SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: July 11, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV410543	Jain Family Investments, LLC v. Pawan Agrawal	Click on LINE 1 or scroll down for ruling.
LINE 2	23CV427370	Boris Iofis v. David Lawver et al.	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 3	23CV427370	Boris Iofis v. David Lawver et al.	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 4	21CV390666	Eric F. Hartman v. Koshy P. George et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	23CV418150	Susana Rodriguez Robles et al. v. Kia America, Inc.	OFF CALENDAR
LINE 6	18CV323923	Corrie Johnson v. Nordstrom, Inc.	Click on LINE 6 or scroll down for ruling.
LINE 7	22CV397671	George Soliman v. Mohammed Bhuiyan et al.	This appears to be a default prove-up hearing against defendant Bhuiyan that was mistakenly placed on the law-and-motion calendar. The court takes this matter OFF CALENDAR and directs plaintiff to file the correct papers to set the matter properly for the correct hearing.
LINE 8	23CV412726	Yolanda Arthorlee v. Ford Motor Company et al.	OFF CALENDAR
LINE 9	23CV427200	Walter James Kubon et al. v. Rosalie Guancione	Motion to consolidate: there is no proof of service of the motion on file, and the court has received no response to the motion. Parties to appear to address the apparent notice defect.
LINE 10	24CV428675	In Re: Certain Statutory Interested Parties as Defined by Cal. Ins. Code 10134(G)	Petition for approval of structured settlement payments: parties to appear.

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Calendar Line 1
Case Name: *Jain Family Investments, LLC v. Pawan Agrawal*
Case No.: 23CV410543

I. BACKGROUND

In this case, plaintiff Jain Family Investments, LLC ("JFI") seeks to recover on an alleged loan to defendant Pawan Agrawal ("Agrawal"). The original and still-operative complaint, filed on January 27, 2023, states seven causes of action against Agrawal and Does 1-10: (1) Breach of Promissory Note; (2) Fraud; (3) Intentional Misrepresentation; (4) Negligent Misrepresentation; (5) False Promise; (6) Money Had and Received; and (7) Unjust Enrichment.

On October 6, 2023, Agrawal filed a cross-complaint against JFI and various cross-defendants. The cross-complaint stated eight causes of action (none of which are listed on the caption page): (1) Breach of Contract; (2) Breach of Contract; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Breach of the Implied Covenant of Good Faith and Fair Dealing; (5) Breach of Fiduciary Duty; (6) Breach of Fiduciary Duty; (7) Conversion; and (8) Unjust Enrichment.

On November 17, 2023 Agrawal filed a first amended cross-complaint ("FACC") stating the same eight causes of action. The FACC also added Shailendra Sharma ("Sharma") as an individual cross-defendant. FJI filed an answer to the FACC on January 16, 2024. Sharma filed an answer to the FACC on February 13, 2024. That answer indicated that Sharma was "pro per." Sharma served the answer on Agrawal's counsel via first class mail. More than two weeks later, on February 29, 2024, attorney Austin Jackson, identifying himself as counsel for Sharma, filed a declaration for an automatic extension of time for Sharma to respond to the FACC. As Sharma had already answered the FACC without demurring or moving to strike at the same time, this declaration had no legal effect.[1]

Currently before the court is Sharma's demurrer to the FACC, filed on April 15, 2024, more than two months after Sharma's answer. Agrawal filed a two-paragraph opposition to the demurrer on June 26, 2024.

II. DEMURRER TO THE FACC

A. Basis for the Demurrer

Sharma demurs to all causes of action in the FACC on the grounds of uncertainty and failure to state sufficient facts. (See Demurrer, p. 2:18-3:17.) The main thrust of the demurrer is that the FACC scarcely mentions him—indeed, Sharma is mentioned only in paragraphs 6 and 33 of the FACC, and none of the causes of action are expressly asserted against him.

Agrawal's sole argument in opposition is that the demurrer is untimely as a result of the filing of Sharma's answer on February 13, 2024. (Opposition, p. 2:15-19.)

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[1] The court's docket does not indicate when Jackson became counsel of record for Sharma. The court assumes that Jackson was unaware that Sharma had already filed an answer when he filed the declaration, and that the declaration was therefore filed erroneously but in good faith.

B. Discussion

Agrawal is correct that this demurrer is untimely. Code of Civil Procedure section 430.10 states, in part: "The party against whom a complaint or cross-complaint has been filed may object, by demurrer *or* answer as provided in Section 430.30." (Emphasis added.) Code of Civil Procedure section 430.30, subdivision (c), provides: "A party objecting to a complaint or cross-complaint may demur and answer *at the same time*." (Emphasis added.) Code of Civil Procedure section 432.10 states: "A party served with a cross-complaint may within 30 days after service move, demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint." While it is not clear when Sharma was served with the FACC, a demurrer must be filed before or at the same time as an answer. Thus, if Sharma was going to demur to the FACC, he was required to do so by February 13, 2024, when he filed his answer.

The declaration from Austin Jackson accompanying the demurrer does not mention the February 13, 2024 answer. It asserts, in paragraph 4, that counsel for Agrawal agreed to extend Sharma's time to respond to March 4, 2024. This is based on email communications that occurred on Friday, February 16, 2024. As Sharma served his answer by mail on February 13, 2024, it may be that counsel for Agrawal had not yet received the answer when this exchange took place. In any event, the filing of the answer cut off Sharma's ability to file a demurrer regardless of any agreement between counsel.

While the court does not necessarily disagree with the substantive arguments in the demurrer—indeed, even Agrawal does not appear to dispute that the FACC fails to assert any cause of action against Sharma—the demurrer is procedurally defective and must therefore be OVERRULED.

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Calendar Lines 2-3
Case Name: *Boris Iofis v. David Lawver et al.*
Case No.: 23CV427370

Plaintiff Boris Iofis initiated this action against defendants David Lawver, Palladium Development, LLC, 284 W. Shaw, LLC, Turnkey Ventures, L.L.C., and Turnkey Retail I, L.L.C. ("Defendants") on December 5, 2023. Palladium Development, LLC, 204 W. Shaw, LLC, Turnkey Ventures, LLC, and Turnkey Retail I, LLC (the "Entity Defendants") demur to all thirteen causes of action in the complaint on the grounds of uncertainty and failure to state facts sufficient to constitute a cause of action. Lawver also demurs to all thirteen causes of action on overlapping or similar grounds.[2]

I. BACKGROUND

The complaint, filed while Iofis represented himself, asserts causes of action against "all" Defendants for: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) unjust enrichment; (4) fraud and deceit; (5) breach of fiduciary duty; (6) fraudulent transfer; (7) conversion; (8) intentional infliction of emotional distress; (9) securities fraud; (10) financial elder abuse; (11) negligent misrepresentation; (12) intentional misrepresentation; and (13) non-payment.

The complaint alleges that in 2018, Lawver solicited Iofis with an investment opportunity, also known as the "Cook Street Property Project," for properties located at 46 Cook Street and 48 Cook Street, San Francisco, California. (Complaint, ¶ 21.) On March 7, 2018, Lawver presented Iofis with a promissory note, and on March 8, 2018, Lawver presented Iofis with a Memorandum of Agreement wherein Lawver promised to use the proceeds from the sale of the "Cook Street Project" to satisfy the loan. (*Id*., ¶¶ 22-23.) Lawver also promised to deliver a signed deed of trust to secure Iofis's investment. (*Ibid*.)

On June 28, 2019, Iofis executed an "Amended Memorandum of Agreement" with defendant 284 W. Shaw, LLC ("284 W Shaw") related to property located at 284 West Shaw Avenue, Clovis, California. (Complaint, ¶ 32.) The memorandum stipulated that 284 W Shaw would fully repay the loan, including both the principal and interest, on or before April 15, 2020. (*Ibid.*) The memorandum obligated the "Defendant" to execute and deliver a promissory note and deed of trust. (*Id.*, ¶ 34.)

In January 2023, Iofis discovered that "the Defendant" had neither signed nor recorded a deed of trust to secure "their interest in the Cook Street Property Project." (Complaint, ¶ 24.) The "property at 46 Cook Street was sold on December 3, 2020, without disclosing the loan to the Title Company, the new buyer." (*Ibid*.) The "property at 48 Cook Street was sold on December 11, 2020 without the consent or knowledge of [Iofis] and without disclosing the loan to the Title Company, the new buyer, or [Iofis]." (*Id*., ¶ 25.)

