

1. FOR PUBLICATION

2.
3. **IN THE SUPERIOR COURT**
4. **FOR THE**
5. **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6. **DR. PATERNO B. HOCO, a.k.a.**
7. **DR. LARRY B. HOCO,**

8. **Plaintiff,**

9. **v.**

10. **OKP (CNMI) CORPORATION, et al.,**

11. **Defendants.**

Civil Action No. 06-0445 (R)

**ORDER PARTIALLY
GRANTING MOTIONS TO
DISMISS AND STRIKE**

12. This matter was last before this Court on March 20, 2007 for the following motions: (1)
13. Defendant Commonwealth Ports Authority's ("CPA's") Rule 12(b)(6) motion to dismiss Plaintiff
14. Paterno B. Hocog's Amended Complaint against CPA for failure to state a cause of action; (2)
15. CPA's Rule 12(f) motion to strike the introduction of Plaintiff's Amended Complaint; (3)
16. Defendant Brian Chen's ("Chen's") Rule 12(b)(6) motion to dismiss the eight causes of action
17. against him and alternatively strike allegations in these claims; (4) Defendant Yee Chee Keong's
18. ("Yee's") Rule 12(b)(6) motion to dismiss the five causes of action against him; (5) Defendant OKP
19. (CNMI) Corporation's ("OKP's") Rule 12(b)(6) motion to dismiss the cause of action against it for
20. negligence; and (6) OKP's Rule 12(f) motion to strike allegations in the causes of action for
21. Fraudulent Misrepresentation and the Prayer for Relief.

22.
23. **I. BACKGROUND**

24. This case concerns an airport runway construction project awarded to OKP by CPA, for
25. which OKP negotiated with the Plaintiff to excavate backfill materials from Plaintiff's land. The
26. facts giving rise to the suit are stated in the Court's December 22, 2006 order ("the Order") partially
27.

1. granting Defendants’ motions to dismiss the original complaint. The Order granted Plaintiff 30
2. days to file an Amended Complaint and required Plaintiff to obtain leave of Court before
3. introducing new matters. Defendants now move to dismiss or strike portions of the Amended
4. Complaint. Because of their similar situation as shareholders of OKP, Yee joins in all of Chen’s
5. motions and arguments.

6. **II. APPLICABLE STANDARDS**

7. Plaintiff argues that Defendants’ motions are untimely and improper because these
8. defendants already answered the original complaint. The Court disagrees. When a complaint is
9. amended in a material way, defendants are entitled to file a Rule 12 motion as a responsive pleading
10. to an amended complaint. *Federal Agricultural Mortgage Corp. v. It’s A Jungle Out There, Inc.*,
11. No. 03-3721, 2005 WL 3325051 (N.D. Cal. Dec. 7, 2005); *see also* WRIGHT & MILLER, FEDERAL
12. PRACTICE & PROCEDURE, CIVIL 3d, § 1388, at 491. This is true even if the defendants already filed
13. an answer to the original complaint.¹

14. Plaintiff suggests that CPA’s Rule 12(b)(6) motion be converted to a motion for judgment
15. on the pleadings under Rule 12(c).² In the interest of expediency, CPA agrees to the conversion.
16. Accordingly, CPA’s Rule 12(b)(6) motion to dismiss is converted to a motion for judgment on the
17. pleadings under Rule 12(c).
18.
19.

20. ¹ *See Campbell v. Deddens*, 518 P.2d 1012, 1014 (Ariz. App. 1974)(citations omitted):

21. When respondent filed an amended complaint, such pleading superseded his original complaint which
22. then became *Functus officio*. Since the amended complaint took the place of the original, all
23. subsequent pleadings are based on the amended complaint. Consequently, petitioner’s answer to the
24. amended complaint became his first responsive pleading to the merits of respondent’s claim even
though petitioner had responded to the original complaint, and all subsequent proceedings are
regarded as based on the amended complaint.

25. ² *See Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1212 (10th Cir. 2003); *In re Enron Corp. Securities,*
26. *Derivative & “ERISA” Litigation*, 439 F. Supp. 2d 692, 695 (S.D. Tex. 2006); *Vermett v. Hough*, 606 F. Supp. 732 (D.
C. Mich. 1984).

1. Because the filing of an amended complaint allows the Court to set aside previous
2. responses,³ and because Rule 12(f) also allows the Court to strike irrelevant matters “upon the
3. court’s own initiative at any time,” the Court considers the motions to strike timely.

