiwan to meet with Golden-Legion's management, Golden-Legion sent LUSA a series of invoices via email requesting payment for goods Golden-Legion and Forerunner had shipped to LUSA.[30] LUSA did not pay the invoices, 11

[20] Pls.' Facts, ¶ 21; Rao Depo. at 41:9–14, 51:18–52:25, 77:6–8, 78:13–25, 112:8–113:9.
[21] Pls.' Facts ¶ 5; Rao Depo. at 12:2–4, 13:3–11, 28:11–22.
[22] Opposition, Exh. 3 (sample invoices).
[23] Pls.' Facts, ¶ 16; Rao Depo. at 39:5–40:1.
[24] Opposition, Exh. 10.
[25] Pls.' Fact, ¶ 17; Def.'s Facts, ¶ 16.
[26] Def.'s Facts, ¶ 17; Rao Depo. at 109:24–111:13.
[27] Def.'s Facts, ¶ 20; Opposition, Exh. 11.
[28] Pls.' Facts, ¶ 18; Rao Depo. at 109:24–110:15,123:12–16, 130:7–12.
[29] Pls.' Facts, ¶ 20; Rao Depo. at 123:14–17.
[30] Pls.' Facts ¶ 18; Rao Depo. at 117:14–118:2, 119:18–121:10, 151:6–14.

and Rao neither responded to Golden-Legion's requests that he discuss the invoices nor contest their validity in any way.[31] Golden-Legion asserts that the invoices total approximately $800,000.[32]

II. Discussion

A. Standard Governing Motions For Summary Judgment

A motion for summary judgment must be granted when «the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.» Fed.R.Civ.Proc. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue as to which the nonmoving party will have the burden of proof, however, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. See *id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, «specific facts showing that there is a genuine issue for trial.» *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); Fed.R.Civ.Proc. 56(e). 12

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. See *T.W. Electric Service, Inc. v. Pacific Electric Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The evidence presented by the parties must be admissible. Fed.R.Civ.Proc. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See *Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49, 56 (2d Cir. 1985); *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). 13

B. LUSA's Counterclaim for Breach of Contract

1. Whether the United Nations Convention on Contracts for the International Sale of Goods Applies

Plaintiffs argue that, assuming *arguendo* the 2007–2012 exclusive sales agency agreement described by Rao exists, it is barred by the statute of frauds.[33] It is undisputed that there is no 14

[31] Pls.' Facts ¶¶ 18–19; Rao Depo. at 109:24–111:2, 112:4–23, 117:11–118:13, 120:5–122:4.
[32] Motion at 5. Plaintiffs provide a summary of the alleged invoices, but do not provide the invoices themselves. (See Declaration of Felix T. Woo in Support of Motion for Partial Summary Judgment («Woo Decl.»), Docket No. 29 (Sept. 10, 2010), Exh. B.) Plaintiff's counsel did not elicit testimony from Rao at his deposition concerning the amounts allegedly due and owing to Golden-Legion.
[33] Motion at 6.

writing signed by the parties evidencing such an agreement.[34] Rather, defendant contends that California law does not apply to this dispute, and that the United Nations Convention on Contracts for the International Sale of Goods («CISG») governs because «Golden-Legion is a Taiwanese company, and LUSA is a California corporation.»[35] Defendant cites no authority for this proposition. It merely asserts that the United States is a signatory to the CISG, although Taiwan is not, giving the court discretion to apply the CISG.[36]

«[I]nternational sales contracts are ordinarily governed by a multilateral treaty, the United Nations Convention on Contracts for the International Sale of Goods («C.I.S.G.»), which applies to 'contracts of sale of goods between parties whose places of business are in different States ... when the States are Contracting States.' The United States ... [is a] contracting state[] to the C.I.S.G.» See *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003) (citing the United Nations Convention on Contracts for the International Sale of Goods («CISG»), art. 1(1)(a), April 11, 1980, 52 Fed. Reg. 6262, 19 I.L.M. 668 (1980)); see also *Golden Valley Grape Juice and Wine, LLC v. Centrisys Corp.*, No. CV F 09-1424 LJO GSA, 2010 WL 347897, *2 (E.D. Cal. Jan. 22, 2010) («The disputes in this case arise out of an agreement for a sale of goods from an Australian party to a United States party. Such international sales contracts are ordinarily governed by a multilateral treaty, the United Nations Convention on Contracts for the International Sale of Goods»). **15**

