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METRONYM, INC. AND MAKER
ECOSYSTEM GROWTH FOUNDATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PETER JOHNSON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

MAKER ECOSYSTEM GROWTH HOLDINGS, INC., NKA METRONYM, INC., a foreign corporation; and MAKER ECOSYSTEM GROWTH FOUNDATION, a foreign corporation,

Defendants.

Case No.: 3:20-cv-02569-MMC

DEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

Date: February 10, 2023
Time: 9:00 a.m.
Courtroom: 7
Judge: Hon. Maxine M. Chesney

Second Amended Complaint Filed: September 8, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

PRELIMINARY STATEMENT

Plaintiff's opposition brief ("Opposition" or "Opp.")[1] confirms that dismissal is warranted. Recognizing that the SAC fails to state a claim, Plaintiff tellingly resorts to some of the oldest tricks in the book in his effort to sneak the legally insufficient SAC past the pleading stage. First, he improperly attempts to amend his pleading on the fly by injecting new factual allegations, which appear nowhere in the SAC, through both the Opposition itself and a separate, improper fact declaration. (Opp. at 1, 3-12, 15-16.) Second, he tries to water down the applicable Rule 9(b) pleading standard by misconstruing it and then seeking to avoid it altogether by incorrectly claiming Defendants are somehow the only parties with any knowledge regarding the purported fraud. (*Id.* at 10-12.) Third, he incorrectly claims that nearly every fatal pleading flaw is a "question of fact" inappropriate for determination at this stage. (*Id.* at 14, 17.) Fourth, he rewrites California's economic loss doctrine in an attempt to move this case outside of its straightforward application. (*Id.* at 19-22). And finally, when all else fails, he repeatedly asks for leave to replead. (*Id.* at 3, 4, 9, 17, 25).

None of these shopworn tactics address the core deficiencies of the SAC, which impermissibly lumps all Defendants into a single, undifferentiated group; fails to identify a false or misleading statement with any particularity; fails to plead fraudulent or reckless intent, reliance or causation; and is barred by the economic loss doctrine. The SAC's legal deficiencies are pervasive and uncurable. Accordingly, the Court should dismiss the SAC with prejudice.

ARGUMENT

I. Plaintiff Concedes that Dismissing the Foundation Is Warranted

The Foundation should be dismissed because it has been dissolved and thus lacks the capacity to be sued under Cayman law. (Mot. at 11.) Plaintiff's only argument in opposition was based on his request for limited discovery (Opp. at 9), which he has now withdrawn in full (ECF No. 77). Accordingly, dismissal is warranted.[2]

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[1] "Motion" or "Mot." refers to Defendants' Motion to Dismiss the Second Amended Complaint. (ECF No. 72.) Capitalized terms used herein and not defined shall have the same meaning as in the Motion.

[2] Plaintiff also requested leave to amend the SAC to add Universal DeFi Holding Company, LLC ("UDHC") as a defendant. (Opp. at 9.) But Plaintiff's request was based on a misinterpretation of Defendants' Motion, which made clear that *Metronym* is the Foundation's successor in interest, not UDHC. (Becker Decl. ¶ 5.) Plaintiff admitted as much when he withdrew his request for jurisdictional discovery of UDHC. His request thus should be denied.

II. Plaintiff's Request for Judicial Notice Should be Denied

The Court should decline Plaintiff's request to take judicial notice of the materials introduced through the new Johnson declaration—none of which was even mentioned in the SAC. (*See* Opp. at 3-4.) "[I]t is axiomatic that [a] complaint may not be amended by the briefs in opposition to a motion to dismiss." *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1009 (N.D. Cal. 2014) (first alteration in original) (citation omitted). Plaintiff's thinly-veiled attempt to plead new facts not included in the SAC should thus be rejected out of hand.

Even if Plaintiff's request were considered, it should be denied. Plaintiff does not attempt to satisfy the requisite standard for judicial notice. *See* Federal Rule of Evidence 201(b) (court may "judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").[3] Plaintiff has not explained why the Court can take judicial notice of any of these new allegations. *See, e.g.*, *Peralta v. Swetalla*, 2022 WL 783014, at *3 (E.D. Cal. Mar. 11, 2022) (denying request for judicial notice, in part, because plaintiff failed to explain why court should take judicial notice). Instead, Plaintiff appears to argue that these new facts should be considered because they were incorporated by reference in the SAC. (Opp. at 3-4.) But he fails to point to any place in the SAC where any of these documents or information are referenced, either directly or indirectly, and review of the SAC reveals that they were not.

Finally, even if the Court could take judicial notice of these new materials, Plaintiff cannot rely on them for the truth of their contents, as he appears to do here.[4] *Sneed v. AcelRx Pharms., Inc.*, 2022 WL 4544721, at *3 (N.D. Cal. Sept. 28, 2022) (taking notice of publicly available documents, but not for the "truth of any of the facts asserted in these documents").

[3] The request is also procedurally deficient because it was not made as a standalone filing, *see Innovative Sports Management, Inc. v. Portocarrero*, 2021 WL 2497925, at *2 (C.D. Cal. Apr. 6, 2021) ("Requests for judicial notice must be made via a separately filed request for judicial notice."), and the documents for which Plaintiff requests judicial notice are not attached as exhibits. *Perez v. Kroger Co.*, 336 F. Supp. 3d 1137, 1141 (C.D. Cal. 2018) ("The party requesting judicial notice must supply the court with the source material needed to determine whether the request is justified.")

[4] For example, Plaintiff requests judicial notice of an article posted by a "Mr. Topbottom" and a Reddit post supposedly made by a former executive of MEGH, both for the truth of their contents. (Opp. at 8-9; Johnson Decl. ¶¶ 11-2.) These requests are plainly improper under applicable Ninth Circuit precedent. *See, e.g., Ali v. Intel Corp.*, 2018 WL 5734673, at *3 (N.D. Cal. Oct. 31, 2018).

III. Plaintiff Fails to Plead an Intentional or Negligent Misrepresentation Claim

A. Plaintiff does not satisfy Rule 9(b)

Plaintiff's vague and conclusory allegations fail to satisfy the heightened pleading standard of Rule 9(b) (Mot. at 12-14), which Plaintiff concedes applies to both his intentional and negligent misrepresentation claims. (Opp. at 10.) Plaintiff's Opposition offers three arguments as to why Rule 9(b) is satisfied here, none of which has merit.

First, Plaintiff attacks a straw man by arguing that "[R]ule 9(b) does not require nor make legitimate the pleading of detailed evidentiary matter." (Opp. at 11 (citation omitted).) Defendants do not argue otherwise. Rather, as even Plaintiff recognizes, Rule 9(b) requires Mr. Johnson identify "'the who, what, when, where, and how' of the misconduct charged." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). This includes specific factual allegations concerning the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Frustere v. Wells Fargo Bank, N.A.*, 2012 WL 4514066, at *1 (N.D. Cal. Oct. 2, 2012) (Chesney, J.). The SAC is devoid of such allegations. (Mot. at 12-14.)[5]

Second, Plaintiff offers a chart purporting to show the "who, what, when, where, and how" of Defendants' fraud. (Opp. at 11-12.) But this chart reveals the opposite of what Plaintiff intended, as it lacks a single citation to the SAC (because many of its allegations are nowhere to be found there). (*Id.*) Indeed, Plaintiff's row in the chart detailing the supposed "what" of Defendants' fraud—the core of his misrepresentation claims—is based entirely on his (improperly) newly-added facts. (*Id.* at 5-6, 11-12.) Even Plaintiff's new allegations are legally insufficient, as they continue to lump together "Defendants" and fail to specify exactly who said what and when. (*Id.* 10-11.) While Plaintiff argues that "the Court can reasonably infer that the statements . . . have been ratified and approved by the company and its highest officers" (*id.* at 13), this is just more of the same vague, conclusory claims—it is not even clear to which "company" Plaintiff refers.[6]

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[5] Plaintiff relies on *Walling v. Beverly Enterprises*, 476 F.2d 393 (9th Cir. 1973), but there the Ninth Circuit held that Rule 9(b) was satisfied because, unlike here, Plaintiff had in fact alleged with particularity "the time, place and nature of the alleged fraudulent activities." *Id.* at 397.

[6] Plaintiff cites to *Glovatorium, Inc. v. NCR Corp.*, 684 F.2d 658 (9th Cir. 1982), for the unrelated proposition that "California law provides for corporate liability where 'the advance knowledge, ratification, or act of oppression, fraud, or malice [is] . . . on the part of an officer, director, or *(cont'd)*

Finally, Plaintiff tries to avoid the strictures of Rule 9(b) by claiming that *all* relevant details regarding the purported fraud are in Defendants' possession. (Opp. at 11-13.) Plaintiff's theory misconstrues the law and belies common sense. The statements that make out Plaintiff's misrepresentation claims—whatever they may be—have to have been public, and thus are not (and can never be) within Defendants' sole knowledge. When and where Plaintiff saw those supposed statements is *solely* within *Plaintiff's* possession. Indeed, Plaintiff's own authority shows that, at the very least, he must allege with particularity what statements he is challenging, when they were made, where he saw them, and how they were misleading. *See Wool v. Tandem Computs., Inc.*, 818 F.2d 1433 (9th Cir. 1987).[7] And the law is clear that Plaintiff may not lump defendants together under Rule 9(b). *See Sugarman v. Muddy Waters Cap. LLC*, 2020 WL 633596, at *4 (N.D. Cal. Feb. 3, 2020). The SAC fails on all these levels.[8]

B. Plaintiff has not alleged any misrepresentation

Plaintiff has not pled that Defendants made any misrepresentations. *First*, while Plaintiff complains that he lost his collateral during the events of "Black Thursday," he cannot deny that he and every other MakerDAO user was warned of the very risks that came to pass. (*See* Mot. at 14-15.) Plaintiff attempts to brush off these extensive risk warnings by contending that "in each instance, the supposed disclosure relates to risks not implicated in this case." (Opp. at 13.) But even a cursory review reveals that these risk warnings covered the precise risks at issue. (*Compare* SAC ¶ 32 ("[T]he Maker Protocol's lone process of CDP liquidation *failed* [and] . . . [t]he Maker Foundation operated one of the four Keeper bots, which immediately ran into *technical issues* and wasn't able to operate.") *with* Mot. at 8-9 ("There are numerous ways the Open Source Software and Service could *fail* in an unexpected way, *resulting in the total and absolute loss of all of your funds* [and] . . . [t]here is an

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managing agent of the corporation.'" (Opp. at 13.) But the SAC does not make any allegations whatsoever with respect to any "officer, director, or managing agent" of any Defendant, let alone any knowledge, ratification or act by such unnamed persons.

[7] Plaintiff relies on *Tarmann v. State Farm Mutual Automobile Insurance Co.*, 2 Cal. App. 4th 153 (Cal. App. 1991), to assert that Rule 9(b)'s specificity requirement is relaxed when "allegations indicate that 'the defendant must necessarily possess full information concerning the facts of the controversy'" (Opp. at 12), but does not explain what is peculiarly within Defendants' knowledge.

[8] Plaintiff notes that knowledge can be averred generally, but his conclusory allegations do not even meet that standard. (Mot. at 16-18; *see, e.g.*, SAC ¶¶ 77, 80.) *See also Sakai v. Merrill Lynch Life Ins. Co.*, 2006 WL 8442981, at *6 (N.D. Cal. Sept. 26, 2006) (Chesney, J.); *Portney v. CIBA Vision Corp.*, 2008 WL 5505517, at *7 (C.D. Cal. July 17, 2008).

inherent risk that the technology could *contain weaknesses, vulnerabilities, or bugs* causing, among other things, the complete *failure* of the Maker Protocol and/or its component parts.").)

Far from "boilerplate" (Opp. 14), these disclosures were clear, unambiguous and prominently displayed in many of the same sources upon which Plaintiff bases his claims. (Mot. at 7-8.) For example, he expressly relies on the 2017 Whitepaper while ignoring statements, contained in a section of the same document particularly dedicated to risks, which warned him of the risks he now claims were concealed. (*E.g.*, Mot. at 7-8 ("In a worst case scenario, all decentralized digital assets that are held as collateral in The Maker Platform, such as Ether (ETH) or Augur Reputation (REP), could be stolen without any chance of recovery.").) Moreover, Plaintiff affirmatively agreed to the 2018 Terms of Service when he signed up to use the system, which contained further risk warnings. (Mot. at 8.)