In April 2023, Iofis discovered that the "Defendant" had not executed a Deed of Trust nor recorded one to secure Iofis's interest in 284 West Shaw Avenue in Clovis. (Complaint,

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[2] The Entity Defendants also demur to the second and thirteenth causes of action on the ground that they are duplicative. "This is not a ground on which a demurrer may be sustained." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890.)

¶ 35.) As of April 15, 2020, the "Defendants" had not honored their obligation to repay Iofis's loan to 284 W Shaw. (*Id.*, ¶ 37.)

The Entity Defendants filed a demurrer on April 5, 2024. Lawver filed a demurrer on April 8, 2024. Iofis appears to have filed oppositions to both sets of demurrers on June 24, 2024, and again on June 26, 2024. The court shall consider the second set of oppositions as Iofis's operative oppositions to both sets of demurrers. The Entity Defendants and Lawver filed replies on July 2, 2024.

II. DEMURRER

A. General Legal Standard

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . [t]he pleading does not state facts sufficient to constitute a cause of action[;] . . . [t]he pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e)-(f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court, in ruling on a demurrer, treats it "as admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. [Citation.] It 'admits the truth of all material factual allegations in the complaint . . . ; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.) Evidentiary facts found in exhibits attached to a complaint may be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) In ruling on a demurrer, courts may also consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

Lawver and the Entity Defendants demur to each cause of action on the grounds that they fail to state facts sufficient to constitute a cause of action and are uncertain. (See Entity Defendants' Demurrer, pp. 4-5; Lawver's Demurrer to Complaint, pp. 1-2.) There is a tremendous amount of overlap between the opening and opposition briefs filed by the parties on both demurrers, with large blocks of text cut and pasted wholesale from one brief into the other. The court will therefore address the Entity Defendants' and Lawver's demurrers together, given this overlap.

1. Uncertainty

a) Legal Standard

A demurrer to a pleading lies where the pleading is uncertain. (Code Civ. Proc., § 430.10(f).) "Uncertain" includes ambiguous and unintelligible. (*Ibid*.) As a general matter, courts disfavor demurrers for uncertainty, and a court will typically sustain them only when the pleading is so incomprehensible that the opposing party cannot reasonably respond. (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135.) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.)

b) The Entity Defendants

The Entity Defendants demur to all causes of action on uncertainty grounds. (See Entity Defendants' Demurrer, pp. 4-5.) Lawver also demurs on uncertainty grounds. (See Lawver's Demurrer, p. 8:25 (Lawver MPA).)

The Entity Defendants argue the complaint names them but lacks any "charging allegations against them." (Entity Defendants' Supporting Opening Memorandum to Plaintiff Iofis's Complaint, p. 3:19-20 (Entity Defendants' MPA).) No "factual allegations" relate to Turnkey Ventures, LLC and Turnkey Retail I, LLC in the first through fourth and sixth through twelfth causes of action. (*Id*. at p. 3:22-23.) No exhibits reference these entities. (*Id*. at p. 4:15-16.) As the Entity Defendants note, Iofis indiscriminately "lumps" the other corporate entities into various causes of action, "improperly" suing these entities with no explanation as to why. (*Id*. at p. 5:2-4.) Lawver therefore argues that the complaint is uncertain to the terms "Defendant" and "Defendants." (Lawver MPA, *supra*, p. 8:26-9:2.)

The court agrees with the Entity Defendants and finds that Iofis has not pleaded the allegations in his complaint with sufficient certainty.

Iofis interchangeably refers to "Defendants" and "Defendant" throughout the complaint without making clear which defendant he is referring to, and this indiscriminate mixing is pervasive. (See Complaint, ¶¶ 55-132.) The correct defendant is often not apparent even from the context. Iofis responds that it is "clear" in context that "Defendant" refers to Lawver, and that "Defendants" refers to the Entity Defendants. (Plaintiff's Opposition to Entity Defendants' Demurrer (Opp. To Entity Defendants' Demurrer), p. 8:19-22.) This is not apparent from a reading of the complaint, and the use of the plural term "Defendants" still fails to clarify which of the Entity Defendants is being referred to. Iofis has brought thirteen causes of action against Lawver and four distinct entities. The Entity Defendants cannot reasonably respond to the issues raised in each cause of action without understanding what Iofis alleges each specific entity has done to substantiate his causes of action. (See *Khoury v. Maly's of Calif., Inc*. (1993) 14 Cal.App.4th 612, 616 [explaining that a demurrer for uncertainty will be sustained only where a defendant cannot reasonably respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against them].)

For example, Iofis describes allegedly fraudulent conduct undertaken by the "Defendant," and not the "Defendants" collectively as a whole. (See Complaint, ¶ 23 ["The

'Defendant' presented the Plaintiff with a Memorandum of Agreement [], wherein the 'Defendant' promised to use the proceeds from the sale of the 'Cook Street Project' to satisfy the loan."].) Yet when alleging causes of action based on allegedly fraudulent conduct, Iofis repeatedly refers to the conduct of "Defendants" and their "representations." (*Id*., ¶ 113 ["But for Defendants' representations, Plaintiff would not have invested $130,000.00."].)

Iofis also repeatedly uses the phrases the "Loan," "Note," "Deed," "Investment Agreements," and "Agreement" throughout the complaint. While he defines these terms, the complaint involves two distinct transactions, both involving a loan, a deed, and an agreement. It is not clear in the complaint what loan, deed, or agreement Iofis refers to at different points in the complaint. For example, Iofis describes the agreement between Iofis and 284 W Shaw using the term "Agreement," which is also the term Iofis had previously used to define as the agreement between Iofis and Palladium Development. (Complaint, ¶ 35.)

At one point in the complaint, Iofis defines the term "Loan Agreement" as collectively referring to "Note" and "Agreement." (Complaint, ¶ 63.) "Note" and "Agreement" refer to the note and agreement Iofis discussed with Lawver regarding the properties at 46 and 48 Cook Street. As a result, the Entity Defendants' demurrer has assumed that "Loan Agreement" refers to Iofis's agreement with Palladium Development, and the Entity Defendants demur to Iofis's securities fraud cause of action solely in regards to the agreement between Palladium Development and Iofis. (Entity Defendants' MPA, p. 11:18.) Yet Iofis's opposition seems to suggest that his securities fraud allegations against "Defendants" also encompasses the agreement between Iofis and 284 W Shaw. (Opp. To Entity Defendants' Demurrer, at p. 16:3-5 ["Finally, Lawver on behalf of Palladium and 284 Shaw, continued to make representations . . ."].) This is inherently ambiguous and indecipherable.

This court almost never sustains a demurrer on uncertainty grounds, but this is a rare instance. The court SUSTAINS the Entity Defendants' and Lawver's demurrers to the complaint on the ground that it is uncertain, with 30 days' leave to amend.

2. First Cause of Action – Breach of Contract

a) The Entity Defendants

(1) The Turnkey Entities

The Entity Defendants demur to Iofis's first cause of action for breach of contract on statute of limitations grounds and because Turnkey Ventures, LLC, and Turnkey Retail I, LLC did not contract with Iofis. (See Entity Defendants' MPA, pp. 5:25-6:5.) The "agreements referenced in the first cause of action are: 1) the Palladium 'Note' and 'Agreement' and 2) the Shaw 'Memorandum.'" (*Id.* at pp. 5:28-6:1.) The "Palladium Note and Agreement are between Palladium and Plaintiff." (*Id.* at p. 6:2.) The "agreement pertaining to the Shaw Loan is between 294 W. Shaw and Plaintiff." (*Id.* at p. 6:3.) The court agrees with the Entity Defendants that as Turnkey Ventures, LLC, and Turnkey Retail I, LLC "are not parties to these contracts, this Demurrer must be sustained to them." (*Id.* at p. 6:4-5.) Generally, a non-party to a contract cannot be sued for breach of that contract unless the non-party assumed the obligations in the contract. (See *Gold v. Gibbons* (1960) 178 Cal.App.2d 517, 519 ["Breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations."].) The complaint fails to

allege how Turnkey Ventures, LLC, and Turnkey Retail I, LLC could have breached an agreement to which they were not a party.