4. **A. Rule 12(b)(6) and Rule 12(c) Motions**

5. Under Rule 12(b)(6), a complaint may be dismissed if it fails to state a claim upon which
6. relief can be granted. Com. R. Civ. Pro. 12(b)(6). The complaint must contain either direct
7. allegations on every material point necessary to sustain a recovery on any legal theory, even though
8. it may not be the theory suggested or intended by the pleader, or contain allegations from which an
9. inference fairly may be drawn that evidence on these material points will be introduced at trial. *In*
10. *re Adoption of Magofna*, 1 N.M.I. 449, 454 (1990). The court evaluates the complaint in the light
11. most favorable to the non-movant, and takes its allegations as true. *Cepeda v. Hefner*, 3 N.M.I. 121,
12. 126 (1992). When a Rule 12(c) motion raises a Rule 12(b)(6) defense, the motion should be
13. evaluated under the Rule 12(b)(6) standard. *Office of the Attorney General v. Luo*, No. 98-1107
14. (N.M.I. Super. Ct. Feb. 22, 1999).

16. **B. Rule 12(f) Motion**

17. Rule 12(f) Com. R. Civ. Pro. allows the Court to strike, upon motion or *sua sponte*, any
18. redundant, immaterial, impertinent, or scandalous matter in any pleadings. Immaterial matter is
19. defined as matter that “has no essential or important relationship to the claim for relief or the
20. defenses being pleaded.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), *rev'd on*
21. *other grounds*, 510 U.S. 517 (1994). Impertinent matter is defined as “statements that do not
22. pertain, and are not necessary, to the issues in question.” *Id.*, 984 F.2d at 1527. Scandalous matter
23. is defined as an allegation “that unnecessarily reflects on the moral character of an individual or
24. states anything in repulsive language that detracts from the dignity of the court.” *Cobell v. Norton*,

25. _____
26. ³ *Campbell v. Deddens*, 518 P.2d 1012, 1014 (Ariz. App. 1974).

1. 224 F.R.D. 1, 5 (D.D.C.2004), and “includes allegations that cast a cruelly derogatory light on a
2. party or other person.” *In re TheMart.com Secs. Litig.*, 114 F.Supp.2d 955, 965 (C.D.Cal.2000).

3. Motions to strike, while disfavored, are entertained when one of the four enumerated
4. grounds is present and there is showing of some prejudice to the moving party. *See* 5A C. WRIGHT
5. & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1382. Granting a motion to strike may be
6. proper if allegations being challenged are so unrelated to plaintiff’s claims as to be unworthy of any
7. consideration as a defense, and their presence in the pleading will be prejudicial to the moving
8. party. *See Fantasy*, 984 F.2d at 1527-28.

10. **III. ANALYSIS**

11. **A. Chen’s and Yee’s Motion to Dismiss the Breach of Contract Claim**

12. Plaintiff’s original complaint states that “Dr. Hocog and Defendant OKP, through Defendant
13. Brian M. Chen, executed a Letter of Intent . . . The Letter of Intent was a valid contract supported
14. by bargained for consideration.” Complaint, ¶¶ 30, 54. Although Paragraph 57 alleges that
15. “Defendants” breached the Letter of Intent, all of the subparagraphs refer only to OKP. In contrast,
16. Plaintiff’s amended complaint affirmatively alleges that Chen was a party to the Letter of Intent.
17. *See, e.g.*, Amended Complaint at ¶ 32 “Dr. Hocog and Defendant Brian M. Chen executed a Letter
18. of Intent.” Plaintiff alleges that “Defendant Brian M. Chen, however, did not indicate the nature of
19. his representative capacity, if any.” *See id.* at ¶ 65.

21. Chen argues that the Letter of Intent shows that it is a contract between Plaintiff and OKP,
22. not Plaintiff and Chen. The body of the letter refers only to “our company” (as in OKP) and not
23. Chen.⁴ Chen’s signature appears over his own typewritten name, which appears over the following:

25. ⁴ *See In the Matter of the Estate of Allen G. Gifford*, 144 A.D.2d 742 (N.Y. 1988) (determining that a promissory
26. note issued by George Gifford was an obligation the Gifford Construction Company rather than Gifford personally
because, *inter alias*, the note declared that “we” promise to pay the money back).