Defendant's contention that the CISG applies despite the fact that Taiwan is not a signatory to the treaty is in error. Article 1 of the CISG states that the «Convention applies to contracts of sale of goods between parties whose places of business are in different States ... when the States are Contracting States.» See CISG, 19 I.L.M. 668 at art. 1(1)(a). Taiwan is not a signatory, and there is no provision providing for discretionary application of the treaty where only one party is a national of a signatory state. *Id.* (listing signatories to the CISG). **16**

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[34] Rao testified:

«Q: Did you ever set forth the terms of this agreement that you're referring to in writing?

A: No ...

Q: And at no time was this agreement ever reduced to a document that you signed on behalf of LUSA or Mr. Legion [Liao] or anyone else signed on behalf of Golden-Legion?

A: That's correct.» (Rao Depo, 12:2–4, 13:7–11).

Rao also testified, however, that the «agreement ... was in writing.» (Rao Depo. at 34:10.) When questioned, Rao conceded that the «purchase orders and invoices» were the «writings» to which he referred. (See Rao Depo. at 34:16–35:6.) The invoices do not constitute an enforceable contract, however, because they reflect only the commission Rao was to receive for each sale; they do not set forth the material terms of the parties' purported agreement, i.e., «'(a) each party to the contract[;] ... (b) the land, goods or other subject-matter to which the contract relates[;] [and] and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.'» *Levin v. Knight*, 780 F.2d 786, 792 (9th Cir. 1986) (citing *Burge v. Krug*, 160 Cal.App.2d at 201, 205 (1958)). «'[T]he writing, considered alone, [must] express[ ] the essential terms with sufficient certainty to constitute an enforceable contract.'» *Id.*; see also *Inamed Corp. v. Kuzmak*, 275 F.Supp.2d 1100, 1122 (C.D. Cal. 2002) («Similarly, where there is no meeting of the minds upon the material terms of a contract, the agreement cannot be enforced»).

[35] Opposition at 10.

[36] *Id.*

Moreover, even if the CISG did apply to a contract between nationals of a signatory and non-signatory state, the treaty explicitly states that it does not govern questions of contract validity, only questions of contract formation. See CISG, 19 I.L.M. 668 at art. 4 («This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage»). See also *Rice Corp. v. Grain Bd. of Iraq*, No. 2:06-cv-01516, 2009 WL 3489916, *3 (E.D. Cal. Oct. 25, 2009) («Plaintiff also alleges the contract is 'subject to the terms of the United Nations Convention on Contracts for the International Sale of Goods' ('UNCCISG'). The allegation that the UNCCISG is controlling is incorrect. The UNCCISG concerns the formation of contracts and does not ... address 'the validity of the contract or any of its provisions of any usage,'» citing CISG, 19 I.L.M. 668, at art. 1(1)(a). 17

LUSA cites Article 11 of the CISG, which states that «[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.» CISG, 19 I.L.M. 668, at art. 11; see also *Golden Valley*, 2010 WL 347897 at *3. Defendant's reliance on this provision is unavailing, as the question framed by Golden-Legion's motion is not whether LUSA and Golden-Legion entered into a contract, but whether enforcement of that contract is barred by California's statute of frauds. As noted, the CISG applies to questions of contract formation, but not to questions of contract validity. See *Rice Corp.*, 2009 WL 3489916 at *3. California's statute of frauds is an affirmative defense to enforcement of a contract, even if it is otherwise validly formed. See *Puget Sound Pulp & Timber Co. v. O'Reilly,* 239 F.2d 607, 611 (9th Cir. 1957) («The defense of the Statute of Frauds is ... an affirmative defense» (internal citations omitted)); *Consortium Information Services, Inc. v. Credit Data Services, Inc.*, 149 Fed. Appx. 575, 576 (9th Cir. Aug. 1, 2005) (Unpub. Disp.) (stating that the statute of frauds is a «defense» that a party must «plead affirmatively»). Because Golden-Legion challenges the validity of the purported sales agency contract, the CISG would not provide the controlling rule of law even were it applicable. 18