In response, Iofis claims that the Turnkey entities are liable as "an agent, servant, affiliate, employee, or in some cooperative capacity" with the other defendants (Opp. to Entity Defendants' Demurrer, p. 7:19-20), but this alleged agency or "cooperative" relationship is not explained anywhere in the complaint, except in insufficient alter ego allegations (discussed below). There is no explanation as to how either Turnkey company may have acted as an agent, much less how this makes them liable for anything the other defendants may have done.

(2) The Statute of Limitations

The Entity Defendants also argue that the statute of limitations bars the first, second, third, fourth, fifth, eleventh, twelfth, and thirteenth causes of action because these causes of action concern a breach of the alleged agreement between Iofis and Palladium Development, LLC. (Entity Defendants' MPA, p. 5:8-24.) According to the Entity Defendants, Iofis had four years, the longest statute of limitations period applicable to each of Iofis's causes of action, to file suit. (*Id*. at p. 5:11-12.) Iofis did not bring this action until four years and nine months after his cause of action accrued on the Cook Street transaction with Palladium. In opposition, Iofis relies on the delayed discovery exception to the statute of limitations.

"A statute of limitations defense may be raised by demurrer." (*Doyle v. Fenster* (1996) 47 Cal.App.4th 1701, 1707.) "A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. [Citation.] The running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint might be barred. [Citation.] If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment. . . .' [Citation.]" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325.)

"An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citation.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 (*Fox*).) "Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. [Citations.]" (*Ibid.*)

"In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer. [Citation.] [¶] Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury." (*Fox, supra*, 35 Cal.4th at pp. 808-809.)

The court analyzes the statute of limitations arguments for the first, second, third, fourth, fifth, eleventh, twelfth, and thirteenth causes of action separately (where relevant), as these causes of action are not necessarily limited to the agreement between Iofis and Palladium Development, the transaction as to which the argument is clearest.

The Entity Defendants argue, and Iofis does not dispute, that a four-year statute of limitations applies to actions originating from breach of a written agreement. (Code Civ. Proc., § 337, subd. (a).) Iofis nevertheless argues that the statute of limitations for breach of contract causes of action did not start to run here until he discovered "Defendants'" failure to record deeds of trust in 2023. Under his theory of discovery, the statute of limitations did not start to run, as the Entity Defendants suggest, when the balance for the Palladium loan became due and payable on February 28, 2019, because "Lawver and Palladium continued to make the annual 12% interest payments on the Loan," and thus there was no discovery of a breach. (*Id*. at p. 8:8-10.) The Entity Defendants respond that "the pleadings are uncertain about how long interest payments were made," that Iofis's "own pleadings are internally inconsistent," that Iofis's cited authority "torpedoes" his own argument, and that Iofis has failed to plead specific facts invoking the discovery rule. (Entity Defendants' Reply, p. 3:1-13.)

The court agrees with the Entity Defendants that Iofis has failed to plead sufficient facts to invoke the discovery rule. Iofis does not plead anything to show that despite diligent investigation of the circumstances of the injury, he could not have reasonably discovered a breach within the applicable statute of limitations period, a problem compounded by the contradictory allegations in the complaint. (Complaint, ¶ 131 ["To date, the monthly payment has not been made."].) Iofis relies on paragraph 30 of the complaint to indicate that payments continued to be made on the Palladium loan even after the loan became due, and as a result, the agreement was not fully breached at that time. But that paragraph only states, "The Defendant has only made 12% annual interest payments on the Plaintiffs' loan of $130,000.00." It does not indicate when those payments were made or ceased being made.

At the same time, Iofis points out that even if the court accepts the Entity Defendants' statute of limitations argument, it only applies to Iofis's agreement with Palladium Development. (Opp. To Entity Defendants' Demurrer, p. 9:20-23.) Iofis's agreement with 284 W Shaw "was not breached until at least March 6, 2020, making it within the four-year statute of limitations for written contracts." (*Ibid*.) This point is well taken, and the Entity Defendants do not address it in their reply.

In short, it does appear that at least part of the breach of contract allegations may be barred by the statute of limitations. Nevertheless, as a demurrer does not lie to a portion of a cause of action, (see *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682), the court OVERRULES the Entity Defendants' demurrer to the first cause of action.

b) Lawver

Lawver also demurs to the first cause of action on statute of limitations grounds, as well as on the ground that he did not contract with Iofis. (Lawver MPA, p. 9:3-22.) The court agrees with this latter point. Palladium Development and 284 W Shaw are the parties that contracted with Iofis, not Lawver, and the complaint does not state sufficient facts to support a cause of action for breach of contract against Lawver. "[I]t is settled that 'corporate agents and employees acting for and behalf of a corporation cannot be held liable for inducing a breach of

the corporation's contract." (*Mintz v. Blue Cross of California*, (2009) 172 Cal. App. 4th 1594 1604, citing *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24, 25.)

The court also finds problematic Iofis's theory of alter ego liability for Lawver. To support an alter ego theory of liability, a plaintiff must plead: (1) such a unity of interest and ownership that the separate personalities of the corporation and the individuals do not exist, and (2) that an inequity will result if the corporate entity is treated as the sole actor. (See *Stodd v. Goldberger* (1977) 73 Cal.App.3d 827, 832.) In applying the alter ego doctrine, courts consider whether an individual or organization dominated and controlled the entity, the controlling party used the entity's assets as his or her own, the entity served as a mere shell and conduit for the controlling party, the entity was undercapitalized, and the entity failed to abide by the formalities of corporate existence. (See *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 235.)

The complaint does not adequately plead Lawver's alter ego liability as to each of the Entity Defendants. Iofis contends that Lawver "is the controlling individual" of all four Entity Defendants. (Complaint, ¶¶ 10-14.) Furthermore, Turnkey Ventures LLC "exercises managerial or controlling influence" over 284 W Shaw. (*Id*., ¶ 11.) Neither of these allegations demonstrates a "such a unity of interest and ownership" that separate personalities cannot exist. Although Lawver appears to have signed the agreements on behalf of 284 W Shaw and Palladium Development, this is not enough. The conclusory alter ego allegations in paragraphs 15 through 19 of the complaint do not provide any facts supporting a contention that one was an alter ego for another. For example, the complaint does not contain any factual allegations that Lawver undercapitalized the four Entity Defendants or diverted funds from the Entity Defendants for his own use.

Further, Iofis makes the conclusory allegations in paragraph 17 of the complaint on information and belief. In general, even when it is permissible to allege an ultimate fact based on information and belief, a party cannot simply include the phrase "information and belief" without more. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-1159 (*Gomes*).) To plead an allegation on the basis of information and belief properly, a plaintiff must allege the facts or information that led him or her to infer or believe the truth of the ultimate factual allegation. (*Gomes, supra*, 192 Cal.App.4th at pp. 1158-1159; see also *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 1077, 1106 ["where factual allegations are based on information and belief, the plaintiff must allege 'information that 'lead[s] [the plaintiff] to believe that the allegations are true.'"].) Here, the FAC fails to describe any facts supporting the allegations in paragraphs 15 through 19 of the complaint.

The court SUSTAINS Lawver's demurrer to the first cause of action with 30 days' leave to amend.

3. Second Cause of Action – Breach of the Covenant of Good Faith and Fair Dealing

The Entity Defendants demur to the second cause of action on the ground that the statute of limitations bars this cause of action and that Palladium Development, L.L.C. was the only entity that contracted with Iofis. (Entity Defendants' MPA, pp. 6:6-7:2.)

The Entity Defendants' demurrer refers only to the "Loan Agreement." (Entity Defendants' MPA, p. 6:11-12.) The complaint defines "Loan Agreement" as the "Note" and "Agreement," and the "Note" and "Agreement" refer to Iofis's agreement with Palladium Development. (See Complaint, ¶¶ 22, 23, 63.)

A four-year statute of limitations applies to actions originating from breach of a written agreement. (Code Civ. Proc., § 337, subd. (a).) While the court is overruling the Entity Defendants' demurrer to the first cause of action, which discussed the statute of limitations in relation to the written agreements between Iofis, Palladium Development, and 284 W Shaw, it did so on the basis that a demurrer cannot be sustained to a portion of a cause of action, and the first cause of action included the contract with 284 W Shaw. Given that the second cause of action refers only to the alleged breach of the agreement between Palladium Development and Iofis, the court agrees with the Entity Defendants that the statute of limitations bars the second cause of action against them.