1. “OKP (CNMI) CORP.” This suggests that Chen was signing for OKP when he signed the Letter of
2. Intent.⁵

3. There are no allegations of any extra-contractual understanding between Chen and Plaintiff
4. regarding personal responsibility for the contract. There are no allegations that Chen said anything
5. to suggest that he was signing the contract in a personal capacity. Since neither the allegations nor
6. the attachments (namely the Letter of Intent) allow the Court to infer that Chen was individually a
7. party to any contract between OKP and Plaintiff, there is no basis for asserting a breach of contract
8. action against Chen personally. The same applies to other defendants employed by or owning shares
9. in OKP, including Yee.
10.

11. The finding that none of OKP’s shareholders are personally liable for breach of contract and
12. other actions does not remove all possibility of liability. If OKP is found liable, and if there is
13. justification for piercing OKP’s corporate veil, the shareholders may be vicariously liable for OKP.
14. However, the amended complaint does not include any allegations that would justify piercing the
15. corporate veil. Thus, the breach of contract claim is dismissed with respect to all defendants except
16. OKP. Should evidence gained through discovery reveal a basis for piercing the corporate veil,
17. Plaintiff may request leave to amend to add relevant allegations.
18.
19.
20.
21.
22.

23. ⁵ *See, e.g., Star Supply Co. v. Jones*, 665 S.W.2d 194, 198 (Tex. Ct. App. 1984) (“signature of a corporate
24. officer on a contract does not render it his personal contract, where in the body of the contract, it is purported to be a
25. corporation contract”) (citation omitted); 18B *Am. Jur. 2d, Corporations*, § 1841 (it is the “rule that where, in the body
26. of the contract, it purports to be a contract of the corporation, the signature in the name of the officer with or without an
27. affix designating his representative capacity does not render it his personal contract”) (citations omitted); *Receivables
28. Finance Corp. v. Hamilton*, 408 S.W.2d 44 (Mo. 1966) (person who, acting with sufficient authority, signs or endorses
an instrument in corporate name with his own signature affixed as an officer, the principal being thus disclosed, is not
individually liable).

1. **B. Chen’s and Yee’s Motion to Dismiss the Fraudulent Misrepresentation Claim and**
2. **OKP’s Motion to Strike Parts of the Claim**

3. Plaintiff’s claim for fraudulent misrepresentation against OKP and Chen contains more
4. details than that of the original complaint. *See* ¶¶ 74e, 74g, 75, 76, 77a, 77b, 77e, 77g, and 82. OKP
5. asks the Court to strike Paragraphs 74e, 74g, 76e, 76g,⁶ and 82.

6. Paragraph 74 alleges that OKP and Chen represented to Plaintiff that a “licensed surveyor
7. will be retained to periodically perform quantity survey to ascertain the amount of backfill material
8. extracted from the property,” and OKP and Chen would present a final contract for Plaintiff’s
9. approval. This paragraph is essentially the same as Paragraph 31g of the “Operative Facts” section
10. of the original complaint.

11. Paragraph 77 alleges that OKP’s and Chen’s representations were false in that a quantity
12. survey was not periodically performed, which resulted in the over-quarrying and abuse of Plaintiff’s
13. land; and OKP and Chen failed to present to Plaintiff a final contract. These allegations are
14. contained in Paragraphs 57g (Breach of Contract), 77b (Waste), and 35 (Operative Facts) of the
15. original complaint.
16.

17. Paragraph 82 alleges that the wanton and malicious nature of OKP’s and Chen’s conduct
18. and their conscious and reckless disregard of Plaintiff’s rights render them liable for punitive
19. damages. This is similar to Paragraph 60 (Breach of Contract) of the original complaint.

20. Paragraph 76 now alleges that OKP and Chen’s representations were material.

21. The Court judges the significance of these new allegations using the same standards by
22. which courts assess whether allegations in an amended complaint comply with the statute of
23. limitations. Where amended complaints add new parties, courts often find that the original
24. complaint did not toll the statute of limitations with respect to these parties, because the original
25.

26. _____
27. ⁶ Presumably OKP refers to paragraph 77, as paragraph 76 contains no subsections.

1. complaint did not put these parties on notice. *E.g., LoCicero v. Metropolitan Transp. Authority*, 733
2. N.Y.S.2d 477 (N.Y.A.D. 2 Dept. 2001). Where amended complaints clarify existing allegations by
3. adding allegations that defendants could have anticipated, courts often infer that the original
4. complaint was enough to give notice and thereby toll the statute of limitations.⁷ Adding more details
5. to an existing claim or rearranging a complaint is not the same as introducing a new matter. With
6. respect to the fraud claim, the original complaint is simply rearranged, and the word “material” is
7. inserted (perhaps because such allegation is a necessary element of a fraud claim). Thus, there is no
8. basis for striking or dismissing any of the fraud allegations.