For all these reasons, the court concludes that the CISG does not govern resolution of the instant dispute. 19

2. Whether Taiwanese or Chinese Law Applies

Defendant argues alternatively that if the CISG does not apply, the Taiwanese Civil Code, or the Law of the Republic of China applies.[37] Once again, defendant cites no authority in support of these arguments.[38] 20

[37] *Id.* at 12.

[38] Defendant attaches a «Wikipedia» web page titled «Law of the Republic of China.» (Opposition, Exh. 17.) Wikipedia is not binding authority, nor has defendant asked the court to take judicial notice of the document. Even were defendant to do so, the court would decline its request, as the manner in which information is input to Wikipedia indicates that it is not a reliable source of accurate information. See *BP Products North America Inc. v. United States*, —— F.Supp.2d ——, 2010 WL 2180351 at *6 n. 10 (C.I.T. June 1, 2010) («The court notes BP's frequent reference to the website http:// wikipedia.org in its description of this process. Wikipedia is a 'user-contributed online encyclopedia' compiled of articles placed on '[w]eb sites that allow users to directly edit any

A federal court sitting in diversity must generally apply the substantive law of the forum state, including its choice-of-law rules. See *Gurvey v. Legend Films, Inc.*, No. 09-CV-942-IEG (JMA), 2010 WL 55889, *4 (S.D. Cal. Jan. 4, 2010) (citing *Ferens v. John Deere Co.*, 494 U.S. 516, 524–25 (1990), *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79–80 (1938), and *Muldoon v. Tropitone Furniture Co.*, 1 F.3d 964, 966 (9th Cir. 1993)); see also *ABM Industries, Inc. v. Zurich American Ins. Co.*, No. C 05-3480 SBA, 2006 WL 2595944, *10 (N.D. Cal. Sept. 11, 2006) («The Court must apply California choice of law rules in this case, a diversity jurisdiction case: 'It is well-settled that in diversity cases federal courts must apply the choice-of-law rules of the forum state,'» citing *Estate of Darulis v. Garate*, 401 F.3d 1060, 1062 (9th Cir. 2005)). See also *Strassberg v. New England Mut. Life Ins. Co.*, 575 F.2d 1262, 1263 (9th Cir. 1978) («The district court, exercising diversity jurisdiction, was obliged to apply the law of the State of California, including the choice of law rules of the forum state,» citing *Klaxon Co. v. Stentor Elec. Manufacturing Co.*, 313 U.S. 487, 496–97 (1941). **21**

In 1967, the California Supreme Court adopted the «governmental interest» approach to choice-of-law issues. See *Gurvey*, 2010 WL 55889 at *13 (citing *Reich v. Purcell*, 67 Cal.2d 551, 554 (1967), and *Hurtado v. Super. Ct.*, 11 Cal.3d 574, 579–80 (1974)); see also *Strassberg*, 575 F.2d at 1263–64 («California conflicts law has developed significantly since the original enactment of California Civil Code § 1646, which in substance provides that a contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if no place of performance is indicated, according to the law of the place where the contract was made. Under the leadership of former Chief Justice Roger Traynor, the California law moved away from a mechanical choice of law process to employ the 'governmental interest analysis' approach»). This approach requires «analysis of the respective interests of the states involved.» *Gurvey*, 2010 WL 55889 at *13 (citing *Hurtado*, 11 Cal.3d at 579). **22**

Analysis of choice of law under the governmental interest approach involves a three-step analysis. «First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law 'to determine which state's interest would be more impaired if its policy were subordinated to **23**