Lawver demurs to the second cause of action on statute of limitations grounds on the same basis as the Entity Defendants. (Lawver MPA, p. 10:1-4.) For the same reasons, the court agrees with Lawver that the statute of limitations bars the second cause of action against him. In addition, for the same reasons that the court is sustaining Lawver's demurrer to the first cause of action, so it must sustain the demurrer to the second cause of action: Lawver was not a contracting party, and the alter ego allegations are insufficient.

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the second cause of action with 30 days' leave to amend.

4. Third Cause of Action – Unjust Enrichment

The Entity Defendants demur to Iofis's third cause of action on the grounds that: (1) the statute of limitations bars this cause of action, (2) California does not recognize a cause of action for unjust enrichment, (3) Iofis fails to plead unjust enrichment against the non-Palladium Development defendants, and (4) a written agreement preempts the basis for Iofis asserting unjust enrichment. (Entity Defendants' MPA, p. 7:3-17.) Lawver likewise demurs to the third cause of action on the ground that a written agreement preempts the basis for asserting unjust enrichment. (Lawver MPA, p. 11:7-10.)

Iofis contends in response that California courts recognize a cause of action for unjust enrichment. (Opp. To Entity Defendants' Demurrer, p. 10:17-21.)

The court is persuaded by the Entity Defendants' argument that Iofis cannot simultaneously plead unjust enrichment while also bringing claims based on a valid, enforceable contract. (See Entity Defendants' Reply, p. 4:1-8.) It is true that modern rules of pleading generally permit plaintiffs to "set forth alternative theories in varied and inconsistent counts." (*Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 29 (*Rader*); see also *Mendoza v. Continental Sales Co., Inc.* (2006) 140 Cal.App.4th 1395, 1402 ["the modern practice allows that party to plead in the alternative and make inconsistent allegations"].) Thus, if a plaintiff had uncertainty as to whether the parties had entered into an enforceable agreement, the plaintiff would be entitled to plead inconsistent causes of action predicated on both the existence and absence of such an agreement. (See *Rader, supra*, 178 Cal.App.3d at p. 29

[plaintiff "is not precluded by law from alleging in one cause of action the breach of a contract and an inconsistent theory of recovery in another cause of action"].)

Nevertheless, the court in *Klein v. Chevron U.S.A., Inc*. made it clear that a plaintiff could not bring an unjust enrichment cause of action while simultaneously bringing a cause of action premised on a valid, enforceable contract:

> Although a plaintiff may plead inconsistent claims that allege both the existence of an enforceable agreement and the absence of an enforceable agreement, that is not what occurred here. Instead, plaintiffs' breach of contract claim pleaded the existence of an enforceable agreement and their unjust enrichment claim did not deny the existence or enforceability of that agreement. Plaintiffs are therefore precluded from asserting a quasi-contract claim under the theory of unjust enrichment.

(*Klein v. Chevron U.S.A., Inc*. (2012) 202 Cal.App.4th 1342, 1389 (*Klein*).) Here, just as in *Klein*, Iofis's unjust enrichment cause of action does not deny the existence or enforceability of its written agreement(s). In fact, Iofis seeks damages for unjust enrichment as a "direct and proximate result of the Defendant's breach of the 'Loan Agreement.'" (Complaint, ¶ 69.)

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the third cause of action with 30 days' leave to amend.

5. Fourth Cause of Action – Fraud and Deceit

The Entity Defendants demur to Iofis's fourth cause of action because the statute of limitations bars it, Iofis fails to plead fraud with particularity, and the cause of action duplicates the breach of contract cause of action. (Entity Defendants' MPA, pp. 7:18-8:9.) Lawver similarly demurs to Iofis's fourth cause of action on the basis of the statute of limitations. (Lawver MPA, at pp. 11:11-12:3.)

A three-year statute of limitations period applies to Iofis's fraud and deceit cause of action. (Code Civ. Proc., § 338, subd. (d).) Iofis again relies on the discovery rule in opposition to the demurrers. Because the discovery rule operates as an exception to the statute of limitations, "if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint. [Citations.]" (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 437.)

Consistent with the discussion above, the court finds that Iofis has not pled sufficient facts to support use of the discovery rule as an exception to the statute of limitations for this fraud-based cause of action. Iofis alleges that he discovered the alleged fraudulent activity – Lawver's misrepresentation that he would provide Iofis with a signed deed – in January 2023 and April 2023. (Complaint, ¶ 24 ["In January 2023, the Plaintiff discovered that the Defendant had neither signed nor recorded a Deed of Trust to secure their interest in the Cook Street Property Project. The property at 46 Cook Street was sold on December 3, 2020, without disclosing the loan to the Title Company, the new buyer."]; ¶ 35 ["In April 2023, the Plaintiff discovered that the Defendant had not executed a Deed of Trust nor recorded one to secure his interest in the Shaw Project."].) Iofis, however, does not offer any facts showing an

excuse for this late discovery, including any efforts at reasonable diligence, particularly in view of the Defendants' arguments that any principal on the loans was long past due.

The court also agrees with Defendants that the complaint fails to plead fraud with particularity. As noted above, the complaint is extremely uncertain in its allegations against the specific defendants, and this extends the allegations as to the "how, when, where, to whom, and by what means" that is required for fraud. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 (*Lazar*).) Fraud and deceit must be more particularly pled than other causes of action (such as breach of contract), and this complaint falls significantly short.

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the fourth cause of action with 30 days' leave to amend.

6. Fifth Cause of Action – Breach of Fiduciary Duty

Defendants contend that Iofis's fifth cause of action fails because neither the Entity Defendants nor Lawver owed Iofis a fiduciary duty. (See Entity Defendants' MPA, pp. 8:16-9:10.) "The elements of a cause of action for breach of fiduciary duty are; (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. [Citation.]" (*Gutierrez v. Giradi* (2011) 194 Cal.App.4th 925, 932.) According to the Entity Defendants, the "charging allegations are against Mr. Lawver, not the other defendants, even though Lawver was never Plaintiff's real estate agent such that no fiduciary relationship was alleged." (*Id*. at p. 8:16-18.) The "very allegations of the Complaint show they are targeted against Mr. Lawver as a licensed real estate agent, not the Corporate Entity Defendants." (*Id*. at p. 8:18-20.)

The complaint does outline the fiduciary duty owed by real estate agents to their clients and does discuss how Lawver "is a licensed real estate agent licensed to do business in California." (Complaint, ¶ 75.) But this is not enough. Lawver was not an agent for Iofis—his clients were Palladium and 284 W Shaw. Contracting parties in arms-length transactions are not fiduciaries of each other.

According to Iofis, "A fiduciary relationship is 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party.'" (Opp. To Entity Defendants' Demurrer, p. 12:9-11, citing *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25 (*Wolf*).) But this is just a generic statement of the law—it does not establish that such a duty was undertaken here by Lawver with respect to Iofis. Iofis contends that "Lawver and the limited liability companies he acted on behalf of, Palladium and 284 Shaw, were bound by his duty to act with the utmost good faith for the benefit of Plaintiff to take care of Plaintiff's investments and fulfill the agreements between them." (*Id.* at p. 12:17-20.) This conclusory allegation is not founded in the law. Iofis cites *Dieckmann v. Superior Court* (1985) 175 Cal. App. 3d 345, 356, but that case does not stand for the proposition for which he cites it; in fact, it does not even mention the existence (or lack) of a fiduciary duty. Iofis does not otherwise allege the basis for any other purported fiduciary duty owed to Iofis.

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the fifth cause of action with 30 days' leave to amend.

7. Sixth Cause of Action – Fraudulent Transfer

The Entity Defendants demur to Iofis's sixth cause of action on the grounds that Iofis fails to plead fraud with specificity and that the cause of action only relates, "at best," to Palladium Development. (Entity Defendants' MPA, p. 9:11-22.) Lawver also demurs to Iofis's sixth cause of action on the ground that Iofis fails to plead fraud with specificity. (Lawver MPA, pp. 12:19-13:8.)