Second, Plaintiff's vague allegations about the MakerDAO system's 13% liquidation penalty cannot show any misrepresentations. The SAC alleges—without identifying any specific statement—that Defendants told MakerDAO system users that in the event of a liquidation there would be a two-step process: their collateral would be auctioned off, and then a 13% liquidation penalty would apply to the results of the auction, with the amount remaining after that penalty returned to the user. (SAC ¶¶ 1, 24-25.) According to Plaintiff, this was a misrepresentation because, during "Black Thursday," MakerDAO system users lost more than just the 13% liquidation penalty. (*Id.* ¶ 1.) But Plaintiff's own description of the events of "Black Thursday" are consistent with his descriptions of the two-step liquidation process. During "Black Thursday," certain MakerDAO system users' accounts were liquidated due to the drop in ETH prices, and the auction process resulted in $0.00 winning bids for the collateral. (*Id.* ¶ 32.) Because that collateral returned $0.00, there was nothing left to return to the user, and no liquidation penalty could be applied. Plaintiff does not respond to this argument and thus concedes the point. *See Linder v. Golden Gate Bridge, Highway & Transp. Dist.*, 2015 WL 4623710, at *4 (N.D. Cal. Aug. 3, 2015) (dismissing claim because plaintiff's opposition did not address the defendants' argument). (*See also* Mot. at 14-15.)

Third, Plaintiff's challenge to descriptions concerning how the liquidation process was *supposed to work* fails because such descriptions are non-actionable predictions of future events. (Mot. at 15-16.). *See, e.g.*, *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 158, (Cal.

App. 1991) ("'[P]redictions as to future events . . . are deemed opinions, and not actionable fraud.'" (first alteration in original) (citation omitted)). In response, Plaintiff argues that these descriptions were misrepresentations when made because the MakerDAO system was "dangerous at the time that it invited users to join." (Opp. at 16.) But the SAC does not contain non-conclusory factual allegations demonstrating that these unidentified statements were false at whatever unidentified times they were made. Nor is it consistent with the SAC's theory of harm, which is based on a future and extraordinary cascading series of events during "Black Thursday," where numerous outside factors, including nefarious third-party actors, coalesced together to supposedly cause the alleged harm. And the SAC explicitly characterizes these statements as describing how the liquidation process "*would* work" (SAC ¶¶ 73, 79 (emphasis added)), underscoring their forward-looking and aspirational nature.

Finally, Plaintiff now identifies two new descriptions of the auction process from two supposed webpages that appear nowhere in the SAC. (Opp. at 1, 5-6.) Even if the Court considers them, these statements are not misrepresentations for the same reasons identified in the Motion. Each was made within the context of extensive risk disclosures warning Plaintiff of the risks that ultimately occurred, and their description of the 13% liquidation penalty, which would be applied to amounts remaining after the auction process, were consistent with Plaintiff's allegations. (Mot. at 14-15.)[9]

C. Plaintiff has not adequately alleged knowledge or lack of a reasonable basis

Plaintiff's conclusory allegations are insufficient to plead that Defendants knew the challenged statements were false or had no reasonable basis for believing them to be true. (Mot. at 16-7.) Plaintiff points to statements in the 2017 Whitepaper that "[a] number of unforeseen events could potentially occur," and that "[t]he Maker community will need to incentivize a sufficiently large capital pool to act as Keepers."[10] (Opp. at 15; SAC ¶ 35.) Of course, this allegation shows only that Defendants knew

[9] Plaintiff argues that "whether a given statement qualifies as a misrepresentation and is therefore actionable, is a question of fact." (Opp. at 14.) But Courts routinely dismiss misrepresentation actions where plaintiffs do not plead the falsity of the challenged statements. *E.g.*, *Ukiah Auto. Invs. v. Mitsubishi Motors of N. Am., Inc.*, 2005 WL 19450, at *1-2 (N.D. Cal. Jan. 3, 2005) (Chesney, J.). Indeed, Plaintiff's cases arise in the consumer protection context—claims not pled here—and are inapposite. (*See id.*) Even in that unrelated context, one of Plaintiff's cases notes that in certain instances the Court can make a determination of falsity "based on its own review of the statements." *Hobbs v. Brother Int'l Corp.*, 2016 WL 7647674, at *5 (C.D. Cal. Aug. 31, 2016).

[10] Plaintiff faults Defendants for doing nothing in response to this supposedly known risk, but the language from the 2017 Whitepaper places that responsibly *with the Maker community*.

unforeseen events could potentially occur, and *publicly disclosed* this to all users of the MakerDAO system. Nothing in the 2017 Whitepaper supports the conclusion that Defendants knew, or should have known, that the auction process did not function properly then, or had the ability to predict with certainty that the auction process would not actually function properly in the future.

Plaintiff own arguments are in tension on this point. It is unclear how a statement in the publicly-available 2017 Whitepaper can demonstrate Defendants' knowledge of the problem in the system, but at the same time is not a risk disclosure that would have put users of the MakerDAO system on notice and thereby undermine Plaintiff's claims. (Opp. at 13-16.) Moreover, Plaintiff himself recognizes that Defendants ***did not even exist*** at the time the 2017 Whitepaper was published, nor in 2018 when Plaintiff opened his Vault. (Mot. at 14 n.8.) Plaintiff has not, and cannot, explain how statements made before Defendants existed can establish their knowledge of falsity.

Plaintiff next refers to a Reddit post purportedly made by MEGH's then-CEO, Rune Christensen, on February 28, 2020,[11] which Plaintiff contends "specifically identified some of the issues that led to Black Thursday." (Opp. at 15-16.) For the reasons described above, this Court should disregard Plaintiff's attempt to amend the SAC through this Opposition to include this new statement. (*See supra* at 2.) Regardless, this statement does ***not*** reflect Mr. Christensen's (let alone either Defendant's) acknowledgement that the MakerDAO system's auction process had failed at the time the statement was made. Rather, Mr. Christensen's statement reflects his public disclosure of the possibility of a future potential risk. (Johnson Decl. ¶ 15.) Indeed, Mr. Christensen's disclosure of a future potential risk made on a *public forum* that affirmatively informed MakerDAO users that they could suffer "big loss[es]" through the auction process completely undermines Plaintiff's claims. Plaintiff cannot possibly plead that Defendants hid the truth from Plaintiff or anyone else in light of such disclosures.

D. Plaintiff has failed to plead intent to defraud or induce reliance

Plaintiff argues that intent to defraud is satisfied because the statements were made with the intent to attract more users. (Opp. at 16-17.) Here, Plaintiff cannot plead any such intent as a matter of law because the challenged statements were accompanied by the robust risk disclosures discussed

[11] This statement cannot form the basis for any claim because it happened years after Plaintiff alleges that he joined the system, so he could not have relied upon this in creating his account. (*See infra*, [].)

above. (*See supra* at 4-5; Mot. at 18.) Plaintiff's own cited case supports Defendants' point. *Hobbs v. Brother Corp.*, 2016 WL 7647674, at *5-9 (C.D. Cal. Aug. 31, 2016) (no intent to defraud where the alleged misrepresentations were made in the context of disclosures warning of problems with the product).[12]

E. Plaintiff has failed to plead actual and justifiable reliance

Without any substantive legal response, Plaintiff argues that reasonable reliance is a question of fact. Yet even Plaintiff acknowledges that courts decide issues of reasonable reliance as a matter of law. (Opp. at 16-17.) The Court should do so here because Plaintiff makes no non-conclusory allegations of reasonable reliance, and he was repeatedly warned of the very risks that came to pass, including in the same documents quoted in the SAC. (Mot. at 18-19).

Indeed, another federal court recently came to the same conclusion. *See Rostami v. Open Props, Inc.*, 2023 WL 137748 (S.D.N.Y. Jan. 9, 2023). In that case, the plaintiff alleged that the defendants had promoted a new cryptocurrency through various media and in whitepapers, which represented the intended decentralized nature of the network defendants planned to build. *Id.* at *5. Defendants eventually published a letter announcing it was ending the issuance of tokens. *Id.* Plaintiff, who entered into an agreement to buy the tokens at launch, sued for, *inter alia*, fraudulent inducement, claiming, in part, that defendants had not made the network decentralized. *Id.* The court dismissed the claim, finding no reasonable reliance because plaintiff was "privy to multiple pieces of information that communicated the inherent risks of the . . . investment." *Id.* This included statements in whitepapers (1) warning that the ultimate implementation of the defendants' ecosystem was dependent on factors outside of their control, and (2) that some elements of the platform would remain centralized until decentralized options became feasible. *Id.* Given those disclosures, the court found the plaintiff could not establish reliance on the statements concerning the vision for a decentralized network alone. *Id.* The same reasoning applies here.

[12] Notably, Plaintiff's theory of fraud also is nonsensical. Plaintiff alleges that Defendants knew there were defects in the system for over three years, knowingly did nothing to correct those defects, induced customers to join despite knowing that they would eventually suffer losses due to those defects, and, most remarkably, suffered losses themselves from defects they knew about yet decided not to correct. (SAC ¶ 44.) Courts are not obligated to credit illogical theories, even at the pleading stage. *See Sacco v. Mouseflow, Inc.*, 2022 WL 4663361, at *3 (E.D. Cal. Sept. 30, 2022).

F. Plaintiff has failed to plead resulting damages

Finally, Plaintiff does not adequately plead damages resulting from the alleged misrepresentations. (Mot. at 19.) The Opposition entirely ignores that, as pled in the SAC, Plaintiff's alleged harm was caused not by the challenged statements, but rather by the rapid dip in ETH prices on Black Thursday and the resulting series of events. (*Id.*)

IV. Plaintiff Has Failed to Adequately Plead Negligence

A. Plaintiff's allegations are deficient under Rule 9(b)

Rule 9(b) applies to Plaintiff's negligence claim because it is "grounded in fraud." (Mot. at 4, 20.) Plaintiff does not engage with Defendants' argument or cases on this point, nor does Plaintiff explain why Rule 9(b) should not apply in this particular case. Instead, Plaintiff simply declares, without more, that his state law negligence claim is subject only to the Rule 8 notice pleading requirement. (Opp. at 18.) But even the sole case that Plaintiff cites explains that claims where "fraud is not a necessary element" may still be subject to Rule 9(b)'s particularity requirements when, as here, they allege a "unified course of fraudulent conduct" and "rely entirely on that course of conduct as the basis of that claim." *See Kearns*, 567 F.3d at 1125. That is precisely what the SAC does here, which Plaintiff's Opposition concedes through silence. Accordingly, Rule 9(b) applies and the SAC's allegations—which merely lump different Defendants together and do not allege in particularized fashion how they acted negligently (Mot. at 20)—fail to meet the required specificity.[13]

B. Plaintiff has not adequately alleged that Defendants owe him a duty

1. The economic loss rule applies to Plaintiff's negligence claim

The economic loss doctrine bars Plaintiff's negligence claim. (Mot. at 20-24.) The Opposition invents a new standard for applying the doctrine that supposedly "hinges on a balancing of various policy considerations." (Opp. at 19.) Under Plaintiff's contrived standard, "if a case does not implicate [one of two] policy concern[s] behind the [economic loss doctrine], the Court has no reason to even apply the rule." (Opp. at 21.) This is not an accurate statement of the law. The economic loss doctrine applies automatically to any negligence claim seeking solely economic losses, as the California Supreme Court has emphasized: "Recognition of a duty to manage business affairs so as to prevent

[13] Plaintiff's conclusory allegations and group pleading are also insufficient under Rule 8. (Mot. at 20 n.11.)

purely economic loss to third parties in their financial transactions *is the exception, not the rule*, in negligence law." *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 58 (1998) (emphasis added). The analysis thus begins with the presumption that Defendants do *not* owe Plaintiff a duty to protect against purely economic losses. *See S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 400 (2019).[14]

From this starting point, courts then assess whether an exception justifies imposing a duty on the defendant, such as a "special relationship" between the parties. *Id.* Simply put, Plaintiff's urged "policy considerations" inquiry is both unsupported by case law and inconsistent with this established framework. Indeed, in applying the economic loss doctrine, courts routinely do so without reference to any supposed "policy considerations." *See, e.g., Worldwide Media, Inc. v. Twitter, Inc.*, 2018 WL 5099271, at *10 (N.D. Cal. Aug. 9, 2018); *Sharma v. BMW of N. Am., LLC*, 2014 WL 2795512, at *6 (N.D. Cal. June 19, 2014) (Chesney, J.).[15]

Regardless, even if one accepts Plaintiff's "policy considerations" standard, the economic loss rule applies here. Plaintiff argues—based on improperly submitted hearsay that this Court should not consider, (*see supra* at 2)—that there is a finite number of determinable claims that could be brought based on the events of "Black Thursday," (Opp. at 20-21.) According to Plaintiff, this means that the California Supreme Court's concern with the implications of recognizing "unlimited and unpredictable [negligence] liability for purely economic damages" is impossible here, and thus the economic loss doctrine does not apply. (*Id.* at 20.) Plaintiff misses the point. In any given action, retrospective analysis may identify who suffered economic losses as a result of the defendants' purported negligence, and even quantify those losses. *See, e.g., S. Cal. Gas Leak Cases*, 7 Cal. 5th at 408 (applying economic loss doctrine even where "[i]t may be possible to quantify the profits any one business lost because of an industrial accident"). The relevant inquiry here is not retrospective

[14] In a footnote, Plaintiff argues that the economic loss doctrine "does not apply to the negligent misrepresentation claim." (Opp. at n.15.) Defendants did not argue otherwise. (Mot. at 19-20.)