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[w]eb page on their own from their home computer.' Thomas L. Friedman, The World Is Flat: A Brief History of the Twenty-First Century 94 (Farrar, Straus and Giroux 2005). Wikipedia's construction is based on the theory that 'allowing anyone who surfs along to add or delete content on that page' will result in 'a credible, balanced encyclopedia by way of an ad hoc open-source, open-editing movement.' *Id.* ... Based on the ability of any user to alter Wikipedia, the court is skeptical of it as a consistently reliable source of information. At this time, therefore, the court does not accept Wikipedia for the purposes of judicial notice»). See also *Kole v. Astrue*, No. CV 08-0411-LMB, 2010 WL 1338092, *6 n. 3 (D. Idaho Mar. 31, 2010) (same); *Nuton v. Astrue*, No. SKG-08-1292, 2010 WL 1375297, *1 n. 1 (D. Md. Mar. 30, 2010) (stating that, although a «useful research tool,» Wikipedia «is not a sufficiently reliable or a recognized authority on medicine or medical practice»); *Techradium, Inc. v. Blackboard Connect Inc.*, No. 2-08-CV-00214-TJW, *4 n. 5 (E.D. Tex. Apr. 29, 2009) («Wikipedia disclaims any validity of the content listed on its website, and is therefore not a reliable source of technical information»); *Capcom Co. v. MKR Group, Inc.*, No. C 08-0904 RS, 2008 WL 4661479 (N.D. Cal. Oct. 10, 2008) («The Wikipedia articles Capcom submits as a synopsis of these movies and video games are similarly inappropriate for judicial notice»).

the policy of the other state,' and then ultimately applies 'the law of the state whose interest would be the more impaired if its law were not applied.'» *Id.* (quoting *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 107–08 (2006), and citing *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1080 (9th Cir. 2009)); see also *Paulsen*, 559 F.3d at 1080 («To determine the correct choice of law, we apply a three-step analysis. First, we determine whether the two concerned states have different laws. Second, we consider whether each state has an interest in having its law applied to this case. Finally, if the laws are different and each state has an interest in having its own law applied, we apply the law of the state whose interests would be more impaired if its policy were subordinated to the policy of the other state,» quoting *Havlicek v. Coast-to-Coast Analytical Servs.*, 39 Cal.App.4th 1844, 1851 (1995)); *ABM Industries, Inc.*, 2006 WL 2595944 at *10–11 (same, quoting *Estate of Darulis v. Garate*, 401 F.3d 1060, 1062 (9th Cir. 2005) and citing *North American Asbestos Corp. v. Superior Court*, 180 Cal.App.3d 902, 905 (1986)).

As a initial matter, therefore, the court must determine whether a genuine conflict exists between California law, on the one hand, and the Taiwanese Civil Code and/or the Laws of the Republic of China, on the other. As discussed in greater detail below, California Civil Code § 1624, which codifies California's statute of frauds, provides, in pertinent part, that «[a]n agreement that by its terms is not to be performed within a year from the making thereof» is «invalid, unless [it], or some note or memorandum thereof, [is] in writing and subscribed by the party to be charged.» Cal. Civ. Code § 1624(a)(1). See also *White Lighting Co. v. Wolfson*, 68 Cal.2d 336, 343 (1968). **24**

Defendant contends that the Taiwanese Civil Code and the Law of the Republic of China provide that «[w]hen the parties have reciprocally declared their concordant intent, either expressly or impliedly, a contract shall be constituted.»[39] Based on this assertion, defendant argues that oral contracts are enforceable. Defendant proffers no competent evidence of Taiwanese or Chinese law, either in the form of expert depositions, citations to statutes or other legal authority, or documents that the court can judicially notice. **25**

It is thus impossible for the court to determine whether defendant's contentions concerning Taiwanese and Chinese law are accurate. Assuming *arguendo* that defendant has accurately presented the substance and application of the laws, however, it would appear the California statute of frauds conflicts with both, since neither bars enforcement of an oral contract that cannot by its terms be completed within a year.[40] To the extent this is true, the relevant law of Taiwan and the Republic of China differs from California law. **26**

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[39] Opposition at 12.