Iofis argues that he has provided "sufficient specific facts to make out a cause of action for fraudulent transfer," citing paragraphs 24, 25, 26, and 82 of the complaint. (Opp. To Entity Defendants' Demurrer, p. 13:9-10.) "Plaintiff alleges that Defendants sold the properties located at 46 and 48 Cook Street, San Francisco, California without Plaintiff's knowledge in order to hinder, delay or defraud Plaintiff Lawver and Palladium Development's creditor." (*Id*. at p. 13:11-13.)

The court finds that this does not sufficiently plead fraudulent intent. "A fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy a claim." (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 648, quoting *Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13.) Fraud must be pleaded with particularity and the doctrine of liberal construction of pleadings does not apply. (*Lazar, supra,* 12 Cal.4th at p. 638.) This particularity requirement necessitates pleading facts that show how, when, where, to whom, and by what means the alleged misrepresentations were tendered. (*Id*. at p. 645.) Iofis directs the court to paragraphs 24 through 26 and 82 of the Complaint, but those paragraphs do not set forth facts showing the required intent for fraudulent conveyance, or for any fraud-based cause of action. Iofis otherwise summarily alleges intent, stating, for example, "Plaintiff on information and belief alleges that Defendant sold the Cook Street property located at 46 Cook Street, San Francisco, California with the intent to hinder, delay or defraud Plaintiff as creditors of Lawver and Palladium Development." (Complaint, ¶ 82.) This bare allegation on information and belief is insufficient.

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the sixth cause of action with 30 days' leave to amend.

8. Seventh Cause of Action - Conversion

The Entity Defendants demur to Iofis's seventh cause of action because the statute of limitations bars the cause of action and because Iofis voluntarily entered into loan agreements (such that any retention of funds would give rise to a cause of action for breach of contract, not the tort of conversion). (Entity Defendants' MPA, pp. 9:23-10:19.) Lawver also demurs to the seventh cause of action on statute of limitations grounds, arguing that the three-year period to bring suit has already passed because the parties' agreement required Palladium Development to pay Iofis his principal on February 28, 2019. (Lawver MPA, pp. 13:9-14:3.)

Code of Civil Procedure section 338, subdivision (c), sets forth a three-year statute of limitations for actions alleging conversion. "Ordinarily the statute of limitations applying in conversion actions [] begins to run from the date of the conversion even though the injured person is ignorant of his rights. [Citations.]" (*Strasberg v. Odyssey Group*, (1996) 51 Cal. App. 4th 906, 916.) "This rule, however, is not absolute; for example, where there has been a

fraudulent concealment of the facts the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion. [Citations.]" (*Ibid*.)

Iofis ties his seventh cause of action to Palladium Development's alleged misconduct, stating that "Defendant has misappropriated and converted money belonging to the Plaintiff from the Cook Street Project for his own personal use, and used the money for unauthorized purposes . . . ." (Complaint, ¶ 87.) The Cook Street Project refers to the properties located at 46 Cook Street and 48 Cook Street, the subject of the agreement between Palladium Development and Iofis. (*Id*., ¶ 21.) The court has already discussed, and found persuasive, the Entity Defendants' statute of limitations argument as to the agreement between Iofis with Palladium Development: Iofis has failed to sufficiently plead facts invoking the discovery rule.

The court is also generally persuaded by Defendants' point that a standard contractual obligation to repay money does not satisfy the legal requirements for a conversion cause of action. (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1151-1152.)

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the seventh cause of action with 30 days' leave to amend.

9. Eighth Cause of Action – Intentional Infliction of Emotional Distress

Defendants demur to Iofis's eighth cause of action for intentional infliction of emotional distress on the ground that Iofis fails to allege sufficiently outrageous conduct. (Entity Defendants' MPA, pp. 10:20-11:10; Lawver MPA, p. 14:4-23.) Instead, Iofis participated in "voluntary personal business investments for his own benefit and pecuniary gain." (Entity Defendants' MPA, p. 11:4-6.)

"The tort of intentional infliction of emotional distress is comprised of three elements: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct. [Citation.]" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494 (*Cochran*).) "There is no bright line standard for judging outrageous conduct and its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility. The process evoked by the test appears to be more intuitive than analytical." (*Cochran, supra*, 65 Cal.App.4th at p. 494; internal quotations omitted.) "Even so, the appellate courts have affirmed orders which sustained demurrers on the ground that the defendant's alleged conduct was not sufficiently outrageous. [Citation.]" (*Ibid*.) "Conduct is considered outrageous when it is 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.]" (*Belen v. Ryan Seacrest Productions, LLC* (2021) 65 Cal.App.5th 1145, 1164.) "[M]ere insulting language, without more, ordinarily would not constitute extreme outrage" unless it is combined with "aggravated circumstances." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499.) But "'[b]ehavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental

distress.'" (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946 (Agarwal), disapproved on other grounds in *White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 574, fn. 4.)

Iofis argues that he has pled that he "is vulnerable to injuries through mental distress due to his 'advanced age and limited knowledge of real estate." (Opp. To Entity Defendants' Demurrer, p. 15:4-5.) According to Iofis, matters "to be considered when determining whether behavior can be considered outrageous include if the Defendant knows plaintiff has a special susceptibility to emotional distress." (*Id*. at p. 15:1-2, citing *Symonds v. Mercury Sav. & Loan Ass'n* (1990) 225 Cal.App.3d 1458, 1469 (*Symonds*).) In *Symonds*, the court held that a jury could find that the defendant engaged in sufficiently outrageous conduct because the defendant "knew appellant was elderly," defendant knew the alleged agreement placed plaintiff "into a difficult financial situation," defendant "was told [plaintiff's] health had suffered because of the loss of money yet [defendant] allegedly continued to call [plaintiff] every day to pressure her into signing a promissory note and threatening to attach her funds." (*Symonds, supra*, 225 Cal.App.3d at p. 1469.) Defendant "continued to place these threatening calls even though [defendant] had been directed to speak only with [plaintiff's] attorney." (*Ibid*.) Iofis also relies on *McDaniel v. Gile* (1991) 230 Cal. App. 3d 363 (*McDaniel*) for a similar proposition. (Opp. To Entity Defendants' Demurrer, p. 15:8-9.) In *McDaniel*, the defendant knew plaintiff "was peculiarly susceptible to emotional distress" and plaintiff allegedly sexually harassed a client and withheld his legal services because plaintiff refused to grant the defendant sexual favors. (*McDaniel, supra*, 230 Cal. App. 3d at p. 373.)

Here, Iofis has not sufficiently pled such facts and he has not sufficiently pled outrageous conduct to sustain his intentional infliction of emotion distress cause of action. Citing paragraphs 40 through 44 of the complaint, Iofis claims that he has alleged that Lawver "acted intentionally with awareness that his acts would likely result in mental distress, as he was aware of Plaintiff's precarious financial condition, health conditions, and mental health issues." (Opp. To Entity Defendants' Demurrer, p. 15:10-13.) Paragraphs 40 through 44 of the complaint do not, in fact, make these allegations. Nor does Iofis allege that Lawver or the Entity Defendants knew of Iofis's financial condition or that he was susceptible to suffering medical harm; he does not specifically allege that they engaged in threatening or pressuring activity.

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the eighth cause of action with 30 days' leave to amend.

10. Ninth Cause of Action – Securities Fraud

The Entity Defendants demur to Iofis's ninth cause of action for securities fraud on the grounds that Iofis lacks privity with the corporate defendants and that Iofis failed to bring suit within the applicable statute of limitations period. (Entity Defendants' MPA, pp. 10:11-11:2.) Lawver demurs to Iofis's ninth cause of action on the grounds the statute of limitations bars the cause of action. (Lawver MPA, p. 15:6-18.) Iofis responds that he has alleged sufficient facts to show that "each Defendant was, and is, acting as an agent, servant, affiliate, employer in some cooperative capacity with the other named Defendants, and that each Defendant is equally as liable as Palladium for Securities Fraud." (Opp. To Entity Defendants' Demurrer, p. 16:10-13.)

As noted above, the court finds that Iofis has not sufficiently pled alter ego liability, and so the court does not agree with Iofis that he has pled facts sufficient to show that all of the Entity Defendants are proper parties to this cause of action. (Opp. To Entity Defendants' Demurrer, p. 16:8-9.)