[15] Plaintiff cites *Southern California Gas Leak Cases* for the proposition that "whether the economic loss doctrine applies . . . 'turns on a careful consideration of the sum total of the policy considerations at play, not a mere tallying of some finite, one-size-fits-all set of factors.'" (Opp. at 19 (quoting *S. Cal. Gas Leak Cases*, 7 Cal. 5th at 401).) The language Plaintiff quotes refers to the application of the six *Biakanja*/*J'Aire* factors, which courts employ to determine whether there is a "special relationship." *See S. Cal. Gas Leak Cases*, 7 Cal. 5th at 400-01. In *Sheen v. Wells Fargo Bank, N.A.*, the California Supreme Court discussed two particular contexts where the economic loss rule has been applied but did not limit its application to those two scenarios. 12 Cal. 5th at 905, 922 (2022).

but forward-looking, assessing whether imposing a duty to guard against economic losses in connection with certain conduct (in this case, related to an online system) could lead to potentially indeterminate, open-ended liability. Imposing a negligence-based duty on Defendants to protect MakerDAO system users against their economic losses would open Defendants up to potentially unlimited liability based on (1) the variable, unknowable number of users of the system, and (2) the amounts of collateral those users decided, in their own discretion, to lock in their Vaults. Potential liability for economic losses based on the vagaries of variable collateral value and users', rather than the Company's, decisions on how much collateral to deposit, are the exact type of losses that may "proliferate more easily" and result in indeterminate potential liability "out of proportion to [a defendant's] culpability" justifying the application of the economic loss doctrine here. *Id.* at 407 (alteration in original).

*Whitesides v. E*Trade Securities, LLC*, 2021 WL 930794, at *2 (N.D. Cal. Mar. 11, 2021), is on all fours. (Mot. at 22-3.) There, defendant E*Trade operated an online broker-dealers platform that allowed users to trade oil futures contracts. *Id.* at *2. In early 2020, the coronavirus pandemic caused a "precipitous decline in demand for oil," resulting in oil futures closing at a negative price. *Id.* at *1. E*Trade's platform suffered a system failure, displaying inaccurate prices and prohibiting users from closing out their positions. *Id.* Plaintiffs were three customers holding oil futures contracts when the price fell below zero who alleged that they were unable to sell those contracts because of the system failure, resulting in substantial losses. *Id.* at *2. In applying the economic loss rule and finding no special relationship, the *Whitesides* court explained that if it recognized a duty under those facts, there "would be no meaningful limits on the tort exposure of service providers who market services to the public" and "*[a]ny person who used the service and suffered economic loss could sue*." *Id.* at *6 (emphasis added).[16] The same is true here and compels dismissal.

[16] Plaintiff's only response to *Whitesides* is that it was based on "important policy considerations which disfavor recognizing a duty of care . . . [that] would create limitless liability and unending litigation," which Plaintiff claims is not present here. (Opp. at 24.) Of course, *Whitesides* is directly applicable for that very reason —indeed, Plaintiff does not even attempt to explain how the oil future trading losses in *Whitesides* are materially different than the losses he alleges here, particularly in the way that they could be quantified with respect to any particular plaintiff.

2. The parties do not have a special relationship justifying an exception

Plaintiff also does not, and cannot, plead facts sufficient to establish a "special relationship" between Plaintiff and Defendants under the six-factor test established by California courts. (Mot. at 21-24.) The "special relationship" exception concerns whether there is a sufficiently particularized connection between Defendants' conduct and the Plaintiff, or a particular class of individuals to which Plaintiff belongs, to justify the imposition of a negligence-based duty to protect against economic losses. Here, the SAC is clear that Defendants' alleged conduct did not specifically target Plaintiff, or any particular category of user. Rather, Defendants allegedly published an open-source code for anyone to review and use, and the unidentified statements Plaintiff alleges were misleading were available to every prospective or current user of the MakerDAO system to see. To find a special relationship under these circumstances would allow the exception to the economic loss doctrine to swallow the rule. *See Elsayed v. Maserati N. Am., Inc.*, 215 F. Supp. 3d 949, 964 (C.D. Cal. 2016) ("Were the rule to merely require foreseeable use by *any* consumer, the special relationship exception to the economic loss doctrine would swallow the rule.").

Tellingly, Plaintiff's Opposition addresses the first and most important *Biakanja*/*J'Aire* factor—i.e., "the extent to which the transaction was intended to affect the plaintiff"—last, because this factor strongly favors dismissal. *See S. Cal. Gas Cases*, 7 Cal. 5th at 401 (citation omitted). Indeed, Plaintiff does not argue how Defendants' conduct targeted Plaintiff, or a particular category of user, at all. Rather, with zero caselaw support, Plaintiff asserts that his allegations are sufficient to satisfy the first, and most important, *Biakanja/J'Aire* factor merely because Plaintiff asserts a putative class action and Defendants' conduct purportedly targeted that class. (Opp. at 23.) That is legally insufficient. Courts routinely find the first *Biakanja/J'Aire* factor *not* satisfied where a plaintiff purports to represent a class. *See In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 972 (S.D. Cal. 2014); *Whitesides*, 2021 WL 940794, at *6; *Labajo v. Best Buy Stores, L.P.*, 478 F. Supp. 2d 523, 532 (S.D.N.Y. 2007) (applying California law). This makes sense. If a plaintiff could satisfy the first factor merely by asserting a class action, the first factor would *always* be satisfied in that circumstance. That is not the law. *Id.*

Instead, Plaintiff must establish that Defendants intended to target him or a particular subset

of persons to which he belongs, rather than all potential system users. *See Ott v. Alfa-Laval Agri*, 31 Cal. App. 4th 1439, 1455 (Ct. App. 1995) (intent must be shown "particular to the plaintiffs, as opposed to all potential purchasers of the equipment"). Here, Plaintiff alleges that Defendants' conduct was directed to anyone who wanted to use the MakerDAO system, not only him or a targeted group impacted by the zero-bid exploit. (*E.g.*, SAC ¶ 1.) This is precisely the type of generalized conduct that weighs heavily against any finding of a special relationship. *See, e.g.*, *In re Sony Gaming*, 996 F. Supp. 2d at 972 (no special relationship where plaintiffs failed to allege defendants' conduct intended to affect plaintiff "'in a way particular to [them], as opposed to all potential' consumers" (alteration in original) (citation omitted)); *Whitesides*, 2021 WL 930794, at *6 (same).[17]

Plaintiff next argues that the second, third, and fourth *Biakanja*/*J'Aire* factors—i.e., the "foreseeability of harm to the plaintiff," "the degree of certainty that the plaintiff suffered injury," and "the closeness of the connection between the defendant's conduct and the injury suffered," *see Southern California Gas Cases*, 7 Cal. 5th at 401—weigh in favor of finding a special relationship because, respectively, (1) Defendants' express representations led Plaintiff to create a Vault and, in turn, lose the collateral he locked into the Vault; (2) Plaintiff's damages can be identified with "exact precision;" and (3) Defendants foresaw the risks of the auction feature "not working properly and did nothing to prevent it." (Opp. at 22-3.) Nothing Plaintiff argues here addresses his foundational issue—that Defendants' conduct didn't target him or any particular class of MakerDAO system user. It is thus not foreseeable that Defendants' generalized conduct would harm Plaintiff, nor is there a close connection between that conduct and the harm Plaintiff allegedly suffered.

In any event, none of Plaintiff's arguments weigh in favor of a special relationship. Plaintiff has not alleged the specific representations he claims were misleading or how they were false, let alone who made them or that he relied on them when he created his Vault. (*Supra* at 3-4; Mot. at 12-14.) As such, Plaintiff cannot explain how the zero-bid auction exploit was foreseeable or how there was a close connection between Defendants' conduct and any alleged loss. Most critically, Plaintiff does not respond to Defendants' argument that the SAC alleges the harm he suffered was the result

[17] In any event, no class has been certified. Plaintiff is currently the only party to this action and must have his own claim in order to represent a putative class. *See Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *4 (N.D. Cal. Jan. 7, 2014).

of an unforeseeable cascading set of factors—(1) the swift and dramatic decline in ETH prices; (2) the resulting increase in transaction fees on the Ethereum blockchain; and (3) the failure of certain Keeper bots coupled with third-party Keeper bots programmed by bad actors to take advantage of this precise scenario—that allegedly resulted in Plaintiff's harm. (*Supra* at 9; Mot. at 16-18, 23-24.) This severs any close connection between Defendants' conduct and Plaintiff's alleged harm.

Finally, the fifth and sixth *Biakanja*/*J'Aire* factors—i.e., "the moral blame attached to the defendant's conduct" and "the policy of preventing future harm," *Southern California Gas Cases*, 7 Cal. 5th at 401 (citation omitted)—also favor dismissal. Plaintiff claims that Defendants are morally blameworthy because they "knew there was a risk of zero-bid auctions" yet "nonetheless advertised that investor holdings were protected" by the auction system. (Opp. at 23.) But the SAC does not contain a single particularized factual allegation to support this bald statement.[18] To the contrary, Defendants repeatedly provided robust risk disclosures about the possibility of technical issues on the system and the total loss of users' collateral—the opposite of being a bad actor. Moreover, Defendants' conduct is not morally blameworthy, when, as described above, it required a chain of "Black Swan" events and third-party actions to result in Plaintiff's alleged harm. For these same reasons, the "policy of preventing future harm" does not weigh in favor of finding a special relationship here. Imposing a duty would not change Defendants' conduct.

While Plaintiff relies on *Fabian v. Lemahieu* (Opp. at 23-24), it is inapposite. *Fabian* simply did not address the application of the economic loss rule. *Fabian v. Lemahieu*, 2019 WL 4918431, at *14 (N.D. Cal. Oct. 4, 2019). Rather, *Fabian* concerned whether the plaintiff alleged a legal duty in the first instance under so-called *Rowland* factors, not whether that plaintiff alleged an exception to the applicable economic loss doctrine under the so-called *Biakanja*/*J'Aire* factors. While the *Rowland* and *Biakanja*/*J'Aire* factors overlap, in part, critically, the Rowland factors do not include the first *Biakanja*/*J'Aire* factor, which weighs heavily in favor of no special relationship here. Moreover, the

[18] Plaintiff complains, in circular fashion, that "under Defendants' arguments, there is no cause of action that could be brought against them" because the challenged statements were coupled with disclaimers, foreclosing intentional and negligent misrepresentation claims, and the economic loss rule bars the negligence claim. (Opp. at 23.) To Plaintiff, this means that Defendants' "misrepresentations go unpunished, and their negligence—resulting in millions of dollars in investor losses—is not actionable." (*Id.*) Of course, if Defendants made no misrepresentations and did not act negligently, as is the case here based on Plaintiff's own allegations, that is the correct result.