10. **C. Chen’s and Yee’s Motion to Dismiss for Waste**

11. The CNMI recognizes a cause of action for waste. *See Camacho v. L&T Int’l Corp.*, 4
12. N.M.I. 323, 328 (1996). The elements of a claim for waste have been stated as follows:

13. (1) an act constituting waste;
14. (2) the act must be done by one legally in possession; and
15. (3) the act must be to the prejudice of the estate or interest therein of another.

16. *Eleopulos v. McFarland and Hullinger, LLC*, 145 P.3d 1157 (Utah Ct. App. 2006); *see also Jowdy*
17. *v. Guerin*, 457 P.2d 745, 748 (Ariz. App. 1969) (identifying element two as the “act must be done
18. by one legally in possession”) (citing 56 Am. Jur., Waste, § 2, p. 450 (1947)).

20. Chen argues that since the amended complaint alleges Chen was illegally on the property,
21. (¶86) it lacks the second element needed for a claim for waste.

22. Plaintiff notes that the amended complaint does not allege that defendant Chen “illegally
23. possessed” Lot No. 249 R. 10, only that OKP, Chen, and Does 1-20 “illegally entered” Plaintiff’s
24.

25. _____
26. ⁷ *See, e.g., Rubin v. Valicenti Advisory Services, Inc.*, No. 03-6201, 2007 WL 196680 (W.D.N.Y. Jan 26, 2007);
27. *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. W. Dist. 2006); *Quaak v. Dexia, S.A.*, 445
28. F.Supp.2d 130 (D. Mass. 2006).

1. land and [illegally] damaged, destroyed, and abused Plaintiff’s entire Lot No. 249 R 10. Plaintiff
2. argues that Chen mistakenly equates “possession” with “enter.”

3. There are few situations in which one can illegally enter land that one lawfully possesses. In
4. the instant case, illegal entry would appear to preclude lawful possession. The claim of waste must
5. therefore be dismissed. Plaintiff has leave to correct his complaint and specifically allege the
6. elements of a waste claim.

7. **D. Chen’s and Yee’s Motion to Dismiss the Conversion Claims**

8. Under the Restatement, (Second) of Torts, § 222A(1) conversion is: (1) an intentional
9. exercise; (2) of dominion or control;(3) over a chattel; (4) resulting in serious interference with the
10. right of control.²

11. The amended complaint alleges that “Defendant OKP, by its agents and employees, namely,
12. Brian M. Chen, Yee Chee Keong, and Does 1-20, acting within the scope of their employment, took
13. possession of soil and minerals located on Dr. Hocog’s land, and converted them to Defendants
14. OKP, Brian M. Chen, Yee Chee Keong, and Does 1-20’s own use.” Amended Complaint, ¶ 96.
15. Paragraph 102 makes an identical allegation with respect to permanent trees and plants located on
16. Plaintiff’s land.
17.

18. Chen argues that the amended complaint lacks allegations needed to state a cause of action
19. against Chen personally. In response, Plaintiff refers the Court to paragraphs 39, 75, 86, 87, 87a,
20. 87b, 94, 96, 100, and 102 of the amended complaint. Paragraph 39 alleges that Defendants OKP,
21. Chen, Yee Does 1-20, and others entered Plaintiff’s land and excavated, dug, moved, and removed
22. soil and minerals. Paragraph 75 alleges that Chen acted individually and on behalf of OKP.
23.

24. ² The tort of conversion has been recognized by the CNMI Supreme Court. *See, e.g., Demapan v. Bank of*
25. *Guam*, 2006 MP 16 (“[u]nder the common law, conversion is an intentional tort which requires an intentional exercise
26. of dominion and control over property of another”) (citing RESTATEMENT (SECOND) OF TORTS, § 222A).

1. Paragraphs 87 and 88 re-allege that Defendants OKP, Chen, Yee, and Does 1-20 entered and
2. cleared the land; quarried, excavated, moved, and dug soil and minerals; and removed soil. There
3. are no allegations suggesting that Chen ever converted the backfill for his private use, however, and
4. it is apparent to the Court that Chen had no need for the backfill himself. Accordingly, this claim is
5. dismissed with respect to Chen and Yee. Plaintiff may petition for leave to amend the complaint to
6. reassert this claim against parties other than OKP if evidence shows that other parties personally
7. converted Plaintiff's property.
8.