[40] Defendant states the purported content of Taiwanese and Chinese law in broad and general terms. Given the level of generality defendant employs, one could argue that there is no conflict between the laws of Taiwan and the Republic of China, on the one hand, and California law, on the other. Specifically, California law enforces contracts when both parties intend to enter into an agreement. See Cal. Civ. Code, §§ 1580, 1550, 1565 (contract formation requires «mutual consent,» which cannot exist unless the parties «agree upon the same thing in the same sense»). See also *Weddington Productions, Inc. v. Flick*, 60 Cal.App.4th 793, 811 (1998) («If there is no evidence establishing a manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation»); *Alexander v. Codemasters Group Limited*, 104 Cal.App.4th 129,

The court thus turns to the second step of the governmental interest analysis. Here, it examines each jurisdiction's interest in having its law apply to this case so as to determine whether a true conflict exists. This requires evaluating «whether the ... interests the rule is designed to protect will be significantly furthered by its application to the case at hand. Generally, the preference is to apply California law, rather than choose the foreign law as a rule of decision. Therefore, if application of a foreign decisional rule will not significantly advance the interests of the foreign state, a California court will conclude that the conflict is 'false' and apply its own law.» *Strassberg*, 575 F.2d at 1264 (citing *Hurtado*, 11 Cal.3d at 580); *Reich*, 67 Cal.2d at 556). «In determining which state has the stronger interest in having its law applied, the court gives considerable weight to the following two factors: (1) the residence of the defendants and (2) the forum.» See *Gurvey*, 2010 WL 55889 at *13 (citing *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 485 (9th Cir. 1987), *Nogart v. Upjohn Corp.*, 21 Cal.4th 383, 395 (1999), and *Ashland Chem. Co. v. Provence*, 129 Cal.App.3d 790, 794 (1982)). 27

In this case, defendant is a California corporation headquartered in Santa Barbara.[41] California is also plaintiffs' chosen form. These factors thus weigh in favor of applying California law. Moreover, defendant has adduced no evidence identifying the interests the Taiwanese and Chinese laws are designed to protect, nor suggesting that either Taiwan or China has an interest in having its law apply to this dispute. Thus, the court concludes that the conflict is false. As a consequence, it need not analyze the third factor of the governmental interest test, and concludes that California law applies. *Strassberg*, 575 F.2d at 1264. See also *Kearney*, 39 Cal.4th at 108 (stating that the court proceeds to the third step «if [it] finds that there is a true conflict»). 28

3. LUSA's Counterclaim for Breach of Contract

LUSA's first counterclaim for breach of contract alleges that Golden-Legion breached the parties' oral contract in 2009 by contacting customers in the United States and Canada directly, failing to ship all of its product to LUSA, and failing to pay LUSA the agreed-upon commission.[42] Having determined that California law applies, the court must determine whether the alleged oral contract is barred by the California statute of frauds. As noted, under California Civil Code § 1624(a)(1), an agreement that by its terms is not to be performed within a year must be in writing to be valid. Cal. Civ. Code § 1624(a)(1). See also *Newfield v. Ins. Co. of the West*, 156 Cal.App.3d 440, 447 (1984); *Tostevin v. Douglas*, 160 Cal.App.2d 321, 328 (1958). Where one party has completely performed his or her obligations under a contract that is otherwise subject to the statute of frauds, however, that performance removes the statutory bar to enforcement. *Nesson v. Moes*, 215 Cal.App.2d 655, 657–59 (1963). See also *Klein v. Dominos Pizza* 29

141 (2002) («Mutual consent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings»). The rule defendant cites—that «[w]hen the parties have reciprocally declared their concordant intent, either expressly or impliedly, a contract shall be constituted»—does not directly address oral as opposed to written contracts, nor whether there is any requirement under Taiwanese or Chinese law that certain types of contracts be in writing. The court will presume, however, that defendant asserts that there are no limitations on or qualifications of the rule of law it has cited.

[41] Opposition at 5.

[42] Counterclaims, ¶¶ 24-26.

Inc., 66 F.3d 335, 1995 WL 520052, * 1 (9th Cir. Sept. 1, 1995) (Unpub. Disp.); 1 B. Witkin, *Summary of California Law, Contracts*, § 289 (10th ed. 2005).