Fabian complaint contained detailed factual allegations that the defendants assisted in building and promoting a cryptocurrency exchange to boost the value of their own native cryptocurrency, and promoted that exchange as safe despite knowing for over seven months that transaction shortfalls were occurring, resulting in the loss of $170m of cryptocurrency tokens. *Id.* at *2-9. On those particular facts, the court found that it was foreseeable that security failures on the exchange would result in harm to plaintiffs and that the defendants' conduct, if true, "could be viewed as morally reprehensible" and made that action the type that could "further the goal of preventing future harm." *Id.* at 12. Here, by contrast, Plaintiff does not offer any non-conclusory allegation that Defendants knew there were particular weaknesses in the MakerDAO auction process, much less that an unforeseeable cascading set of factors would lead to the zero bid exploit by third-party bad actors. Nor does Plaintiff allege that Defendants promoted the MakerDAO system as safe for their own benefit despite knowing that the zero bid exploit would occur. To the contrary, Defendants warned users the opposite could occur.[19]

C. Plaintiff has not adequately alleged causation

The SAC itself acknowledges that Plaintiff's harm was the result of superseding causes and not Defendants' alleged conduct. (Mot. at 25.) Plaintiff fails to explain how Defendants' purported negligence resulted in the events of Black Thursday and the $0.00 bids. (Mot. at 25.) Given this, Plaintiff cannot, and does not, establish causation.

Date: January 16, 2023

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
By: */s/ Peter B. Morrison*
PETER B. MORRISON
Attorneys for Defendants
MAKER ECOSYSTEM GROWTH HOLDINGS, INC., NKA METRONYM, INC. AND MAKER ECOSYSTEM GROWTH FOUNDATION

[19] Plaintiff tries to avoid the SAC's fatal defects by claiming that applying Rule 9(b) and the economic loss rule to his negligence claims is "contradictory." (Opp. at 18.) Plaintiff is mistaken. He asserts a negligence claim, and thus whether Defendants owed him a duty—including the application of the economic loss doctrine—is a legal element of that claim. (Mot. at 19-20.) The factual allegations Plaintiff alleges to support these legal elements, however, are grounded in an alleged unified course of fraudulent conduct and thus must be pled with particularity under Rule 9(b). (Mot. at 20.) There is nothing "contradictory" about applying the Rule 9(b) pleading standard to Plaintiff's factual allegations and the separate legal requirements as to the elements of his claim. *See, e.g., United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1179-80 (C.D. Cal. 2009) (applying Rule (b) and the economic loss doctrine to negligence claim).

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METRONYM, INC. AND MAKER ECOSYSTEM GROWTH FOUNDATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PETER JOHNSON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

MAKER ECOSYSTEM GROWTH HOLDINGS, INC., NKA METRONYM, INC., a foreign corporation; and MAKER ECOSYSTEM GROWTH FOUNDATION, a foreign corporation,

Defendants.

Case No.: 3:20-cv-02569-MMC

(1) DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT;

SEPARATE COVER:

(2) DECLARATION OF STEVEN BECKER IN SUPPORT OF MOTION TO DISMISS;

(3) [PROPOSED] ORDER;

(4) REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS;

(5) DECLARATION OF PETER B. MORRISON IN SUPPORT; and

(6) [PROPOSED] ORDER.

Date: February 10, 2023
Time: 9:00 a.m.
Courtroom: 7
Judge: Hon. Maxine M. Chesney

Second Amended Complaint Filed: September 8, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 9:00 a.m. on February 10, 2023, in the courtroom of the Honorable Maxine M. Chesney, located at 450 Golden Gate Avenue, Courtroom 7, 19th Floor, San Francisco, California 94102, Defendants Maker Ecosystem Growth Holdings, Inc., NKA Metronym, Inc. ("Metronym"), and Maker Ecosystem Growth Foundation (the "Foundation" and together with Metronym, "Defendants") will and hereby do move this Court for an order dismissing the Second Amended Class Action Complaint ("SAC") (ECF No. 69) filed by Plaintiff Peter Johnson ("Plaintiff").

Defendants make this Motion pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(6) and 9(b). It is based on this Notice of Motion and Motion to Dismiss, the Memorandum of Points and Authorities, the Declaration of Steven Becker, the Request for Judicial Notice, the Declaration of Peter B. Morrison and exhibits in support thereof, the record in this action and such further evidence and argument that this Court may consider. Defendants respectfully request that the Court dismiss the SAC in its entirety, with prejudice.

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

The MakerDAO Protocol is an open-source, community-driven blockchain platform that allows users to generate a price-stable, decentralized digital currency called "Dai."[1] Users can generate Dai by locking another cryptocurrency, such as Ether ("ETH"), into the system as collateral. Because the technology underpinning the MakerDAO Protocol is novel, it comes with a number of inherent risks and uncertainties, all of which were repeatedly and expressly disclosed to potential users. One such user, Peter Johnson, opened his account on the MakerDAO platform in November 2018. When doing so, Plaintiff was expressly warned that (1) "[t]here are numerous ways the

[1] Generally speaking, a "blockchain platform" is a peer-to-peer network that records and reflects all transactions on a publicly viewable and unalterable system. A "decentralized" network is one that does not have any central governance, authority or management, but rather a dispersed group of network users collectively modify code deployed on a blockchain network, such as Ethereum. "Open-source" means that the system's code is publicly available and entirely transparent.

[MakerDAO Protocol] could fail in an unexpected way, resulting in the total and absolute loss of all of [his] funds" (Ex.[2] B) and (2) "[t]he greatest risk to the system during its early stages is the risk of a malicious programmer finding an exploit" that would allow users' collateral to "be stolen without any chance of recovery" (Ex. A).

In early 2020, these very risks materialized during an event that Plaintiff terms "Black Thursday," when global cryptocurrency markets experienced a severe dislocation, setting off a chain of unforeseen events that resulted in the liquidation of users' collateral accounts on the MakerDAO Protocol. Malicious third-party actors unaffiliated with Defendants capitalized on these events to exploit the MakerDAO Protocol's liquidation process, allowing these unaffiliated parties to take possession of the collateral that certain users, including Plaintiff, had locked in the system.

Through this lawsuit, and notwithstanding the express warnings, Plaintiff now seeks to hold Defendants responsible for the losses he suffered due to the events of "Black Thursday" at the hands of these third parties, asserting claims for intentional misrepresentation, negligent misrepresentation and negligence. But Plaintiff's strained attempt to force these facts into common law tort is unsupported by his allegations, which are conclusory in every respect and fail to establish any of his claims. Indeed, throughout the SAC, Plaintiff' impermissibly lumps Defendants together as one defined entity (the "Defendant") with no attempt at differentiation, let alone particularity; fails to identify any specific statement containing an alleged misrepresentation or omission while ignoring the many statements that directly undermine his claims; and fails to allege any duty either Defendant owed him. This Court should dismiss the SAC with prejudice for the following reasons.

The Foundation is not a proper defendant because it has been dissolved (*infra* Section II). As an initial matter, Plaintiff admits that the Foundation, a Cayman Islands-organized entity, has been dissolved. (SAC ¶ 6.) Consequently, Plaintiff cannot maintain a lawsuit against the Foundation under established Cayman Islands law, requiring dismissal. *See Fund Liquidation Holdings LLC v. Bank of Am. Corp.*, 991 F.3d 370, 383–84 (2d Cir. 2021).

[2] "Ex. __" refers to the exhibits attached to the Declaration of Peter B. Morrison in support of the Defendants' Request for Judicial Notice, filed concurrently herewith.

Plaintiff has failed to plead intentional or negligent misrepresentation (*infra* Section III). Plaintiff's intentional and negligent misrepresentation claims are legally deficient and should be dismissed. First, Plaintiff fails to satisfy the heightened pleading standard of Rule 9(b), which applies to both claims. (*See infra* Section III.A.) Instead, he makes only vague, conclusory assertions, failing to identify what representations he claims were purportedly untrue. Put simply, the SAC does not come close to alleging the "what, when, where, and how" of Plaintiff's claims. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). Furthermore, Plaintiff combines both Defendants together throughout the SAC, with no attempt to delineate his allegations as to each. For these reasons alone, Plaintiff's misrepresentation claims should be dismissed. *See Fowler v. Wells Fargo Bank, N.A.*, 2019 WL 1369934, at *2 (N.D. Cal. Mar. 26, 2019) (Chesney, J.).

Second, while the thrust of Plaintiff's theory is that Defendants misled him about the risks that transpired on "Black Thursday," the SAC ignores altogether the extensive and repeated risk disclosures that were communicated to the public, many of which Plaintiff expressly acknowledged when becoming a MakerDAO Protocol user. (*See infra* Section III.B.) These disclosures warned of the risks that came to pass, thus defeating Plaintiff's theory that he was somehow misled. *See Eshelman v. Orthoclear Holdings, Inc.*, 2009 WL 506864, at *7 (N.D. Cal. Feb. 27, 2009).

Third, Plaintiff offers nothing beyond bare legal conclusions that either Defendant harbored an intent to induce reliance or to defraud him. (*See infra* Section III.D.) Similarly, Plaintiff fails to allege any well-pled facts showing actual and justifiable reliance on any purported misstatements (which are never identified with any level of specificity). (*See infra* Section III.E.) Without more, as this Court has found, Plaintiff's bare legal conclusions are insufficient as a matter of law. *See Kennedy v. Wells Fargo Bank, N.A.*, 2011 WL 5080166, at *2 (N.D. Cal. Oct. 25, 2011) (Chesney, J.).

Fourth, Plaintiff fails to plead causation. (*See infra* Section III.F.) By his own admission, Plaintiff's damages were caused not by reliance on Defendants' statements, but rather by the independent and intervening actions of unaffiliated third parties who exploited the MakerDAO Protocol during the unforeseen events of "Black Thursday." *See Body Jewelz, Inc. v. Valley Forge*

Ins. Co., 241 F. Supp. 3d 1084, 1091 (C.D. Cal. 2017). As such, the Court should dismiss his misrepresentation claims.

Plaintiff has failed to adequately plead negligence (*infra* Section IV). Plaintiff's negligence claim fares no better. Again, Plaintiff has not satisfied the heightened pleading standard of Rule 9(b), which applies to the negligence claim because Plaintiff's allegations are grounded in alleged fraud. (*See infra* Section IV.A.); *see also Levy v. FCI Lender Servs., Inc.*, 2020 WL 1674582, at *11 (S.D. Cal. Apr. 6, 2020). Even if Rule 9(b) did not apply, the Court should nevertheless dismiss the SAC because it makes no attempt to differentiate between the Defendants, let alone plead the most basic details regarding each Defendant's supposed conduct.

Moreover, Plaintiff's claim runs headlong into the economic loss doctrine, which independently forecloses Plaintiff from alleging that Defendants owed him a duty. (*See infra* Section IV.B.) It is well-established under California law that, "[i]n general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage." *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th 905, 922 (2022) (citation omitted); *see also Sharma v. BMW of N. Am., LLC*, 2014 WL 2795512, at *6 (N.D. Cal. June 19, 2014) (Chesney, J.). Here, because Plaintiff alleges merely economic loss, his negligence claim fails on that basis alone. Nor does Plaintiff allege any facts to support an exception to the economic loss doctrine, such as a "special relationship existing between the parties." *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, 2016 WL 6523428, at *12 (S.D. Cal. Nov. 3, 2016). To the contrary, Plaintiff's allegations paint him as just one of many users of an open-source, community-driven blockchain platform, which did not specifically target him in any particular way. This bars Plaintiff's ability to allege a special relationship with Defendants.[3]

Finally, Plaintiff's negligence claim should be dismissed for failure to plead causation. (*See infra* Section IV.C.) By his own account, Plaintiff's alleged damages were caused by the actions of malicious third parties, which were superseding events that break the chain of causation and thus

[3] Because the SAC does not adequately allege a duty, Plaintiff also cannot plead any breach. *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 851-52 (N.D. Cal. 2012) ("If there is no duty, then there can be no breach.")

defeats Plaintiff's claim as a matter of law. *See Zanger v. City of Pasadena*, 2007 WL 9734351, at *3 (C.D. Cal. Jan. 23, 2007).

BACKGROUND

I. THE MAKER DEFENDANTS

Maker Ecosystem Growth Foundation is a Cayman Islands-organized entity that has recently been dissolved. (SAC ¶ 6.) Maker Ecosystem Growth Holdings, Inc. is a Cayman Islands-organized entity that has been renamed Metronym, Inc. (*Id.* ¶ 5.) The SAC alleges that these two entities together "collectively operate, run, and manage the [MakerDAO Protocol], a cryptocurrency platform." (*Id.* at 1.) The SAC groups the Foundation and Metronym together, failing to distinguish between them in its factual allegations. (*See id.* at 1 ("the two entities . . . are collectively referred to herein as 'Defendant' or 'The Maker Foundation.'").)

