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14 UNITED STATES DISTRICT COURT
15 FOR THE CENTRAL DISTRICT OF CALIFORNIA
16

17 NANTWORKS, LLC, a Delaware
limited liability company, and NANT
18 HOLDINGS IP, LLC, a Delaware
limited liability company,

19 Plaintiffs,

20 vs.

21 BANK OF AMERICA
22 CORPORATION, a Delaware
corporation, and BANK OF
23 AMERICA, N.A., a national banking
association,

24 Defendants.
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CASE NO. 2:20-cv-7872-GW-PVC
**PLAINTIFFS' SUPPLEMENTAL
BRIEF REGARDING NOMINAL
DAMAGES FOR BREACH OF
CONTRACT PURSUANT TO
CALIFORNIA LAW**

1 Pursuant to the Court’s August 14, 2024 Supplemental Tentative Ruling on
2 Defendants’ Corrected Motion for Summary Judgment as to Plaintiffs’ Breach of
3 Contract Claim (“Tentative” at 62), Plaintiffs respectfully submit the following three
4 cases in support of Plaintiffs’ position that nominal damages are available for their
5 claim that Defendants’ breached the 2011 CRA, which is governed by California law:
6 *Sweet v. Johnson*, 169 Cal. App. 2d 630 (1959), *Elation Sys., Inc. v. Fenn Bridge LLC*,
7 71 Cal. App. 5th 958 (2021), and *Palantir Techs. Inc. v. Abramowitz*, No. 19-CV-
8 06879-BLF, 2022 WL 2952578 (N.D. Cal. July 26, 2022) (which are attached as
9 Exhibits 1-3 to the Declaration of Rachael L. McCracken filed in support of this brief
10 for the Court’s convenience). Plaintiffs’ Opposition (Dkt. 522, herein the “Opp.”)
11 cites to both *Sweet v. Johnson*, 169 Cal. App. 2d 630 (1959) and *Elation Sys., Inc. v.*
12 *Fenn Bridge LLC*, 71 Cal. App. 5th 958 (2021) in support of the proposition that
13 nominal damages are available for a breach of contract under California law. *See* Dkt.
14 522 (Opp.) at 19. Defendants do not address either case in their reply.

15 In *Sweet v. Johnson*, 169 Cal. App. 2d 630 (1959), the California Court of
16 Appeal unequivocally found that “[a] plaintiff is entitled to recover nominal damages
17 for the breach of a contract, despite inability to show that actual damage was inflicted
18 upon him, since the defendant’s failure to perform a contractual duty is, in itself, a
19 legal wrong that is fully distinct from the actual damages.” *Id.* at 632 (internal citation
20 omitted) (noting Cal. Civ. Code § 3360 (“Where a breach of duty has caused no
21 appreciable detriment to the party affected, he may yet recover nominal damages.”));
22 *see also* Judicial Council of California Civil Jury Instructions (2024), CACI No. 360
23 (Nominal Damages). *Sweet v. Johnson* has been cited by California courts
24 consistently since 1959 in support of the proposition that nominal damages are
25 available for a breach of contract pursuant to California law.

26 In *Elation Sys., Inc. v. Fenn Bridge LLC*, 71 Cal. App. 5th 958 (2021), the Court
27 of Appeal followed *Sweet v. Johnson* and Cal. Civ. Code § 3360, and distinguished
28 Ninth Circuit cases that it found were not controlling or persuasive on whether

1 nominal damages were available for a breach of contract claim. *Elation Sys.*, 71 Cal.
2 App. 5th at 966-67. The Court of Appeal found that an employer could recover
3 nominal damages for breach of a non-disclosure agreement by a former employee
4 where the employer was otherwise unable to establish lost profit damages. *Id.* at 965-
5 66. At trial, a jury found the employee breached the non-disclosure agreement and
6 awarded the plaintiff \$10,000. *Id.* at 962. The trial court granted defendant’s motion
7 for judgment notwithstanding the verdict finding that “there was no evidence
8 supporting the \$10,000 damages award.” *Id.* The Court of Appeal reversed this
9 decision and found that “the trial court should have awarded nominal damages in light
10 of the jury’s unchallenged finding of breach,” and concluded that “the failure to award
11 nominal damages here is sufficient grounds for reversal of the judgment,” citing both
12 *Sweet v. Johnson* and Cal. Civ. Code § 3360. *Elation Sys.*, 71 Cal. App. 5th at 965-
13 67. In so finding, the Court in *Elation* explicitly rejected the reasoning of two Ninth
14 Circuit cases that had been cited by the defendants for the proposition that breach of
15 contract claims “are not actionable in California without a showing of appreciable and
16 actual damage.” *Id.* at 966-67 (distinguishing *Ruiz v. Gap, Inc.*, 380 F. App’x 689
17 (9th Cir. 2010) and *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010 (9th Cir.
18 2000)).

19 Courts in the Ninth Circuit have recognized and relied on *Elation* for the
20 proposition that nominal damages are available for a breach of contract under
21 California law.¹ For example, in *Palantir Techs. Inc. v. Abramowitz*, No. 19-CV-
22 06879-BLF, 2022 WL 2952578 (N.D. Cal. July 26, 2022), the court denied
23 defendant’s motion for summary judgment on a breach of contract claim arising from
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26 ¹ When interpreting state law, the “duty as a federal court is to ascertain and apply
27 the existing California law . . . [c]ircuit precedent interpreting state law, therefore, is
28 only binding in the absence of any subsequent indication from the California courts
that our interpretation was incorrect.” *AGK Sierra De Montserrat, L.P. v. Comerica*
Bank, 100 F.4th 1122, 1126 (9th Cir. 2024) (internal citations and quotations omitted).

1 a non-disclosure agreement. *Id.* at *3. As here, the defendant moved for summary
2 judgment on the grounds that plaintiff had no evidence of damages from its alleged
3 breach of the non-disclosure agreement. *Id.* at *1. The court rejected this argument
4 and denied summary judgment because “there are genuine disputes of material fact
5 regarding whether [plaintiff] suffered damages from [defendant]’s alleged breach of
6 contract” including that “recent California Court of Appeal authority confirms that
7 nominal damages are available as a matter of law where a contract has been
8 breached.” *Id.* at *3.

9 Like in *Palantir Techs. Inc. v. Abramowitz*, Plaintiffs respectfully submit that
10 Defendants’ motion for summary judgment should be denied because nominal
11 damages are available for a breach of contract claim as a matter of California law.

12
13 DATED: August 22, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for NantWorks, certifies that this brief is under 7000 words, which complies with the word limit of L.R. 11-6.1.

DATED: August 22, 2024

Respectfully submitted,

By /s/ Rachael L. McCracken

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