LUSA asserts that the parties entered into an oral agreement in 2007 that was to last for five years and expire in 2012.[43] Because the agreement was to remain in force for five years, it is subject to California Civil Code § 1624's requirement that it be memorialized in writing. LUSA has adduced no evidence that the 2007 contract was fully performed, such that the statutory bar has been removed. Consequently, based on the undisputed evidence in the record, the court concludes that the alleged exclusive sales agency contract between LUSA and Golden-Legion is barred by California's statute of frauds and grants summary judgment in plaintiffs' favor on LUSA's breach of contract counterclaim. **30**

C. LUSA's Counterclaim for Breach of the Covenant of Good Faith and Fair Dealing

Like its breach of contract claim, LUSA's second counterclaim for breach of the covenant of good faith and fair dealing is based on plaintiffs' refusal to abide by the terms of the parties' oral contract.[44] California law implies a covenant of good faith and fair dealing in every contract. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 2 Cal.4th 342, 371 (1992); see also *Chodos v. West Publishing Co.*, 292 F.3d 992, 996 (9th Cir. 2002) (noting that «California law, like the law in most states, provides that a covenant of good faith and fair dealing is an implied term in every contract» (citations omitted)). The covenant is implied «to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenant) frustrates the other party's rights [to] the benefits of the contract.» *Marsu B.V. v. Walt Disney Co.*, 185 F.3d 932, 938 (9th Cir. 1999) (citing *Los Angeles Equestrian Ctr., Inc. v. City of Los Angeles*, 17 Cal.App.4th 432, 447 (1993)). **31**

«In order to state a claim for breach of an implied covenant of good faith and fair dealing, the specific contractual obligation from which the implied covenant of good faith and fair dealing arose must be alleged.» *Inter-Mark USA, Inc. v. Intuit, Inc.*, No. C-07-04178 JCS, 2008 WL552482, *6 (N.D. Cal. Feb. 27, 2008) (citing *Love v. The Mail on Sunday*, No. CV05-7798 ABC (PJWx), 2006 WL 4046180, *7 (C.D. Cal. Aug. 15, 2006)). This is because «[i]t is universally recognized [that] the scope of conduct prohibited by the covenant of good faith is circum- **32**

[43] Rao Depo. at 15:13–15, 40:15–41:3. Rao testified as follows:
«Q. Was there a time frame placed on this agreement; it would last five years, ten years, eight months?
A. Yes, they were five year agreements....
Q. When was this five-year agreement renewed? When did it begin, and when was it going to end?
A. It started in the beginning, '90—approximately in 1997, when the company was—maybe September '97, around that time.
Q. Okay.
A. June, July, July/August we formed the company. So approximately '97, our five-year annual review would have been 2002, maybe, around September.
Q. And then again in 2002 to 2007?
A. To 2007, I believe.
Q. And then from 2007 to 2012, is that you're testifying to?
A. Right. Correct.»

[44] Counterclaims, ¶ 33.

scribed by the purposes and express terms of the contract.» *Id.* at *7 (quoting *Carma Developers*, 2 Cal.4th at 373). See *Commercial Union Assurance Companies v. Safeway Stores, Inc.*, 26 Cal.3d 912, 918 (1980) («However, what that duty embraces is dependent upon the nature of the bargain struck between the [parties] and the legitimate expectations of the parties which arise from the contract»). See also *Spencer v. DHI Mort. Co., Ltd.*, 642 F.Supp.2d 1153, 1165 (E.D. Cal. 2009) («'The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract.' The 'implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract,'» quoting *Smith v. City and County of San Francisco*, 225 Cal.App.3d 38, 49 (1990), and *Pasadena Live, LLC v. City of Pasadena*, 114 Cal.App.4th 1089, 1093–94 (2004)).