9. **E. Chen's, Yee's, and OKP's Motions to Dismiss the Negligence Claims and OKP's**
10. **Motion to Strike**

11. Plaintiff's cause of action for negligence sets forth three different theories of negligence
12. against OKP, Chen, Yee and Does 1-20.

13. **1. Negligent Drivers/Operators**

14. Paragraph 110 of the amended complaint alleges that Defendants were negligent,
15. incompetent and/or reckless drivers/operators who damaged, destroyed, and abused Plaintiff's land,
16. trees, plants, and other things of value. Paragraph 109 alleges that OKP was the owner, or else had
17. the complete control, custody, and care, of the equipment used to conduct these activities.

18. Chen and OKP argue that this is an impermissible new theory and should accordingly be
19. dismissed. OKP adds that it should be stricken for the same reason.

20. The original complaint (at ¶ 98) did not describe the manner in which Defendants allegedly
21. operated (negligently and recklessly). Rather, it described Defendants' alleged duty not to commit
22. waste on Plaintiff's land and to obtain the prior written or oral consent before any clearing, digging,
23. excavating, quarrying, moving, and removing of any soil and minerals and permanent trees and
24. plants. Nevertheless, there were sufficient allegations to suggest that the manner in which
25. defendants operated was negligent or reckless. Nearly every count described defendants' conduct
26.
27.
28.

1. with the verbs “damage and destroy.” Paragraphs 104 and 105 referred specifically to “negligent,
2. incompetent and/or reckless drivers/operators” who drove OKP’s vehicles “in a negligent,
3. incompetent and/or reckless manner, especially, as instructed by Defendant OKP or its managers,
4. and/or others.”

5. The original complaint also failed to specify that OKP was the alleged owner or controller of
6. the equipment. Nevertheless, the original complaint contained enough information to infer that OKP
7. owned or controlled the equipment, given that OKP was the one who allegedly negotiated with
8. Plaintiff to excavate the backfill materials. *See* Complaint, ¶ 29.

10. Since the new allegations merely clarify the previous allegations and do not add new
11. matters, the motions to dismiss and strike this theory are denied.

12. **2. No Permits**

13. Paragraph 108 of the amended complaint alleges that Defendants “violated the laws of the
14. CNMI by damaging, destroying, and abusing Dr. Hocog’s properties without the proper permits.”⁸

15. OKP requests that this paragraph be stricken as it adds a new matter. Plaintiff points out that
16. the original complaint does refer to a lack of permits. *See* ¶ 33: “On information and belief,
17. Defendant OKP did not apply nor secure the necessary permits for the excavation.” Since the
18. original complaint put Defendants on notice of this claim, Paragraph 108 need not be stricken.

20. OKP argues that the required permits were obtained, and requests the Court to take judicial
21. notice⁹ of attached copies of three permits.¹⁰ Plaintiff responds that the permits are in his name, not

23. ⁸ The insinuation that OKP’s actions went beyond the scope of the permits does not result in the conclusion that
24. OKP failed to obtain the necessary permit. Rather, it suggests that OKP violated the terms of the permits under which it
was operating.

25. ⁹ *See* Com. R. Evid. 201 (providing for judicial notice); see also *Venetian Casino Resort, L.L.C. v. Cortez*, 96
26. F.Supp.2d 1102, 1106 (D. Nev. 2000) (when ruling on a motion to dismiss, the trial court may consider: (1) documents
27. physically attached to the complaint, (2) documents of undisputed authenticity alleged or referenced within the
complaint, and (3) public records and other judicially noticeable evidence).

1. OKP's; such that OKP failed to get the permits it needed. The Court disagrees with Plaintiff. The
2. CNMI Coastal Resources Management Office (CRM) and CNMI Division of Environmental
3. Quality (DEQ) permit applications, both of which were signed by Plaintiff, and which caused the
4. issuance of the permits, recognized that the permits were being sought in order for OKP to conduct
5. the work on Plaintiff's property that was anticipated by the parties in their Letter of Intent:¹¹

6. This earthwork project is being undertaken to take advantage of OKP (CNMI)
7. Corporation offer to pay for all cost of topographic survey, geotesting, engineering
8. design and earthwork construction in exchange for taking the excavated material to
be used as embankment in the Rota Airport Runway Extension Project.