The Entity Defendants demur to Iofis's cause of action for securities fraud only as to the "Loan Agreement" between Iofis and Palladium Development. (Entity Defendants' MPA, pp. 11:11-12:2.) Iofis's opposition brief refers to both 284 W Shaw and Palladium Development. (Opp. To Entity Defendants' Demurrer, p. 16:3-4.) The complaint, however, appears to define "Loan Agreement" as the "Note" and "Agreement," and "Note" and "Agreement" refer to Iofis's agreement with Palladium Development. (See Complaint, ¶¶ 22, 23, 63.) Thus, it appears that the cause of action relates only to the agreement with Palladium Development.

An action for violation of Corporations Code section 25401 must be "brought before the expiration of five years after the act or transaction constituting the violation or the expiration of two years after the discovery by the plaintiff of the facts constituting the violation, whichever shall first expire." (Corp. Code, § 25506, subd. (b).)[3]

Iofis grounds his securities fraud cause of action on the same fraud-based conduct that the court has already discussed while analyzing the Entity Defendants' statute of limitations arguments as to other causes of action—namely, that Iofis has failed to plead sufficient facts substantiating his use of the discovery rule to plead around any potential statute of limitations arguments. (See Complaint, ¶¶ 97-101.) As such, the court finds the Entity Defendants' statute of limitations argument to be persuasive.

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to ninth cause of action with 30 days' leave to amend.

11. Tenth Cause of Action – Financial Elder Abuse

The Entity Defendants demur to Iofis's tenth cause of action on the grounds that Iofis fails to allege undue influence and fails to plead financial elder abuse with particularity, as no facts show that the entities ("lumped" together indiscriminately as the "defendants") took money from Iofis for a wrongful use or intent to defraud. (Entity Defendants' MPA, p. 12:3-16.) Lawver also demurs to Iofis's tenth cause of action on the ground that Iofis fails to plead sufficient facts to support the cause of action. (Lawver MPA, pp. 15:19-16:11.)

Financial elder abuse is defined by Welfare and Institutions Code section 15610.30, subdivision (a) as follows: [¶] " 'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or

[3] The Palladium Development agreement was entered into in March 2018, making five years from that date March 2023, nearly nine months before this case was filed.

dependent adult by undue influence, as defined in Section 15610.70." The petition invokes the language of both subdivisions (a)(1) and (a)(3) of Welfare and Institutions Code section 15610.30.

"The Elder Abuse Act makes certain enhanced remedies available to a plaintiff who proves abuse of an elder, i.e., a 'person residing in this state, 65 years of age or older.' (Welf. & Inst. Code, § 15610.27.) In particular, a plaintiff who proves 'by clear and convincing evidence' both that a defendant is liable for physical abuse, neglect or financial abuse (as these terms are defined in the Act) and that the defendant is guilty of 'recklessness, oppression, fraud, or malice' in the commission of such abuse may recover attorney fees and costs. (Welf. & Inst. Code, § 15657, subd. (a).)" (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 (*Carter*).)

In order to state a claim for financial elder abuse, a plaintiff must plead and prove the following: (1) the plaintiff was "elderly" within the meaning of the Elder Abuse Act (Welf. & Inst. Code, §§ 15600 et seq. [i.e., 65 years of age or older]); (2) the defendant took or retained the plaintiff's property with the intent to defraud the plaintiff, for a wrongful use, or by undue influence; (3) the plaintiff was harmed; and (4) the defendant's conduct was a substantial factor in causing in the plaintiff's harm. (See CACI No. 3100; Welf. & Inst. Code, § 15610.30.)

A cause of action for elder abuse is statutory and, therefore must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) "Accordingly, [the] '[u]se of such terminology [as fraudulently and recklessly] cannot cure [the] failure to point out exactly how or in what manner the [respondent] transgressed.' [Citation.]" (*Carter*, *supra*, 198 Cal.App.4th at p. 410.)

The court finds that Iofis has not sufficiently pled a cause of action for elder abuse. Iofis does not plead his age, only that he is a "senior citizen." (Complaint, ¶ 7.) For purposes of the Elder Abuse Act, an "'[e]lder'" is a California resident, 65 years of age or older. (Welf. & Inst. Code, § 15610.27.) Further, as discussed above, the complaint fails to plead fraudulent intent adequately.

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the tenth cause of action with 30 days' leave to amend.

12. Eleventh Cause of Action – Negligent Misrepresentation

The Entity Defendants demur to Iofis's eleventh cause of action on the grounds that the statute of limitations bars the cause of action and that Iofis fails to plead sufficient facts to state a cause of action for negligent misrepresentation. (Entity Defendants' MPA, pp. 12:17- 13:2.) Specifically, the Entity Defendants argue that the negligent misrepresentation at issue—"Defendants" represented that they would deliver an executed deed to Iofis, the property subject to the "Loan Agreement"—was based on a representation to perform in the future. (*Id*. at p. 12:23-25.) Such a misrepresentation cannot sustain a cause of action for negligent representation. (*Ibid*.) Lawver demurs to Iofis's eleventh cause of action because "it is based on a representation to perform in the future." (Lawver MPA, pp. 16:12-17:6.)

The court agrees. "Although a false promise to perform in the future can support an intentional misrepresentation claim, it does not support a claim for negligent misrepresentation." (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal. App. 4th 437, 458,

citing *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158-159.) The alleged misrepresentations here solely concerned future conduct: *i.e.*, that "the real property subject to the 'Loan Agreement' would be deeded in Plaintiff's name and sold pursuant to the terms of the 'Agreement.'" (Complaint, ¶ 106.) Consequently, this conduct cannot serve as the basis for a negligent misrepresentation cause of action.

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the eleventh cause of action with 30 days' leave to amend.

13. Twelfth Cause of Action – Fraud

The Entity Defendants demur to Iofis's twelfth cause of action because the statute of limitations bars the cause of action, the cause of action duplicates other causes of action, and it fails to allege facts with heightened specificity. (Entity Defendants' MPA, p. 13:5-10.) Lawver demurs to Iofis's twelfth cause of action because the statute of limitations bars the cause of action. (Lawver MPA, p. 17:8-21.)

A three-year statute of limitations period applies to Iofis's fraud cause of action. (Code Civ. Proc., § 338, subd. (d).) The court has already discussed the Entity Defendants' statute of limitations argument as to fraud-based conduct in its discussion of the Entity Defendants' demurrer to the fourth course of action. The same statute of limitations applies to this cause of action.

As noted above, the court also finds that the complaint fails to plead fraud with the necessary specificity.

The court SUSTAINS Lawver's and the Entity Defendants' demurrers to the twelfth cause of action with 30 days' leave to amend.

14. Thirteenth Cause of Action

The Entity Defendants and Lawver demur to Iofis's thirteenth cause of action for "non-payment" on the grounds that California does not recognize a cause of action for non-payment and that the cause of action fails to plead sufficient facts. (Entity Defendants' MPA, p. 13:11-17; Lawver MPA, p. 17:23-24.) Iofis does not respond to these arguments in opposition. This essentially operates as a concession.

The court SUSTAINS Lawver and the Entity Defendants' demurrer to the thirteenth cause of action WITHOUT leave to amend. A "[p]laintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]" (*Goodman v. Kennedy*, *supra*, 18 Cal.3d at p. 349.) The court is not aware of a cause of action for "non-payment," and the court cannot envision how Iofis can amend his pleading to assert it properly when he fails to make any showing that such a cause of action actually exists.

III. CONCLUSION

The court SUSTAINS the Entity Defendants' demurrer to the entirety of the complaint on the ground of uncertainty with 30 days' leave to amend. (Code Civ. Proc., § 430.10, subd. (f).) The court OVERRULES the Entity Defendants' demurrer to the first cause of action on

the ground of failure to state sufficient facts. (Code Civ. Proc., § 430.10, subd. (e).) The court SUSTAINS the Entity Defendants' demurrer to the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action under section 430.10, subdivision (e), with 30 days' leave to amend. The court SUSTAINS the Entity Defendants' demurrer to the thirteenth cause of action under section 430.10, subdivision (e), without leave to amend.

The court SUSTAINS Lawver's demurrer to the entirety of the complaint on the ground of uncertainty with 30 days' leave to amend. The court SUSTAINS Lawver's demurrer to the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action with 30 days' leave to amend. The court SUSTAINS Lawver's demurrer to the thirteenth cause of action without leave to amend.