II. THE MAKERDAO PROTOCOL

Cryptocurrencies often have volatile market prices, which hinder their ability to serve as an everyday, functional currency. The MakerDAO Protocol was conceptualized and designed to address this issue. (Ex. A at 4.) It is an open-source system built upon the Ethereum blockchain, which the Defendants did not create nor do they run, that "involves the collateralization of digital assets (such as cryptocurrencies like ETH) in order to create a 'stable coin '– DAI – which is a 'decentralized, unbiased, collateral-backed cryptocurrency soft-pegged to the U.S. Dollar.'" (SAC ¶ 14.) Users can generate DAI by opening a self-controlled account (called a "CDP" or "Vault") on the MakerDAO Protocol. (*Id.* ¶ 19.) MakerDAO users generate DAI by locking another cryptocurrency, such as ETH, into the Vault as collateral. (*Id.* ¶ 19.) Once ETH is locked into a Vault, users can generate DAI in return, which they can then use as a functional currency. (*Id.* ¶¶ 15, 19.)

The platform users are required to over-collateralize their Vaults (for example, by locking ETH worth 150% of the amount of DAI generated). (*Id.* ¶¶ 19-20.) If a user's collateralization level drops below a certain threshold, a liquidation event is triggered, wherein the Vault Holder's collateral is auctioned to settle the Vault's debt with the Maker Protocol. (*Id.* ¶¶ 19-20, 22-23.) Liquidation events are triggered by "Keeper bots" – i.e., independent programs on the MakerDAO Protocol that

look for undercollateralized Vaults, trigger the liquidation process for those Vaults, and then bid on the collateral in those Vaults. (*Id.* ¶ 32.) The MakerDAO Protocol was designed with the expectation that multiple Keeper bots would be operating at any given time in order to achieve the best price on liquidated collateral. (*Id.*) Keeper bots could be programmed and operated by anyone. If a user's Vault goes through this auction process, the Protocol applies a 13% liquidation penalty. (*Id.* ¶ 33.) All of these functions were disclosed in the very first MakerDAO Whitepaper, quoted by Plaintiff in the Complaint. (*See generally* Ex. A.) Moreover, these functions are embedded and reflected in the MakerDAO Protocol's source code, which is entirely open-source and can be publicly viewed and analyzed. (*See, e.g.*, Ex. C at 1.)

III. "BLACK THURSDAY"

Plaintiff alleges that on March 12, 2020, which he and others call "Black Thursday," a series of sudden and unforeseen market events occurred – coupled with the actions of malicious third-parties – that caused the collateral in his Vault to be liquidated and the loss of a significant portion of his value. (*See* SAC ¶¶ 26-32.) First, in the early morning of March 12, 2020, the price of ETH declined rapidly, dropping from approximately $171 per ETH to under $130 per ETH in just a few hours. (SAC ¶¶ 26-27.) This rapid and unforeseen decline in the price of ETH caused a number of Vaults to be undercollateralized, thus triggering their liquidation process. (SAC ¶¶ 1, 26-28.) At the same time, the rapid drop in ETH value in turn caused unprecedented congestion on the Ethereum blockchain (upon which the MakerDAO Protocol is built) as "parties attempt[ed] to transfer or sell their digital assets," resulting in "bottlenecking" that substantially slowed transactions, and required higher transaction fees in order to push transactions through. (*Id.* ¶ 31.) This, in turn, caused liquidity problems across the broader decentralized finance markets, including with respect to many of the Keeper bots then operating on the MakerDAO Protocol. (*Id.*)

Two such Keeper bots, programmed and operated by "nefarious" third-party actors that had "extensive, highly intelligent knowledge of the Maker Protocol" (*id.* ¶ 47), continued functioning and specifically exploited the ETH price crash and resulting network congestion to bid on and win collateral from liquidated Vaults for $0 (*id.* ¶ 32). As Plaintiff alleges, the Keeper bots were

"programmed to increase their paid transaction fees according to the relative network congestion and were able to successfully place numerous $0 bids on liquidated ETH collateral." (*Id.*) As a result, these third-party Keeper bots were able to take advantage of the unprecedented crash in ETH prices, coupled with the resulting network congestion, to win auctions and obtain certain users' Vault collateral for $0. (*See id.* ¶¶ 32-33.) Put differently, without the sudden drop in ETH and resulting congestion, when liquidation occurred, there would have been multiple Keeper bots bidding, resulting in the Protocol receiving the highest possible price for the collateral. (Ex. A at 12, 20.) However, due to the congestion and inability of other bots to participate in the auction, only the specially-programmed Keeper bots (run by the nefarious third parties) could bid. (SAC ¶¶ 31-32, 47.) As a single bidder, they were able to get collateral for no cost. (*Id.* ¶ 32.) Plaintiff recognizes this was not the "normal liquidation process." (*Id.* ¶ 29.) Importantly, Plaintiff does not allege that Defendants themselves took any part in the auctions and, in fact, expressly alleges that the Foundation was unable to operate its own Keeper bot during the crash. (*Id.* ¶ 32.)

IV. PLAINTIFF'S ALLEGED MISREPRESENTATIONS

Based on the events of "Black Thursday," Plaintiff alleges that Defendants misrepresented the way the MakerDAO Protocol's auction process would work. (*Id.* ¶¶ 73, 79.) Without identifying any particular statement – including who said it and when – he claims that Defendants' misled him to believe that liquidation events "would only result in a 13% liquidation penalty" and that Defendants "never informed Vault Holders that the entirety" of their Vaults could be lost. (*Id.* ¶¶ 24, 43.) Plaintiff does not specifically allege what the precise statements were, who made these purportedly misleading statements, where or how the statements were made, or when they were made. (*See, e.g.*, *id.* ¶¶ 2, 24, 33, 43, 73, 79.)

V. DISCLOSED RISKS REGARDING THE MAKERDAO PROTOCOL

At the same time that Plaintiff fails to identify any specific statements he claims were misleading, he also ignores the repeated, explicit disclosures that warned him of the risks that form the basis of his lawsuit. For example, the 2017 Whitepaper, upon which Plaintiff relies in the SAC (*e.g.*, *id.* ¶¶ 35, 50), stated:

- "The greatest risk to the system during its early stages is the risk of a malicious programmer finding an exploit in the deployed smart contracts, and using it to break or steal from the system before the vulnerability can be fixed. ***In a worst case scenario, all decentralized digital assets that are held as collateral in The Maker Platform, such as Ether (ETH) or Augur Reputation (REP), could be stolen without any chance of recovery***." (Ex. A at 17.)

- "Another high impact risk is a potential Black Swan event on collateral used for the Dai. This could either happen in the early stages of Dai Stablecoin System, before MKR is robust enough to support inflationary dilutions, or after the Dai Stablecoin System supports a diverse portfolio of collateral." (*Id.*)

The 2018 Terms of Service ("TOS"), to which Plaintiff admittedly agreed when he opened his initial CDP (*see* ECF No. 43, at 2),[4] stated in no uncertain terms that:

- "[T]he Open Source Software is an experimental prototype and its use involves a high degree of risk. ***There are numerous ways the Open Source Software and Service could fail in an unexpected way, resulting in the total and absolute loss of all of your funds***." (Ex. B at 1.)

- "You acknowledge and understand that Cryptography is a progressing field. Advances in code cracking or technical advances such as the development of quantum computers may present risks to cryptocurrencies and Service or Content, which ***could result in the theft or loss of your cryptographic tokens or property***. . . . By using the Service or accessing Content, you acknowledge these inherent risks." (*Id.* at 4-5.)

The 2019 Terms of Service, which were publicly posted online, provided similar warnings about the inherent risks of the MakerDAO Protocol (*see* Ex. D §§ 4.5, 4.10), as well as further warnings about the operational risks to the system based on unexpected surges in activity or sophisticated cyberattacks by third-parties:

- "You acknowledge that the Services are subject to flaws and acknowledge that you are solely responsible for evaluating any code provided by the Services or Site. This warning and others provided in this Agreement by Company in no way evidence or represent an ongoing duty to alert you to all of the potential risks of utilizing the Services or accessing the Site." (*Id.* § 4.7.)

- "You are aware of and accept the risk of operational challenges. The Site may experience sophisticated cyber attacks, unexpected surges in activity or other operational or technical difficulties that may cause interruptions to or delays on the Site. You agree to accept the risk of the Services failure resulting from unanticipated or heightened technical difficulties, including those resulting from sophisticated attacks, and you agree not to hold us accountable for any related losses. . . . We do not guarantee that the Site is or will remain updated, complete, correct or secure, or that access to the Site will be uninterrupted." (*Id.* § 4.12.)

[4] This Court previously held that the 2018 Terms of Service are a binding agreement between the parties. (ECF No. 48.)

Similarly, the multi-collateral Dai whitepaper, publicly-available on the MakerDAO website, stated:

- "One of the greatest risks to the Maker Protocol is a malicious actor–a programmer, for example, who discovers a vulnerability in the deployed smart contracts, and then uses it to break the Protocol or steal from it. ***In the worst-case scenario, all decentralized digital assets held as collateral in the Protocol are stolen, and recovery is impossible***." (Ex. C at 16.)

- "A black swan event is a rare and critical surprise attack on a system. For the Maker Protocol, ***examples of a black swan event include: [a]n attack on the collateral types that back Dai[;] [a] large, unexpected price decrease of one or more collateral types[;] [a] highly coordinated Oracle attack[;]*** [or a] malicious Maker Governance proposal." (*Id.* at 16-17.)

- "Users of the Maker Protocol (including but not limited to Dai and MKR holders) understand and accept that the software, technology, and technical concepts and theories applicable to the Maker Protocol are still unproven and ***there is no warranty that the technology will be uninterrupted or error-free***. There is an inherent risk that the technology could contain weaknesses, vulnerabilities, or bugs causing, among other things, the complete failure of the Maker Protocol and/or its component parts." (*Id.* at 18.)

Finally, in addition to the myriad risk disclosures detailed above, the MakerDAO Protocol code is open source, such that the public can view and audit the code at any time. (*See* Ex. C at 1.)

VI. PROCEDURAL HISTORY

On April 14, 2020, Plaintiff filed this putative class action. The SAC sets forth three claims – for negligence, negligent misrepresentation and intentional misrepresentation – all of which concern and arise from Plaintiff's use of the MakerDAO Protocol and Defendants' purported representations regarding the risks associated with its use. (SAC ¶¶ 67-82.) Since filing the initial complaint over two and a half years ago, Plaintiff has filed two amended complaints. (ECF Nos. 9 and 69.)

ARGUMENT

I. STANDARDS

Under Rule 12(b)(6) a complaint will only survive "if it contains sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Loc. Ventures & Invs., LLC v. Open Found.*, 2019 WL 7877936, at *4 (N.D. Cal. May 13, 2019). Although courts generally construe the factual allegations in the light most favorable to the plaintiff, "courts are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Id.*

"[C]ourts are also not bound to accept as true a legal conclusion couched as a factual allegation." *Kennedy v. Wells Fargo Bank, N.A.*, 2011 WL 5080166, at *2 (N.D. Cal. Oct. 25, 2011) (Chesney, J.).

Further, "[c]laims for fraud must meet the heightened pleading standard set out in Federal Rule 9." *Loc. Ventures & Invs., LLC*, 2019 WL 7877936, at *7. "[W]here a complaint includes allegations of fraud, Federal Rule of Civil Procedure 9(b) requires . . . specificity including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Frustere v. Wells Fargo Bank, N.A.*, 2012 WL 4514066, at *1 (N.D. Cal. Oct. 2, 2012) (Chesney, J.) (citation omitted); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." (citations omitted)). Every element must be pled with particularity. *See De Jesus v. Litton Loan Servicing, LP*, 2011 WL 13229252, at *4 (C.D. Cal. Aug. 29, 2011). Conclusory allegations are insufficient. *See Kimball v. Flagstar Bank F.S.B.*, 881 F. Supp. 2d 1209, 1217 (S.D. Cal. 2012). Further, under Rule 9(b), group pleading is not sufficient. *See Sugarman v. Muddy Waters Cap. LLC*, 2020 WL 633596, at *4 (N.D. Cal. Feb. 3, 2020) (Chesney, J.) (Rule 9(b) not satisfied where plaintiff failed to differentiate between defendants); *Eshelman*, 2009 WL 506864, at *12.