9.

10. The entire cost of the project is to be absorbed inhouse by OKP (CNMI) Corporation
11. as part of their Rota Runway Extension Project.

12. *CRM Application.* pages 2 and 5.

13. The DEQ permit application states:

14. This project involved the clearing, excavation and finish grading of approximately
15. 2.5 hectares of private land located along Airport Road on Rota. . . .This earthwork
16. project is being undertaken to take advantage of OKP (CNMI) Corporation offer to
17. pay for all cost of topographic survey, geotesting, engineering design and earthwork
construction in exchange for taking the excavated material to be used as
embankment in the Rota Airport Runway Extension Project.

18.

19. The Court may consider the permits attached as exhibits to this motion without converting this motion into
one for summary judgment. *US v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

20. ¹⁰ Attachments include:

21. (1) CRM 's "Coastal Permit Decision RMS-2006-X-020, Landclearing and Excavation Dr. Larry B.
Hocog" authorizing OKP to conduct clearing and excavation on Plaintiff's property, signed by
Plaintiff on April 13, 2006;
22. (2) DEQ's "Commercial Earthmoving & Erosion Control Permit No. 2006 COM 043R" similarly
authorizing OKP CNMI to conduct clearing and earthmoving activities on Dr. Hocog's property (Lot
23. No. 249 R 10);
24. (3) the Division of Historic Preservation Office ("HPO") Memorandum permit, Serial No. HP-24408
dated January 12, 2006, addressed to the Director of Division of Environmental Quality, advising
25. that "this project has received a HPO standard condition clearance," and requesting additional
conditions included in the earthmoving permit.

26. ¹¹ At the hearing, Plaintiff made an oral motion to exclude the applications as extraneous material or treat OKP's
27. motion as a motion for summary judgment and allow time for a response. The Court denies this motion, as Com. R.
Evid. 201 allows for judicial notice of the permit applications in the same manner as any other public document.

1. All of the existing vegetation inside the property will be uprooted and removed
2. during the clearing and excavation process.

3. *DEQ Application*, pages 3 and 6.

4. The fact that the permits themselves do not reference OKP is immaterial, as it is standard
5. practice for construction permits to be issued in the name of the landowner, and because the permits
6. do not preclude assignment. Thus, Plaintiff cannot recover under the existing allegations regarding
7. the lack of permits. Plaintiff is given leave to allege how Defendants were negligent in the use of
8. the permits obtained.

9. **3. No Permission from Landowner**

10. Paragraph 108 of the amended complaint alleges that Defendants “failed to obtain the prior
11. written consent of Dr. Hocog to damage, remove, alter or change, the contours of the real property,
12. and other things of value.” Chen argues that this allegation does not state a negligence claim
13. because it describes a failure to ask consent to undertake conduct rather than the undertaking of the
14. conduct itself. Because the failure to seek consent to engage in negligence is not the legal cause for
15. any alleged harm, Chen argues that Plaintiff has failed to state a claim upon which relief may be
16. granted. *See* RESTATEMENT (SECOND) OF TORTS, § 281(c) (an element of a cause of action for
17. negligence is that “the actor’s conduct is a legal cause” of the harm). Plaintiff argues that failure to
18. obtain permission is not a separate claim but an element of a single negligence claim.

19. While one can assume a risk, one cannot consent to negligence. *See* RESTATEMENT
20. (SECOND) OF TORTS § 496A, com. “c(1)” (“assumption of risk means that the plaintiff has given his
21. express consent to relieve the defendant of an obligation to exercise care for his protection”) Thus,
22. the allegation of no consent is irrelevant and must be stricken. Plaintiff has leave to amend the
23. complaint to allege a lack of consent with respect to an intentional tort.
24.
25.
26.
27.
28.

1. In sum, Plaintiff may maintain a cause of action for negligence, but only with specific
2. allegations regarding the manner in which Defendants were negligent in the use of their permits or
3. mode of operation on Plaintiff's property.

4. **F. Chen's and Yee's Motion to Dismiss the Unjust Enrichment Claim**

5. The Order explained that Plaintiff could pursue unjust enrichment damages against OKP, so
6. long as they were either outside the scope of damages recovered for breach of contract or in the
7. place of damages for breach of contract. Order, p. 12. Plaintiff was also permitted to make a claim
8. against defendants not privy to the Letter of Intent as an alternative to tort claims, provided that
9. Plaintiff specifically alleged the benefits derived by each defendant. Order, p. 12.