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Calendar Line 4
Case Name: *Eric F. Hartman v. Koshy P. George et al.*
Case No.: 21CV390666

I. BACKGROUND

This is an action concerning an easement dispute at Stafford Court, a private driveway where plaintiff Eric F. Hartman and defendants Koshy P. George and Sheeba George reside. Plaintiff Eric Hartman filed the verified complaint on November 1, 2021 against the Georges, as well as against defendants KPGCPA Financial Services Inc., America's Tax Solutions – Accountant and Advisors, Lynn Dornon Kuehn, The Carpet Butler, John Lee, James Young, and William C. Dresser.

The verified complaint alleges the following causes of action:

1. Conspiracy to Harm Plaintiff and His Real and Personal Property and Injunctive Relief – Against All Defendants

2. Unfair Business Practices – Against Koshy P. George and KPGCPA Financial Services Inc.

3. Abate Public Nuisance and Private Nuisance and Criminal Nuisance (Penal Code 370 – illegal six-foot fence) – Against James Young

4. Assault and Battery – Against Lynn Dornon Kuehn

5. Temporary Writ of Injunction and Permanent Injunction to abate public and private nuisance and for damages – Against Koshy P. George and Sheeba George

6. Trespass and Willful Invasion of Private Property – Against William C. Dresser and Koshy P. George

7. Breach of Written Contract (Governing Documents) – Against Koshy and Sheeba George

8. Slander Per Se and Libel on its Face – Against Koshy George.

On November 11, 2023, this court granted a motion to quash service of summons, filed by defendant America's Tax Solutions, Inc. ("ATSI"), erroneously sued as "America's Tax Solutions—Accountant and Advisors."

Hartman filed an amendment to the complaint on December 5, 2023, substituting ATSI for Doe 1 and Barry Bulakites ("Bulakites") as Doe 2 "as they appear in the Verified Complaint in only the Second Cause of Action for Unfair Business Practices." (See Amendment, p. 2:4-5.) Bulakites is apparently the President of ATSI.

Currently before the court is a motion for summary judgment or summary adjudication by ATSI and Bulakites, filed on April 9, 2024. Hartman filed his opposition on June 27.

II. MOTION FOR SUMMARY JUDGMENT

A. General Standards

The pleadings limit the issues presented for summary judgment or summary adjudication. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion."]; see *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444 ["A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion."].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire case, a cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Automobile Association* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].) "A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action . . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, at p. 850.)

"Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise additional theories of liability. '[S]ummary judgment cannot be denied on a ground not raised by the pleadings. [Citations.]'" (*Nativi v. Deutsche Bank National Trust Co*. (2014) 223 Cal.App.4th 261, 290 (*Nativi*), internal citation omitted; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["[a] party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings"]; *County of Santa Clara v. Atlantic Richfield Co*. (2006) 136 Cal.App.4th 292, 332-333 (*County of Santa Clara*).) The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint or cross-complaint. A moving party need not refute liability on some theoretical possibility not included in the pleadings.

Neither party can rely on its own pleadings (even if verified) as evidence to support or oppose a motion for summary judgment or summary adjudication. (See *College Hospital, Inc. v. Sup Ct*. (1994) 8 Cal.4th 704, 720, fn. 7; *Roman v. BRE Properties, Inc*. (2015) 237 Cal.App.4th 1040, 1054; *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 182.) At the same time, the moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218

Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252.)

B. Grounds for ATSI and Bulakites's Motion

ATSI and Bulakites state that they seek summary judgment or summary adjudication "on the ground that there is no triable issue of fact as to the first and second causes of action alleged in the complaint filed by Hartman." (Notice of Motion and Motion, p. 2:9-11.) In their supporting memorandum, they note that "[w]hile the amendment to the complaint filed by Hartman states that [ATSI/Bulakites] are only being added to the second cause of action, a review of the complaint filed by Hartman indicates that he has alleged the first cause of action against 'All Defendants and Doe Defendants.'" (Memorandum, p. 3:16-19, brackets added.)

The motion is supported by a separate statement of undisputed material facts and a declaration from Bulakites, who avers that he is the President of ATSI, a Delaware corporation.

C. Discussion

The court GRANTS the motion for summary judgment by ATSI and Bulakites, for the reasons that follow.

1. First Cause of Action

As ATSI and Bulakites point out, the complaint's first cause of action for conspiracy is expressly alleged against "Doe Defendants," and ATSI and Bulakites were ultimately substituted as Does 1 and 2 in this case. Hartman's opposition to the motion offers no defense as to the first cause of action, yet he contends that the motion (including the alternative motion for summary adjudication) should be denied in its entirety.

"Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 514 (*Applied Equipment*).) "In order to maintain an action for conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage." (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823.) Unless there is liability for an underlying tort, there can be no liability for conspiracy.

"As we read *Applied Equipment* and the antecedent case authorities on which it builds, in California a civil conspiracy to commit tortious acts can, as a matter of law, *only* be formed by parties who are already under a duty to the plaintiff, the breach of which will support a cause of action against them—individually and not as conspirators—in tort. Restated, in cases where the plaintiff alleges the existence of a civil conspiracy among the defendants to commit tortious acts, the source of substantive liability can*not* arise out of participation in the conspiracy alone. Moreover, according to these authorities, it makes no difference in the analysis whether the underlying duty is imposed by statute (as in *Doctors' Co*.) or by the

common law (as in *Applied Equipment*). A duty, however, independent of the conspiracy itself, must exist in order for substantive liability to attach." (*Chavers v. Gatke Corp*. (2003) 107 Cal.App.4th 606, 614 [emphasis in original, citing *Applied Equipment* and *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39]; see also *Navarette v. Meyer* (2015) 237 Cal.App.4th 1276, 1291-1293.)

In this case, the generic and boilerplate allegations in paragraphs 8-9 of the complaint and in later paragraphs 3-4 of the first cause of action fail to state a cause of action against ATSI and Bulakites as a matter of law.[4] The only reference to "Doe 1" and "Doe 2" in the first cause of action—paragraph 5(4)(H)—merely states that various Does were "co-conspirators," without more. It fails to specify any duty of care allegedly owed by Doe 1 or Doe 2 to Hartman, and it in fact fails to allege anything about ATSI or Bulakites's alleged actions as co-conspirators. A cause of action for civil conspiracy is not a general "catch-all" cause of action.

The complaint as a whole makes no mention of Bulakites. The first cause of action does not mention ATSI (or America's Tax Solutions). The few references to ATSI (as America's Tax Solutions) in paragraphs 2, 10(4) and 10(5) also fail to allege any conspiracy claim. Most of these allegations are made solely on information and belief. A plaintiff cannot, "by placing the incantation 'information and belief' in a pleading . . . insulate herself or himself" from the requirements of Code of Civil Procedure section 128.7, irrespective of whether the pleading is verified or unverified. (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596, fn. 9.) To plead an allegation on the basis of information and belief properly, a plaintiff must allege the facts or information that led him or her to infer or believe the truth of the ultimate factual allegation. (*Gomes v. Countrywide Home Loans, Inc*. (2011) 192 Cal.App.4th 1149, 1158-59; see also *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 100, 1106 ["where factual allegations are based on information and belief, the plaintiff must allege 'information that 'lead[s] [the plaintiff] to believe that the allegations are true.'"'].) Again, Hartman is bound by his complaint on summary judgment, and it fails to allege a cause of action for conspiracy against ATSI or Bulakites (even as "Doe 1" and "Doe 2").

Even if the complaint adequately stated a claim for conspiracy against ATSI or Bulakites, Bulakites's declaration in support of the motion—which denies any contact or collaboration between ATSI and the other defendants regarding the acts alleged in the first cause of action (and also refuting that Koshy George was ever ATSI's President)—would be sufficient to meet the initial burden on summary judgment. (See Bulakites Declaration, ¶¶ 9-24.) Hartman does not address this at all, and he does not make any argument in support of the first cause of action in response to the motion. Indeed, Hartman's declaration, the only evidence submitted with the opposition, does not mention the first cause of action at all.

2. Second Cause of Action

The complaint's second cause of action for Unfair Business Practices is expressly alleged against only Koshy P. George and KPGCPA Financial Services Inc. It asserts violations of Business and Professions Code sections 17040, 17043, and 17049, and it seeks temporary and permanent injunctive relief for these alleged violations, as well as treble damages under the Business and Professions Code. (See Complaint, p. 14:6-11.)