As noted, defendant's claim that LUSA and Golden-Legion had a binding oral contract fails as a matter of law. In the absence of an enforceable contract, there can be no implied covenant of good faith and fair dealing. See *Glacier Optical, Inc. v. Optique du Monde*, 46 F.3d 1141, 1995 WL 21565, *2 (9th Cir. Jan. 19, 1995) (Unpub. Disp.) («We necessarily reject the claim of breach of the implied covenant of good faith and fair dealing. This covenant, although present in every contract, creates obligations only in relation to the agreed terms of the contract. Because the statute of frauds bars the contract claim, there are no contract terms upon which to base an implied covenant of good faith and fair dealing,» citing *Orthomet, Inc. v. A.B. Medical, Inc.*, 990 F.2d 387, 392 (8th Cir. 1993)); *Justo v. Indymac Bancorp*, No. SACV 09-1116 JVS (AGRx), 2010 WL 623715, *7 (C.D. Cal. Feb. 19, 2010) («The eighth cause of action alleges breach of the covenant of good faith and fair dealing. This is based on the alleged oral contract.... Because the alleged oral contract is unenforceable under the statute of frauds, Plaintiffs' breach of implied covenant claim fails with respect to that contract,» citing *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 683–684 (1988)). See also *Raft v. California Federal Bank*, No. H028304, 2006 WL 122312, *5 (Cal. App. Jan. 17, 2006) (holding that, because a contract was unenforceable under the statute of frauds, plaintiff's breach of the implied covenant claim failed).[45] **33**

Because LUSA has failed to raise triable issues of fact regarding the existence of an enforceable contract that might give rise to an implied covenant of good faith and fair dealing, the court grants plaintiffs' motion for summary judgment favor on defendant's second counterclaim. **34**

D. LUSA's Counterclaim for Intentional Interference with Contractual Relations

Defendant's third counterclaim for intentional interference with contractual relations is based on plaintiffs' sale of product directly to U.S. and Canadian customers in violation of LUSA's exclusive sales agency contract, and thus interfered with LUSA's contractual relationships with **35**

[45] «Although the court is not bound by unpublished decisions of intermediate state courts, unpublished opinions that are supported by reasoned analysis may be treated as persuasive authority.» *Scottsdale Ins. Co. v. OU Interests, Inc.*, No. C 05-313 VRW, 2005 WL 2893865, *3 (N.D. Cal. Nov. 2, 2005) (citing *Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n. 8 (9th Cir. 2003) («[W]e may consider unpublished state decisions, even though such opinions have no precedential value»)).

the customers.[46] Under California law, the elements of a «cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts intended or designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.» *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990); see *Quelimane Co. v. Stewart Title Guaranty Co.* 19 Cal.4th 26, 55 (1998); see also *Reeves v. Hanlon*, 33 Cal.4th 1140, 1148 (2004).

Thus, to defeat plaintiffs' motion for summary judgment on this claim, LUSA must raise triable issues regarding the fact that it had a valid contract, or series of contracts, with the customers to which Golden-Legion sold. Rao testified that LUSA did not have contracts with its customers, and failed to adduce any documentary evidence suggesting the existence of such contracts.[47] Rao stated that customers were under no obligation to buy from LUSA or from Golden-Legion, and were free to purchase product from any competitor in the aftermarket auto body parts market. Indeed, he testified that there were «no guarantees» in the auto body aftermarket business.[48] **36**

Because LUSA has failed to raise triable issues of fact concerning certain necessary element of an interference with contractual relations claim, the court grants plaintiffs' motion for summary judgment on defendant's third counterclaim. **37**

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[46] Counterclaims, ¶¶ 41–43.

[47] Rao testified as follows:

«Q: Did Marshall or Bolding or Keystone [the customers Golden-Legion approached] have a contract with LUSA or with you?

A: No.» (Rao Depo. at at 77:6–8).

[48] Rao stated:

«Q: Now, Keystone didn't have to buy products from either LUSA or Golden-Legion; right?

A: Correct.

Q: They could go and purchase it from any other company that sells aftermarket auto body parts; right?

A: Yes.» (Rao Depo. at 41:9–14. See also *id.* at 53:22–25 («no guarantees»).).

For this reason, even if the court were to construe LUSA's counterclaim as a cause of action for intentional interference with prospective economic advantage, it does not appear that LUSA could raise triable issues of fact regarding the claim. The elements of a claim for intentional interference with prospective economic advantage are: «'(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.'» *Pacific Gas & Electric Co.*, 50 Cal.3d at 1126 n. 2 (emphasis added).