Plaintiff must satisfy the heightened pleading standards of Rule 9(b) for both his intentional and negligent misrepresentation claims. *Vestis, LLC v. Caramel Sales, Ltd.*, 2019 WL 11542355, at *5 (C.D. Cal. Nov. 5, 2019) ("Here, Plaintiffs' intentional misrepresentation claim does not allege fraud with sufficient particularity to conform with Rule 9(b)."); *Fowler v. Wells Fargo Bank, N.A.*, 2019 WL 2503548, at *3 n.6 (N.D. Cal. June 17, 2019) (Chesney J.) (applying Rule 9(b) because "under California law, negligent misrepresentation is a species of fraud"); *Ukiah Auto. Invs. v. Mitsubishi Motors of N. Am., Inc.*, 2005 WL 645960, at *1 (N.D. Cal. Mar. 18, 2005) (Chesney, J.) (Rule 9(b) requirements "are equally applicable to a claim of negligent misrepresentation.").

In addition, where, as here, Plaintiff alleges negligence based on a unified course of fraudulent conduct, Plaintiff's negligence claims must meet the requirements of Rule 9(b). *See*

Kearns, 567 F.3d at 1125 ("A plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of that claim. In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading . . . as a whole must satisfy the particularity requirement of Rule 9(b)." (citation omitted)); *LegalForce RAPC Worldwide P.C. v. Swyers*, 2018 WL 3439371, at *5 (N.D. Cal. July 17, 2018) (Chesney, J.) ("Where a claim 'sound[s] in fraud,' however, even where fraud is not a 'necessary element' of the subject cause of action, the plaintiff must comply with Rule 9(b)." (alteration in original)) (quoting *Kearns*, 567 F.3d at 1125)); *Aquilina v. Certain Underwriters at Lloyd's*, 407 F. Supp. 3d 978, 994 (D. Haw. 2019) ("Ninth Circuit case law is clear that allegations of a 'unified course of fraudulent conduct' may subject claims—even those that ordinarily would not require a showing of fraud—to the heightened pleading standard." (citation omitted)).

II. THE FOUNDATION IS NOT A PROPER DEFENDANT BECAUSE IT WAS DISSOLVED

As an initial matter, because the Foundation – a Cayman Islands-organized entity – has been dissolved, it lacks capacity to be sued under Cayman Islands law and must be dismissed. "Capacity to sue or be sued is determined . . . for a corporation, by the law under which it was organized." Fed. R. Civ. P. 17(b)(2).[5] Under Cayman law, a dissolved corporation cannot sue or be sued. *See Fund Liquidation Holdings LLC v. Bank of Am. Corp.*, 991 F.3d 370, 383-84 (2d Cir. 2021) (dissolved Cayman funds had neither capacity to sue nor legal existence following their dissolution); *In re Bos. Generating LLC*, 617 B.R. 442, 495-96 (Bankr. S.D.N.Y. 2020) (Cayman Islands companies that were "dissolved and stricken from the companies registers" could not be sued), *aff'd sub nom. Holliday v. Credit Suisse Sec. (USA) LLC*, 2021 WL 4150523 (S.D.N.Y. Sept. 13 2021); *Dennis v. JPMorgan Chase & Co.*, 342 F. Supp. 3d 404, 409-10 (S.D.N.Y. 2018) (exempted company under Cayman Islands law that has been dissolved has no capacity to sue). The Foundation was placed into

[5] Motions to dismiss based on a corporate dissolution are brought under Federal Rule of Civil Procedure 12(b)(2). *GCIU-Emp. Ret. Fund v. Progress Printing Co.*, 2021 WL 3912552, at *2 (C.D. Cal. May 10, 2021). When Defendants move to dismiss for lack of personal jurisdiction under Rule 12(b)(2), "the plaintiff bears the burden of demonstrating that the court has jurisdiction." *Id.* (citation omitted). Further, "a district court may consider evidence outside of the pleadings, including affidavits submitted by the parties." *Id.*

administrative dissolution in December 2021 and fully dissolved and removed from the Cayman Islands Company Registrar in May 2022. (Becker Decl.[6] ¶ 4; *see also* SAC ¶ 6.) Accordingly, the Foundation cannot be sued. The Court should dismiss it from the litigation.[7]

III. PLAINTIFF HAS FAILED TO PLEAD INTENTIONAL OR NEGLIGENT MISREPRESENTATION

To state an intentional misrepresentation claim, plaintiff must plead: (1) a misrepresentation of a material fact; (2) knowledge of falsity; (3) intent to defraud or to induce reliance; (4) justifiable reliance; and (5) resulting damage. *See Kronk v. Landwin Grp., LLC*, 2011 WL 13143096, at *6 (C.D. Cal. June 7, 2011), *aff'd*, 517 F. App'x 605 (9th Cir. 2013); *see also Frustere*, 2012 WL 4514066, at *1. The elements of negligent misrepresentation are the same with the exception that instead of knowledge of falsity, Plaintiff must plead Defendants were "without reasonable ground for believing [the misrepresentation] to be true." *Hutchins v. Nationstar Mortg. LLC*, 2017 WL 2021363, at *3 (N.D. Cal. May 12, 2017). The SAC fails to allege facts sufficient to satisfy any of these elements, much less with the requisite specificity of Rule 9(b). Accordingly, the Court should dismiss Plaintiff's intentional and negligent misrepresentation claims for failure to state a claim.

A. Plaintiff's allegations fail to comply with Rule 9(b)

To start, Plaintiff's allegations fail to meet the heightened pleading standard of Rule 9(b) for his intentional and negligent misrepresentation claims. *First*, Plaintiff does not specify the "what, when, where, and how" concerning any alleged misstatements. *See Kearns*, 567 F.3d at 1124. Plaintiff does not even identify a specific statement alleged to be misleading, let alone when any such misrepresentations were made, how they were made, or by whom they were made. "This is the level of specificity required by Rule 9(b), and [the] complaint as currently pled fails to provide it."

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[6] "Becker Decl." refers to the Declaration of Steven Becker in Support of Defendants' Motion to Dismiss.

[7] It is irrelevant that the litigation began prior to the dissolution of the Foundation. "Capacity is not only the power to bring an action, but is also the power to maintain it." *Mather Constr. Co. v. United States*, 475 F.2d 1152, 1155 (Ct. Cl. 1973); *see also* § 1559 Capacity to Sue or be Sued—In General, 6A Fed. Prac. & Proc. Civ. § 1559 (3d ed.); *FBME Ltd. v. Mnuchin*, 709 F. App'x 4, 7 (D.C. Cir. 2017) ("[A] putative party cannot take an appeal if it lacks capacity to sue, even if it had capacity when it brought the underlying action").

See Griffin v. Green Tree Servicing, LLC, 166 F. Supp. 3d 1030, 1058 (C.D. Cal. 2015) (finding complaint deficient under 9(b) where the complaint did not allege whether the communications were verbal or by email, nor plead the who and when of specific emails or conversations); *see also Ukiah Auto. Invs. v. Mitsubishi Motors of N. Am., Inc*., 2005 WL 19450, at *1 (N.D. Cal. Jan. 3, 2005) (Chesney, J.) ("[Plaintiffs] have not complied with Rule 9(b), because they do not allege the name(s) of the person(s) who made the specific representations . . . and do not allege the time and place of any such representations."); *Sakai as Tr. of Fusako Sakai 1995 Revocable Tr. Under Tr. Agreement Dated June 27, 1995 v. Merrill Lynch Life Ins. Co.*, 2006 WL 8442981, at *6 (N.D. Cal. Sept. 26, 2006) (Chesney, J.).

Rather than meet this standard, Plaintiff vaguely alleges only that "Defendant misrepresented the nature of how liquidations would work, how liquidation penalties would work, and how liquidation auctions would work." (SAC ¶ 73; *see also id.* ¶¶ 2, 24, 33, 43, 79.) But Plaintiff's "paraphrasing" of the statements asserted to be untrue is plainly insufficient under Rule 9(b). *Fowler*, 2019 WL 1369934, at *2 (finding both intentional and negligent misrepresentation claims deficient under Rule 9(b) because "plaintiffs fail to allege the 'specific content' of the representations on which they rely. Rather, plaintiffs rely on what is, at best, paraphrasing of statements allegedly made" (citation omitted)).

Second, Plaintiff does not differentiate between the conduct of different defendants, instead explicitly choosing to lump the Foundation and Metronym together and referring to them collectively throughout the SAC as "Defendant" or "The Maker Foundation." (*See* SAC ¶ 7.) It is well-settled that this sort of group pleading does not suffice under Rule 9(b). *See, e.g.*, *See Sugarman*, 2020 WL 633596, at *4 (Rule 9(b) not satisfied where plaintiff did not differentiate between defendants); *Eshelman*, 2009 WL 506864, at *12 (same); *Griffin*, 166 F. Supp. 3d at 1058 ("Rule 9(b), moreover, 'does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to . . . inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" (alteration in original) (citation omitted)). In fact, the SAC's allegations are not even clear as to whether the (unspecified) statements alleged to be misleading were made by the Defendants as

opposed to "other third-party user interfaces." (SAC ¶ 24.) This is plainly deficient under Rule 9(b). *See Sugarman*, 2020 WL 633596, at *4 (disregarding alleged misstatements contained in a non-party blog post where plaintiff alleged no facts to support the non-parties' coordination with defendants).

Finally, not only does Plaintiff fail to allege specifically which Defendant made any false or misleading statement, he also fails to specify which individual at either the Foundation or Metronym made them. "Where fraud has allegedly been perpetrated by a corporation, plaintiff must allege the names of the employees or agents who purportedly made the fraudulent representations or omissions, or at a minimum identify them by their titles and/or job responsibilities." *Griffin*, 166 F. Supp. 3d at 1057; *see also Flowers v. Wells Fargo Bank, N.A.*, 2011 WL 2748650, at *6 (N.D. Cal. July 13, 2011) (same); *Arch Ins. Co. v. Allegiant Pro. Bus. Servs., Inc.*, 2012 WL 1400302, at *3 (C.D. Cal. Apr. 23, 2012).[8]

B. Plaintiff has not alleged any misrepresentation.

In any event, Plaintiff has failed to adequately plead that Defendants even made a misrepresentation. While Plaintiff alleges generally that Defendants failed to inform him that he might lose the entire collateral deposited in his Vault (*see* SAC ¶ 33), he ignores that the descriptions of the liquidation process upon which he appears to rely (not having specified the precise statements that were misleading) were coupled with clear and repeated disclosures warning that unforeseen events could nevertheless occur that would cause Plaintiff to lose the entirety of his deposited collateral. (*See supra* at 8 (*e.g.*, "In a worst case scenario, all decentralized digital assets that are held as collateral in The Maker Platform, such as Ether (ETH) or Augur Reputation (REP), could be stolen without any chance of recovery.").) In other words, Defendants did not misrepresent anything because their statements about the liquidation process also warned Plaintiff about the possibility of

[8] This is particularly problematic because, as Plaintiff argued in his bid for interlocutory review of the order compelling arbitration, Defendants did not exist at the time the 2017 Whitepaper was published, or in 2018 when Plaintiff opened his Vault. (*Compare* Maker Defendants' Motion to Compel Arbitration, ECF No. 41 at 17 ("When Plaintiff opened his CDP in November 2018, SLS was doing business as MakerDAO. . . . Shortly thereafter, SLS underwent a corporate reorganization during which SLS passed control of the MakerDAO website and CDP Portal subdomain to Defendant MEGH . . ."); *with* Plaintiff's Motion for Permission to Seek Interlocutory Review, ECF No. 53 at 3 ("In the course of briefing the Motion to Compel, the Maker Defendants conceded that they were never signatories to the 2018 Terms.").)

the types of risks that occurred on "Black Thursday." *See Eshelman*, 2009 WL 506864 (no misrepresentation about risks of pending litigation when those risks were fully disclosed in the relevant purchase agreements); *Kronk*, 2011 WL 13143096, at *2, 7 (no misrepresentation where plaintiff alleged that disclosures promised monthly cash distributions and a high return on investment where the disclosures also documented the risks of investing in the fund). Viewed holistically and in context, these statements belie Plaintiff's theory of fraud. *See id.* (plaintiff cannot plead misrepresentation by relying on statements made in one document while disregarding another).