11. Paragraph 116 of the amended complaint alleges that "Defendants OKP, Brian M. Chen,
12. Yee Chee Keong, and Does 1-20, took, removed, and benefited from the use of Dr. Hocog's land,
13. soil and minerals, plants and trees, and other things of value, to build the embankment at Defendant
14. CPA's Rota project, among other things, without the prior written or oral consent from Dr. Hocog."

15. Chen argues that there are no "specific" allegations, only generalities like "other things of
16. value" and "among other things." Although the amended complaint alleges that Chen "took,
17. removed, and benefited" from the use of Plaintiff's "land, soil and minerals, plants and trees," it
18. alleges that the items were used "to build the embankment at Defendant CPA's Rota project." This
19. suggests that the items were used to build the embankment at the project for the benefit of OKP, not
20. Chen personally. The only connection to Chen is the alleged furtherance of Chen's employment
21. and dividends from Defendant OKP." Amended Complaint, ¶ 121. Chen argues that this allegation
22. is too indirect.

24. The Court agrees with Chen. As discussed in the context of the conversion claims, there is
25. no indication that Chen personally benefited from the removal of Plaintiff's backfill. Accordingly,
26.

1. this claim is dismissed with respect to Chen and Yee. Plaintiff may request leave to amend to add
2. relevant allegations if evidence shows that Chen or another defendant personally benefited from the
3. use of Plaintiff's property.

4. **G. Chen's Motion to Dismiss the Nuisance Claim**

5. *Ada v. J.J. Enterprises, Inc.*, No. 93-0644 (Supr. Ct. February 14, 1994), the only CNMI
6. decision addressing private nuisance, sets forth the elements of a cause of action for private
7. nuisance in the CNMI:

8. 1) the plaintiff is a possessor of the land or has ownership of possessory or
9. nonpossessory estates in land;
10. 2) the defendant is the legal cause of a nontrespassory invasion of the plaintiff's
11. interest in the private use and enjoyment of land; and,
12. 3) such invasion is intentional and unreasonable or unintentional and otherwise
13. actionable under theories of negligent or reckless conduct.
14.

15. *Id.* at 3.

16. Paragraphs 129-130 of the amended complaint allege that Defendants OKP, Chen, Yee and
17. Does 1-20 "turned Dr. Hocog's property into at least two storm-water and erosion control ponding
18. basins that take up almost the entire lot" and that this constitutes a nuisance. There is no allegation
19. that the alleged nuisance originated from any property other than that of Plaintiff.
20.

21. In *Ada*, the plaintiffs asked the court "to expand the definition of nontrespassory invasion to
22. apply to the situation where the interference with property use arises from the actions of an owner
23. of an earlier property interest in the same land." Here, Plaintiff likewise asks the court to expand the
24. definition of a nuisance occurring on a given parcel of land to actions originating from the same
25. parcel of land. The *Ada* Court found that, "Such a holding would stretch the scope of private
26.

1. nuisance law in the Commonwealth wider than any other jurisdiction in the United States political
2. family.” This analysis also applies to the instant case.¹² Accordingly, Plaintiff’s cause of action for
3. nuisance is dismissed. Plaintiff has leave to redirect allegations under the nuisance heading to
4. support his claim for waste.

5. **H. OKP’s Motion to Strike Prayer for relief**

6. The prayer for relief adds a request for judgment against CPA under the vicarious liability
7. theory of actual authority; and pre-judgment interest on amounts owed. OKP moves to strike these
8. requests on grounds that they did not appear in the previous complaint.
9.

10. The Court finds that none of the changes are so drastic as to render the original complaint
11. inadequate notice of the causes of action presented in the amended complaint. Further, none of the
12. additional material is scandalous or irrelevant. The motion to strike these paragraphs is denied.

13. **I. CPA’s Motion to Dismiss the Claim of Agency Liability**

14. At the hearing, Plaintiff made an oral motion to continue CPA’s Rule 12(c) motion, as CPA
15. has not yet answered the complaint. Because Rule 12(c) provides that a motion for judgment on the
16. pleadings may be made only after the pleadings are closed, Plaintiff’s motion is hereby granted.¹³
17.