As respects the third element—intentional acts by plaintiffs designed to disrupt the relationship—LUSA must show that plaintiffs' interference was independently wrongful. «[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.... An act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive.» *Korea Supply Co. v. Lockheed Martin Corp.* 29 Cal.4th 1134, 1159 & n. 11 (2003). Here, any claim for interference with prospective economic advantage asserted by LUSA would fail because it cannot show that plaintiffs' actions were independently wrongful. Specifically, because the alleged oral contract between plaintiffs and LUSA is unenforceable, plaintiffs did not violate any common law legal standard by contacting the customers. (See Def.'s Facts, ¶ 21.)

E. Golden-Legion's and Forerunner's Breach of Contract Claim

Plaintiffs' first claim for breach of contract alleges that LUSA failed to pay outstanding invoices in the months following Rao's 2009 trip to Taiwan.[49] To plead a claim for breach of contract under California law, plaintiffs must allege: (1) the existence of a contract; (2) their performance of the contract, or a legally cognizable excuse for nonperformance; (3) defendants' breach; and (4) resulting damage. *First Commercial Mortgage Co. v. Reece*, 89 Cal.App.4th 731, 745 (2001); *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1388 (1990). **38**

Plaintiffs proffer a summary of the invoices that are allegedly unpaid, but do not provide copies of the invoices themselves.[50] In and of itself, the summary does not establish the existence of a valid contract or series of contracts between plaintiffs and LUSA. More fundamentally, it does not demonstrate that plaintiffs performed all of their obligations under the purported contracts—i.e., that they shipped the amount of product for which an invoice was submitted on the date reflected. The portions of Rao's testimony on which plaintiffs rely do not concede the accuracy of the summary, nor LUSA's obligation to pay them. **39**

At his deposition, Rao testified that he received various invoices that he did not pay because he felt plaintiffs owed LUSA more money than it owed plaintiffs. Questioned about the summary of invoices plaintiffs attach to their motion, Rao testified as follows: **40**

> «Q: So two things. First, he's asking you about outstanding invoices; correct?
>
> A: It appears to be, yes.
>
> Q: So if you turn to the last page, you understood around this period of time, late June, 2009, that Golden-Legion was claiming that LUSA owed it something in the range of $500,000 in past due invoices?
>
> A: That's what the document says, yes.
>
> Q: Did you agree with that?
>
> A: No.
>
> Q: Why not?
>
> A: Because they actually owed me more at that time, I felt.
>
> Q: Okay. So you felt there was [a]n offset, but I'm asking whether these invoices were valid invoices?
>
> A: I can't be certain, but it appears that they look like the right format.
>
> Q: Well, let me try it a different way. During this period of time when they were requesting you pay their invoices, did you say, 'Oh, those invoices are invalid because you never shipped me the product, that product was returned, I didn't order it,' anything of that sort?

[49] Motion at 7–8.
[50] Woo Decl., Exh. B.

A: No.

Q: Your view was they owed you more money than you owed them?

A: And there are many reasons. I'm not sure what they are right now.»[51]

Rao stated that he had not verified whether the information reflected on the summary was incorrect, and that he did not notify Golden-Legion that LUSA would not pay the invoices.[52] While Rao's testimony establishes that he did not dispute the validity of the invoices when they were received in 2009 or of the summary in the last quarter of that year, it does not prove that the invoices are valid, that the summary accurately reflects the content of the invoices, or that plaintiffs fully performed their obligations under the contract(s). Consequently, the court must conclude that triable issues of fact remain regarding plaintiffs' entitlement to judgment on their breach of contract claim. For the foregoing reasons, plaintiffs' motion for summary judgment on their first cause of action for breach of contract must be denied. **41**

III. Conclusion

For the reasons stated, plaintiffs' motion for partial summary judgment on defendant's first, second and third counterclaims is granted. Their motion for summary judgment on their first cause of action is denied. **42**

[51] Rao Depo. at 117:11–118:13.
[52] *Id.* at 120:5–122:4.