Moreover, to the extent Plaintiff points to descriptions of the 13% liquidation fee and claims that they were false and misleading, this too is unavailing. Putting aside that Plaintiff never alleges with specificity who made those statements, Plaintiff does not actually plead these statements are misleading. Instead, he claims "when liquidation happens, the Vault Holder's collateral – the ETH deposited into the CDP – is auctioned off to settle the debt with the Maker Protocol, with the balance of the ETH being returned to the Vault Holder," except for "a 13% penalty applied against the drawn DAI amount." (SAC ¶¶ 23, 33.) The problem on "Black Thursday," as Plaintiff describes it, is that the auctions resulted in $0.00 bids and "lone bidders . . . won hundreds of auctions at no cost." (*Id.* ¶ 32.) Taking Plaintiff's allegations at face value, it is not clear how Defendants' purported statements that a 13% additional penalty would be applied in the event of an auction is inconsistent with what ultimately transpired. Indeed, if an auction results in a winning bid of $0.00, there would be no collateral left to return to the Vault Holder.

Finally, the descriptions of the liquidation process are merely predictions of future events regarding how the system was supposed to work under normal conditions. (*Id.* ¶¶ 73, 79 ("Defendant misrepresented the nature of how liquidations *would* work, how liquidation penalties *would* work, and how liquidation auctions *would* work." (emphasis added)).) These statements are also inactionable because they reflect expectations and predictions for how the liquidation process was supposed to work and not a statement of existing fact. *See Graham v. Bank of Am., N.A.*, 226 Cal. App. 4th 594, 607 (Cal. Ct. App. 2014) ("It is hornbook law that an actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed

opinions." (citation omitted)).

C. Plaintiff has not adequately alleged knowledge of falsity or lack of a reasonable basis.

Plaintiff also fails to allege either that the Defendants knew that the challenged statements were false (for fraudulent misrepresentation) or that Defendants had no reasonable basis for believing the statements to be true (for negligent misrepresentation). *Frustere*, 2012 WL 4514066, at *1 (fraud); *Hutchins*, 2017 WL 2021363, at *3 (negligent misrepresentation). Plaintiff does not allege sufficient facts to support either of these elements.

1. Plaintiff does not plead knowledge of falsity

Plaintiff has failed to plead any facts that demonstrate that the Defendants knew that any purported misstatements concerning the liquidation process were false. Indeed, the SAC does not contain a single fact purporting to show that Defendants knew, at the unspecific time they purportedly made statements describing the liquidation process, that the liquidation process did not, or would not, work as described. Instead, Plaintiff, without more, merely asserts unsupported, conclusory claims that "the Maker Foundation" (or "Defendants") knew of problems in the system. (SAC ¶¶ 35-37; 74.) "[V]ague allegations and conclusory statements . . . do not give rise to an inference of fraudulent intent." *Unico Am. Corp. v. Ins. Sys., Inc.*, 2016 WL 11506626, at *4 (C.D. Cal. May 2, 2016).

To the extent Plaintiff relies on statements made after "Black Thursday" to make out a claim that Defendants knew of the vulnerabilities in the system prior to "Black Thursday" (SAC ¶¶ 46-48, 74), this effort fails for two independent reasons. First, Plaintiff does not adequately plead that any of these statements were made by Defendants or their employees. To the contrary, Defendants have explained that they were not. (*E.g.*, ECF No. 44 at 11.)[9] Even more fundamentally, Plaintiff's

[9] As explained in, *inter alia*, the Motion to Compel Arbitration opening brief, these statements were made by users named "Mitote" and "MakerMan" who are not affiliated with Defendants in any way. (ECF No. 44 at 11.) Nor has Plaintiff plausibly alleged they are. Moreover, as Defendants also explained, the discussion centers around whether the *decentralized community* that governs the MakerDAO system (not the Defendants) had provided certain warnings. *See* MakerDAO, *Governance and Risk Meeting: Ep. 82*, YouTube, at approximately 51:00-55:00 (Mar. 24, 2020), accessible at https://www.youtube.com/watch?v=erh25lnaIo0&t= 3152s.

reliance on after-the-fact statements to prove Defendants knew the statements were false at the time they were made is classic "fraud by hindsight" that courts routinely dismiss. *See Tomek v. Apple Inc.*, 636 F. App'x 712, 713-14 (9th Cir. 2016) (Apple's patch remediating an issue with its MacBook Pro did not support a conclusion that Apple knew that statements made in earlier advertisements were false); *see also Hernandez v. Select Portfolio Servicing, Inc.*, 2015 WL 12658459, at *8 (C.D. Cal. Oct. 29, 2015) ("[A] plaintiff does not satisfy the falsity requirement by merely asserting that a company's later revelation of bad news means that 'earlier, cheerier' statements must have been false. In fact, these types of allegations are called 'fraud by hindsight' and they do not establish liability." (alteration in original) (quoting *Glen Holly Ent., Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1094 (C.D. Cal. 1999))).[10]

2. Plaintiff does not plead lack of reasonable basis

Plaintiff also fails to plead that Defendants lacked a reasonable basis for believing the challenged statements – whatever those statements may be – to be true. The SAC alleges that "Defendant could not have reasonably stress-tested or otherwise concluded that its representations regarding auction events were immune from the zero-bid auctions that occurred en masse on Black Thursday," (SAC ¶ 80), but again, this allegation is hindsight-based, conclusory on its face and insufficient as a matter of law. *See Rothman v. U.S. Bank Nat'l Ass'n*, 2014 WL 4966907, at *4 (N.D. Cal. Oct. 3, 2014) (Chesney, J.) (allegations that defendant's agent "had access" to certain information and "knew or should have known" her statement was untrue, "in the absence of any supporting facts, are conclusory in nature and, as such, insufficient to plead a claim of negligent misrepresentation"); *UMG Recordings, Inc. v. Glob. Eagle Ent., Inc.*, 117 F. Supp. 3d 1092, 1112 (C.D. Cal. 2015) (no negligent misrepresentation where counterclaimants failed to plead facts supporting "bare allegation" that plaintiffs had no reasonable grounds for believing their statements were true). Moreover, Plaintiff's allegation is a strawman; Defendants have never represented that

[10] Without specifying what was actually said, Plaintiff alleges "Maker Foundation members . . . admitted that they had not messaged the risks to Vault Holders that liquidation of CDPs could result in a total loss of collateral (rather than the 13% liquidation penalty)." (SAC ¶ 46.) This conclusory statement does not actually allege that Defendants knew *anything* at the time of the purported misrepresentations.

the system was immune from zero-bid auctions, instead warning of precisely this risk.

D. Plaintiff has failed to plead intent to defraud or induce reliance.

Plaintiff fails to plead *any* facts to support his *ipse dixit* conclusion that Defendants intended to defraud Plaintiff or induce his reliance. Plaintiff's only apparent attempt is to claim the challenged statements were made "intentionally," a bare legal conclusion entitled to no weight. *See Kennedy*, 2011 WL 5080166, at *2 ("[C]ourts 'are not bound to accept as true legal conclusion couched as factual allegation.'" (citation omitted)); *Integrated Storage Consulting Servs., Inc. v. NetApp, Inc.*, 2013 WL 3974537, at *9 (N.D. Cal. July 31, 2013) ("This statement fails to meet the requirements of Rule 9(b) because it asserts conclusions without any factual support that Defendant committed the alleged fraud."). Moreover, as discussed *supra*, Section III.D., and *infra*, Section III.F., Defendants made extensive risk disclosures warning of the risk that transpired, which does not suggest any intent to induce reliance on the particular (unidentified) challenged statements.

E. Plaintiff has failed to plead actual and justifiable reliance.

Plaintiff has not alleged actual reliance. His only attempt appears in paragraphs 75 and 81, which are nothing more than bare legal conclusions that should be disregarded. *See Kennedy*, 2011 WL 5080166, at *2. As discussed, Plaintiff does not even identify which statements are false, let alone allege that he read or heard the statements, or what, if anything, he did in reliance on those statements. *See Phillips v. Apple Inc.*, 2016 WL 1579693, at *7 (N.D. Cal. Apr. 19, 2016) (no misrepresentation where plaintiffs did not allege they saw the challenged statements before using the product). In fact, it is not even clear whether the purported misrepresentations were made before he opened his account on the MakerDAO Protocol. *See id.* ("If Plaintiffs did not view Apple's statement until after suffering injury, then viewing the statement could not have been the 'immediate cause' of the injury." (citation omitted)).

Even if Plaintiff had alleged actual reliance, he cannot allege that such reliance was justifiable. First, his allegations are wholly conclusory; he does not explain how he would have acted differently but for the misrepresentation, making the allegations insufficient. *See Cork v. CC-Palo Alto, Inc.*, 534 F. Supp. 3d 1156, 1178 (N.D. Cal. 2021); *see also Tate-Austin v. Miller*, 2022 WL

1105072, at *11 (N.D. Cal. Apr. 13, 2022) (Chesney, J.) ("[P]laintiffs' facts are insufficient to support their conclusory allegation that the[y] 'reasonably relied on defendants' representations.'").

Moreover, Plaintiff was warned repeatedly of the risk that came to pass, including in documents quoted by Plaintiff in the SAC. (*See* SAC ¶ 35; *see also supra* at 8 (*e.g.*, "In a worst case scenario, all decentralized digital assets that are held as collateral in The Maker Platform, such as Ether (ETH) or Augur Reputation (REP), could be stolen without any chance of recovery.").) Given these disclosures, Plaintiff could not have justifiably relied on Defendants' purported statements concerning the liquidation process. *See, e.g.*, *Sheahan v. State Farm Gen. Ins. Co.*, 442 F. Supp. 3d 1178, 1187-88 (N.D. Cal. 2020); *see also Baymiller v. Guarantee Mut. Life Co.*, 2000 WL 33774562, at *4 (C.D. Cal. Aug. 3, 2000) ("The Court finds that there cannot be reasonable reliance upon misrepresentations or a failure to disclose that are contradicted by the express language of the insurance contracts.").

F. Plaintiff has failed to plead resulting damages.

Finally, Plaintiff has failed to plead that any of the alleged wrongdoing resulted in or caused his damages. By Plaintiff's own allegations, Defendants' conduct (making the alleged statements) was not sufficient, on its own, to cause Plaintiff's harm. Instead, Plaintiff's harm was caused by the rapid dip in ETH prices on "Black Thursday," which resulted in a cascading series of events that ended with Keeper bots unaffiliated with Defendants exploiting the unforeseen circumstances to Plaintiff's detriment. (SAC ¶¶ 26-32.) *See Body Jewelz, Inc. v. Valley Forge Ins. Co*., 241 F. Supp. 3d 1084, 1091 (C.D. Cal. 2017) (dismissing where "the alleged misrepresentations were not the cause of Plaintiff's damages, the 'crash' and GoDaddy's alleged failure to 'manage, administer[,] and monitor Plaintiff's website' were." (alteration in original) (citation omitted)); *see also Gerard v. Wells Fargo Bank, N.A.*, 2015 WL 12780486, at *10 (C.D. Cal. May 19, 2015).

IV. PLAINTIFF HAS FAILED TO ADEQUATELY PLEAD NEGLIGENCE

Plaintiff's negligence claim should also be dismissed. "In order to plead a claim for negligence under California law, a plaintiff must establish the following elements: (1) the defendant owed a legal duty to use due care, (2) a breach of that duty, and (3) the breach was the proximate or

legal cause of the resulting injury." *Diaz v. Intuit, Inc.*, 2018 WL 2215790, at *4 (N.D. Cal. May 15, 2018). Here, Plaintiff fails to plead any element of negligence.

A. Plaintiff's allegations are deficient under Rule 9(b)

Like Plaintiff's misrepresentation claims, his negligence claims lacks the specificity Rule 9(b) requires. (*See supra* at 10-11.) The SAC does not contain a single factual allegation that purports to explain how the Defendants' acted negligently beyond the fact that the events of "Black Thursday" happened to occur. *See Aquilina v. Certain Underwriters at Lloyd's*, 407 F. Supp. 3d 978, 1013 (D. Haw. 2019). Moreover, as with the intentional and negligent misrepresentation claims, Plaintiff impermissibly lumps together the conduct of different defendants. *See id.* at 1013 (dismissing negligence claim where plaintiff "fail[ed] to identify specific facts to show that Pyramid breached any duty of care and because it lumps Pyramid together with the other Broker Defendants"); *see also Levy v. FCI Lender Servs., Inc.*, 2020 WL 1674582, at *11 (S.D. Cal. Apr. 6, 2020) (applying 9(b) standard to negligence claims which were "grounded in fraud" and finding that the plaintiff's group pleading did not satisfy 9(b)).[11]

B. Plaintiff has not adequately alleged that Defendants owe him a duty.

Plaintiff does not adequately plead that Defendants owed him any duty. Plaintiff baldly claims that "Defendant has a duty to Vault Holders to manage the Maker Protocol and its platform as it has advertised and also in a reasonable, prudent, non-negligent manner." (SAC ¶ 68.) This conclusory statement, without more, is insufficient. *See Worldwide Media, Inc. v. Twitter, Inc.*, 2018 WL 5099271, at *9 (N.D. Cal. Aug. 9, 2018).