18. Counsel for CPA noted that it would be inefficient to answer the amended complaint if the
19. instant order results in a second amended complaint. The Court agrees. Thus, CPA will have twenty
20. days to answer any amended complaint, and to amend its Rule 12(c) motion if necessary. CPA shall

21. ¹² Cf. *Carroll v. Absolute Tank Removal, LLC*, 834 A.2d 823 (Conn. Super.2003), (“Neither the parties nor the
22. court ... have discovered any case allowing recovery on a common law private nuisance claim for an injury to a property
23. that originated on that property.”); *Philadelphia Elec. Co. v. Hercules, Inc.* 762 F.2d 303, 314 (3rd Cir.1985); *Rose v.*
24. *Grumman Aerospace Corp.*, 196 A.D.2d 861, 862, 602 N.Y.S.2d 34 (2d Dep’t 1993) (“Because the injury complained
of was to the same property as that on which the nuisance was alleged to exist, the [lessor’s] nuisance cause of action
should have been dismissed.”).

25. ¹³ See *Poliquin v Heckler*, 597 F. Supp. 1004 (D.C. Me 1984) (for purposes of FRCP 12(c), the pleadings are not
26. closed until at least an answer has been filed); *Season-All Industries, Inc. v Turkiye Sise Ve Cam Fabrikalari, A. S.*, 425
27. F.2d 34 (3rd Cir. 1970) (a motion for judgment on the pleadings is improper where no answer has been filed to the
28. complaint); *Mull v Colt Co.* 31 F.R.D. 154 (D.C.N.Y. 1962) (Rule 12(c) motion is inappropriate where a defendant has
not served the answer to an amended complaint).

1. then notice its 12(c) motion for oral arguments. In the event that Plaintiff does not submit a second
2. amended complaint within thirty days of this order, CPA shall have an additional 20 days to submit
3. an answer to the amended complaint and notice oral arguments on its Rule 12(c) motion.

4. **J. CPA's Motion to Strike the Introduction**

5. As the parties did not argue this motion, it shall be continued.

6. **IV. CONCLUSION**

7. Because the amended complaint lacks allegations suggesting that Chen or Yee was
8. personally responsible for the contract with Plaintiff, Chen's and Yee's Rule 12(b)(6) motion to
9. dismiss the breach of contract claim is granted. This cause of action is dismissed with respect to all
10. defendants except OKP. Should there emerge evidence providing justification for piercing the
11. corporate veil, Plaintiff may petition for leave to amend.
12.

13. As the allegations of fraudulent misrepresentation in the amended complaint do not
14. substantially differ from those in the original complaint, Chen's and Yee's Rule 12(b)(6) motion to
15. dismiss and OKP's motion to strike paragraphs 74e, 74g, 76e, 76g, and 82 are denied.
16.

17. Because the allegations under the claim of waste negate recovery under this theory, Chen's
18. and Yee's Rule 12(b)(6) motion to dismiss this claim is granted. Plaintiff has 30 days to amend to
19. properly allege the elements of waste.

20. Chen's and Yee's Rule 12(b)(6) motion to dismiss the conversion claims is granted, as there
21. is no indication of personal involvement on the part of these defendants. Plaintiff may petition for
22. leave to amend if evidence of personal involvement later arises.

23. Chen's, Yee's, and OKP's Rule 12(b)(6) motion to dismiss or strike the negligence claims is
24. granted in part. The portion of the claim alleging lack of permits is dismissed. The allegation of no
25.

26.
27.
28.

1. consent is stricken. Plaintiff has 30 days to amend the complaint to allege a lack of consent with
2. respect to an intentional tort.

3. Chen's and Yee's Rule 12(b)(6) motion to dismiss the cause of action against him for unjust
4. enrichment is granted for lack of specific allegations suggesting personal enrichment. Plaintiff may
5. petition for leave to amend if evidence of personal enrichment later arises.

6. Chen's and Yee's Rule 12(b)(6) motion to dismiss the nuisance claim is granted, as a
7. nuisance cannot originate on the claimant's property.

8. OKP's motion to strike the prayer for relief is denied.

9. CPA's motions are continued until after it answers the complaint. CPA has 20 days to
10. answer any second amended complaint of plaintiff, or thirty days in the absence of a second
11. amended complaint.
12. amended complaint.

13.
14. SO ORDERED this 29th day of March, 2007.

15.
16.
17. /S/
18. _____
19. Juan T. Lizama
20. Associate Judge, Superior Court

21.
22.
23.
24.
25.
26.
27.
28.