Plaintiff nowhere alleges the source of such a duty, whether under statute or common law. Nor could he. It is well-established under California law that "[i]n general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by

[11] Even if Rule 9(b) does not apply to the negligence claims, the allegations fail to meet even the Rule 8 pleading standard because they are wholly conclusory. *See Worldwide Media, Inc. v. Twitter, Inc.*, 2018 WL 5099271, at *9 (N.D. Cal. Aug. 9, 2018) (duty not established where Plaintiff made only conclusory allegations of negligence). Additionally, Plaintiff's "failure to differentiate between the various Defendants is inadequate under both Rule 8(a) and Rule 9(b)." *Aquilina*, 407 F. Supp. 3d at 996.

physical or property damage." *Sheen*, 12 Cal. 5th at 922; *see also Sharma*, 2014 WL 2795512, at *6 ("[T]he economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." (citation omitted)). This rule is "particularly strong when a party alleges 'commercial activities that negligently or inadvertently [went] awry.'" *United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1180 (C.D. Cal. 2009 (alteration in original) (citation omitted)). "[P]urely economic losses flowing from a financial transaction gone awry . . . 'are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence.'" *S. Cal. Gas Co. v. Superior Ct. of L.A. Cnty.*, 7 Cal. 5th 391, 402 (2019) (quoting *Aas v. Superior Ct.*, 24 Cal. 4th 627, 636 (2000)).

This doctrine – often referred to as the economic loss doctrine – applies even where plaintiff is not in privity of contract with the defendant. *See, e.g.*, *S. Cal. Gas Co.*, 7 Cal. 5th at 396; *Sheen*, 12 Cal. 5th at 922; *see also Dubbs v. Glenmark Generics, Ltd.*, 2014 WL 1878906, at *4 (C.D. Cal. May 9, 2014) ("[T]o the extent Plaintiff argues that the economic loss rule does not apply when a plaintiff lacks contractual privity with a defendant, that proposition is clearly belied by California law."); *Anthony v. Kelsey-Hayes Co.*, 25 Cal. App. 3d 442, 446-47 (1972) ("[T]he only kinds of damages caused by negligence which may be recovered from a defendant not in privity with plaintiff are for bodily injury and physical damage.").

Here, it is unquestioned that Plaintiff solely alleges economic losses – i.e., the loss of the cryptocurrency that he had deposited in his vault. (*See* SAC ¶ 4.) Accordingly, Plaintiff cannot establish that Defendants owed him a duty, as a matter of law, unless he pleads one of the four exceptions to the rule: "(1) personal injury, (2) physical damage to property, (3) a special relationship existing between the parties, or (4) some other common law exception to the rule." *Dugas*, 2016 WL 6523428, at *12 (S.D. Cal. Nov. 3, 2016). Plaintiff has alleged no facts to support exceptions one, two, or four.

Nor can Plaintiff rely on the special relationship exception. In considering whether a special relationship exists to justify the application of a duty, California law examines (1) the extent to which

the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm. *See S. Cal. Gas Co.*, 7 Cal. 5th at 401; *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979); *Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958). The California Supreme Court has emphasized that considering these six factors turns on "'the sum total' of the policy considerations at play, not a mere tallying of some finite, one-size-fits-all set of factors." *S. Cal. Gas Co.*, 7 Cal. 5th at 401 (citation omitted). Here, applying these factors, Plaintiff does not – because he cannot – plead a special relationship.

First, regarding whether the transaction was intended to affect the plaintiff, courts look for a plaintiff who was a "specifically intended beneficiar[y] of the defendant's conduct" – an intended beneficiary of a particular transaction. *S. Cal. Gas Co.*, 7 Cal. 5th at 400-01. Said differently, Plaintiff must allege that the conduct was intended to affect Plaintiff in a way *particular to him*, "as opposed to all potential purchasers." *Whitesides v. E*TRADE Sec., LLC*, 2021 WL 930794, at *6 (N.D. Cal. Mar. 11, 2021) (citation omitted). Here, Plaintiff does not plead any facts to support such an inference like those, for example, in *Biakanja*, 49 Cal. 2d at 651 (plaintiff was a specific beneficiary of a will) or *J'Aire*, 24 Cal. 3d at 802, 804 (plaintiff was a restaurant operator who was the intended and specific beneficiary of work done by a contractor hired by the third-party property owner). Instead, the challenged statements were made in public documents, posted for anyone to see, and the MakerDAO Protocol was designed for anyone to use.

This is particularly important because Plaintiff's failure to plead specific intent "also implicates important policy considerations which disfavor recognizing a duty of care." *E*TRADE*, 2021 WL 930794, at *6. If Defendants owed a duty of care to any user of the MakerDAO platform, whether that user signed up through the Defendants or through third parties, they potentially could be exposed to limitless and unknowable liability based on how much cryptocurrency users decided, in their own discretion, to lock in their vaults. That is not intended under California's common law negligence doctrine. *See id.* The court in *E*TRADE* summarized the policy concerns that could flow

from this result as follows:

> Should the Court recognize a duty of care to prevent economic loss under the alleged facts of this case, then there would be no meaningful limits on the tort exposure of service providers who market services to the public. Any person who used the service and suffered economic loss could sue. This broad duty would run contrary to the California Supreme Court's holding that tort liability for economic losses is the exception, not the rule.

Id. The same logic applies with equal force here.

Second, as described above, the alleged harm to Plaintiff was a result of independent actions, which included (1) the collapse in ETH prices (SAC ¶¶ 26-27), (2) the resulting extraordinarily high traffic on the Ethereum network which caused significant bottlenecking and increased transaction fees by as much as ten times (*id.* ¶ 31), and (3) third-party Keeper bots that were programmed to take advantage of the situation (*id.* ¶ 32). Plaintiff cannot plausibly assert that the harm he suffered as a result of this series of specific intervening events was foreseeable. *Diaz*, 2018 WL 2215790, at *5 ("To impose a duty of care . . . in the absence of other objective indicia of fraud, would 'stretch the concept of foreseeability of harm in determining duty beyond recognition.'" (citation omitted)); *see also Patel v. Citibank Corp.*, 2019 WL 7987113, at *5 (C.D. Cal. Sept. 27, 2019) ("The fact that gift card scams exist does not suffice to make it 'foreseeable' that an individual purchaser will be scammed, absent an inquiry or warning by Apple or Google.").[12]

Third, there is no close connection between the Defendants' conduct and Plaintiff's alleged injury. *See E*TRADE*, 2021 WL 930794, at *7 (dismissing claims where the underlying events "attenuate[d] the connection between the defendant's conduct and the injury suffered"). As discussed, the harm at issue was effectuated by third-party actors, not Defendants. *Patel*, 2019 WL 7987113, at *5 ("[W]hile Apple and Google did sell Ms. Patel the gift cards, the harm itself occurred when the Fraudulent Actors deceived Ms. Patel and when she transferred the gift card numbers.").

Finally, "the moral blame attached to the defendant's conduct, [and] the policy of preventing future harm," are less relevant here where the conduct that caused Plaintiff's injury was perpetrated

[12] Although *Diaz* and *Patel* apply the factors from *Rowland v. Christian*, 69 Cal.2d 108 (Cal. 1968), the *J'Aire* factors are merely a "subset" of the *Rowland* factors, and are thus relevant to the analysis under *J'Aire*. *See S. California Gas Co.*, 7 Cal. 5th at 401, 441.

by a third party, especially when those were admittedly "nefarious actors." (SAC ¶ 47.) Indeed, "[a] defendant generally owes no duty to protect another from the conduct of third-parties." *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 851-52 (N.D. Cal. 2012); *E*TRADE*, 2021 WL 930794, at *7 (finding no moral blame because "[w]hile Plaintiffs allege that E*TRADE knew that oil futures contracts could go negative, they do not plausibly allege that E*TRADE knew of the deficiencies in their own system which caused the outage.").

BMA LLC v. HDR Global Trading Ltd. is instructive here. 2021 WL 949371 (N.D. Cal. Mar. 12, 2021). In that case, plaintiffs brought, among other things, a negligence claim arising out of losses they suffered on a cryptocurrency derivatives trading platform called BitMEX, which defendants launched to enable "traders to place bets on direction of cryptocurrency prices." *Id.* at *1-2. The plaintiffs alleged that the defendants failed to provide traders with a functional cryptocurrency trading marketplace by "negligently failing to prevent attacks from third parties," and that because "defendants enticed them to trade on their platform . . . defendants owed them a duty to maintain a functional cryptocurrency marketplace and prevent economic harm to them." *Id.* at *4, 15. The court found defendants did not owe plaintiffs a duty of care because there was no special relationship between them. *Id.* at *15-17 (evaluating the *Biakanja* factors). This was so, in part, because "conclusory allegation[s]" that plaintiffs were "enticed to trade . . . due to Defendants' own predatory advertising tactics" were insufficient to establish a special relationship. *Id.* at *16; *see also Kanyshev v. HDR Glob. Trading Ltd.*, 2021 WL 3545176, at *8 (Cal. Super. Ct. Feb. 25, 2021) (plaintiffs failed to adequately plead defendants owed a duty of care to ensure a functioning marketplace for traders). Just as in the *HDR* cases, Plaintiff here alleges "[t]he Maker Foundation had, however, expressly advertised its services as being immune from the exact type of threats presented by the zero-bid auctions." (SAC VII.) These conclusory allegations are insufficient to establish a special relationship between Defendants and Plaintiff. Because Plaintiff has failed to plead that Defendants' owed him a duty, the Court should dismiss his negligence claim.[13]

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[13] For this same reason, Plaintiff cannot establish that Defendants' breached their duty of care. "If there is no duty, then there can be no breach." *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 851-52 (N.D. Cal. 2012); *Corby v. Kloster Cruise Ltd.*, 1990 WL 488464, at *2 (N.D. Cal. Oct. 5, 1990).

C. Plaintiff has not adequately alleged causation.

Finally, Plaintiff cannot establish causation because the SAC itself makes clear that the actions which caused the harm were the result of superseding causes – the unanticipated traffic on the Ethereum blockchain, the resulting increase in transaction fees, and the third-party bots programmed to take advantage of that scenario. (SAC ¶ 47); *see Zanger*, 2007 WL 9734351, at *3 (granting motion to dismiss negligence claim where police officers were superseding cause for plaintiff's harm); *see also Richard Strick, M.D., Inc. v. United Ret. Plan Consultants, Inc.*, 2018 WL 6004529, at *4 (C.D. Cal. July 13, 2018) (granting summary judgment on negligence claim where "Plaintiffs have offered no evidence to support . . . the proposition that URPC realized or should have realized a likelihood that a criminal intrusion and theft might occur if the Plan assets were not distributed promptly"); Restatement (Second) of Torts § 448 (1965).

Plaintiff also fails to plead how flaws in the MakerDAO Protocol resulted in the $0 bids, how Defendants (much less which Defendant) "actively allow[ed]" the events of "Black Thursday" or how they failed to prevent it. *Terpin v. AT&T Mobility, LLC*, 399 F. Supp. 3d 1035, 1044 (C.D. Cal. 2019) ("Mr. Terpin does not connect how granting the hackers/fraudsters access to Mr. Terpin's phone number resulted in him losing $24 million.") These failures doom Plaintiff's negligence claim.

CONCLUSION

For the reasons above, Defendants respectfully request that the Court dismiss the SAC in its entirety with prejudice.[14]

[14] The Complaint should be dismissed with prejudice because amendment of the Complaint cannot cure Plaintiff's deficient claims. *See Kinnard v. Brisson*, 2004 WL 1465693, at *5-6 (N.D. Cal. June 21, 2004) (Chesney, J.) (dismissing claims with prejudice where plaintiff "does not, and cannot . . . state a claim against defendants" and "[l]eave to amend would be futile because the acts in which [plaintiff] contends defendants engaged cannot constitute a violation"); *Furnace v. Sullivan*, 2008 WL 4856826, at *3 (N.D. Cal. Nov. 10, 2008) (Chesney, J.) (dismissing with prejudice where amendment would be futile). This is particularly true where Plaintiff is unable to ever sufficiently plead causation related to the Defendants and has had more than two years and multiple opportunities to amend his pleading.

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