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[4] For some reason, the complaint's paragraphs are not consecutively numbered.

Business and Professions Code section 17040 states: "It is unlawful for any person engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular established dealer in such article or product, or to prevent the competition of any person who in good faith, intends and attempts to become such dealer, to create locality discriminations. [¶] Nothing in this section prohibits the meeting in good faith of a competitive price."

Business and Professions Code section 17043 states: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

Business and Professions Code section 17049 states: "The prohibitions of this chapter against locality discrimination and sales below cost embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination or sale below cost is in substance or fact effected in violation of the spirit and intent of this chapter."

These three statutes are part of the Unfair Practices Act (Bus. & Prof. Code §§ 17201 et seq.), which "forbids most locality discriminations (§ 17040-17041, 17049-17050), the use of loss leaders (§ 17044), gifts (§ 17043), secret rebates (§ 17045), boycotts (§ 17046), and 'deceptive, untrue or misleading advertising' (§ 17200, 17500). It also prohibits the sale of goods and services below cost (§ 17043, 17048.5, 17049)." (*Pan Asia Venture Capital Corp. v. Hearst Corp*. (1999) 74 Cal.App.4th 424, 432.)

While the December 5, 2023 amendment to the complaint purports to substitute ATSI and Bulakites for Doe 1 and Doe 2 "as they appear in the Verified Complaint in only the Second Cause of Action for Unfair Business Practices," the second cause of action does not make *any* allegations against either Doe 1 or Doe 2. The second cause of action does not mention Bulakites at all, and the allegations in paragraphs 8-12 of the second cause of action referring to "America's Tax Solutions" fail to describe any violation of sections 17040, 17043 and 17049 by ATSI. The incorporation of the preceding allegations by reference in paragraph 7 of the second cause of action also does not support the second cause of action as alleged against either of these two defendants.

The general rule is that statutory causes of action must be pleaded with particularity. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) This rule applies to a cause of action for violation of the Unfair Practices Act. The second cause of action fails to allege that ATSI or Bulakites (or Doe 1 or Doe 2) violated Business and Professions Code section 17040, 17043 or 17049 *at all*, much less how ATSI and Bulakites supposedly violated these provisions. These allegations are devoid of any particularity.

The second cause of action does allege that defendants George and KPGCPA violated other statutes or rules (including the federal Revenue and Tax Code, Civil Code sections 1799 and 1799.1, California regulations relating to accounting corporations and the California Constitution) but these allegations do not state a claim against ATSI or Bulakites for violation of Business and Professions Code sections 17040, 17043, and 17049.

The fact that the second cause of action fails to allege any violation of Business and Professions Code sections 17040, 17043, and 17049 by ATSI or Bulakites (either in their own names or as Does 1 and 2) is a sufficient basis upon which to grant ATSI and Bulakites's motion as to the second cause of action.

Moreover, the Bulakites declaration states (at ¶¶ 25-34) that neither he nor ATSI did anything that could potentially constitute a violation of Business and Professions Code sections 17040, 17043, or 17049. This evidence would be sufficient to meet ATSI/Bulakites' initial burden for summary judgment or summary adjudication of the second cause of action, even if that cause of action did include allegations as to Doe 1 or Doe 1.

With the burden shifted to Hartman, he is unable to raise any triable issue of material fact as to the second cause of action. His opposition consists almost entirely of a bare recitation of authorities (see Opposition, pp. 4:17-6:21) and fails to rebut ATSI and Bulakites's showing. He argues that his allegations against ATSI and Bulakites are based on Business and Professions Code section 17200, but the second cause of action makes no mention of section 17200; instead, it focuses solely on sections 17040, 17043 and 17049. Hartman is bound by his pleading. The declaration from plaintiff Hartman—again, the only evidence submitted with the opposition—also fails to raise any triable issue of material fact, as it is entirely conclusory. Hartman's statement that the alleged violations by defendants George and KPGCPA are somehow to be imputed to ATSI and Bulakites is not supported by the complaint in general or by the second cause of action in particular. (See Hartman Decl. at ¶ 12.) To be material for summary judgment purposes, a fact must relate to some claim or defense in issue under the pleadings. Also, it must be in some way essential to the judgment such that, if proved, it could change the outcome of the case. (See *Riverside County Community Facilities Dist. v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 653; Kelly v. First Astri Corp. (1999) 72 Cal.App.4th 462, 470; *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.) Hartman's declaration in opposition to the motion does not meet this standard. As already noted above, Hartman's declaration cannot function as an amendment of the complaint. (See *Nativi*, *supra*, 223 Cal.App.4th at p. 290; *County of Santa Clara*, *supra*, 136 Cal.App.4th at pp. 332-333.)

For the foregoing reasons, the court grants the motion for summary judgment.

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Calendar Line 6
Case Name: *Corrie Johnson v. Nordstrom, Inc.*
Case No.: 18CV323923

This is a motion by defendant Nordstrom, Inc. ("Nordstrom") to have self-represented plaintiff Corrie Johnson ("Johnson") declared a vexatious litigant and to enter a prefiling order against her under Code of Civil Procedure section 391.7, subdivision (a). Because the evidence is overwhelming that Johnson has repeatedly relitigated or attempted to relitigate the validity of final determinations against her and has repeatedly filed unmeritorious motions in this court and other courts, the court GRANTS the motion. (Code Civ. Proc., § 391, subd. (b)(2) & (b)(3).)

Rather than repeat the long history of litigation between the parties—not only in this court, but also in the Fulton County Superior Court (Georgia) and San Mateo County Superior Court—this court simply takes judicial notice of its own prior orders under Evidence Code section 452, subdivision (d), and incorporates them by reference. Those prior orders are dated January 7, 2020 (Judge Pierce), March 6, 2020 (Judge Pierce), September 24, 2020 (Judge Barrett), November 8, 2022 (Judge Kirwan), July 13, 2023 (the undersigned), February 13, 2024 (the undersigned), and June 18, 2024 (the undersigned).

The court notes, as does Nordstrom, that the Fulton County Superior Court originally ruled against Johnson and entered a judgment against her on June 7, 2015, over nine years ago. After Johnson filed multiple post-judgment motions in that court, including a motion to set aside the judgment and a motion for "default judgment," the Georgia trial court found that Johnson's motions were "completely frivolous and without merit" on February 23, 2017. Since then, Johnson has filed numerous collateral attacks on the Fulton County judgment in Georgia, San Mateo County, and here in Santa Clara County. In this county alone, Johnson has filed *at least six* motions to set aside the court's March 6, 2020 judgment and order finding against her based on collateral estoppel.

Johnson's sole argument in opposition to this motion is that she cannot be ordered to furnish a security under Code of Civil Procedure section 391.1, because a final judgment has already been entered in this case. While this is correct, Nordstrom has not requested the furnishing of a security; nor has it requested a "dismissal" of the case under section 391.1. Instead, it requests a prefiling order under section 391.7, "which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." (Code Civ. Proc., § 391.7, subd. (a).)

As noted above, the court finds that Johnson easily meets the definition of a vexatious litigant under section 391, subdivisions (b)(2) and (b)(3), and that a prefiling order is appropriate. The court notes that Nordstrom previously requested that Johnson be declared a vexatious litigant in San Mateo County, and Johnson avoided such a ruling by dismissing her case before a final decision by the San Mateo trial court. Although the ruling by the San Mateo court that Nordstrom's motion was "moot" was contrary to the case law and contrary to the entire purpose of the vexatious litigant statute—and has thereby created additional burdens on this court—this court will not make the same mistake of avoiding a ruling on the merits. (See *Pittman v. Beck Park Apartments Ltd*. (2018) 20 Cal.App.5th 1009, 1024-1025 ["Nor does the dismissal extinguish the court's interest in deterring and punishing the waste of judicial

resources. A contrary rule would allow a litigant to strategically escape a vexatious litigant finding altogether by dismissing a party or an action prior to a ruling on the vexatious litigant motion and then refiling his or her claims in a later proceeding."].)

The court finds that Johnson is a vexatious litigant. In addition, the court enters a prefiling order that prohibits Johnson "from filing a new litigation in the courts of this state in propria persona without first obtaining leave of the presiding [justice or judge]." (Code Civ. Proc., § 391.7, subd. (a).) Because a final judgment was entered long ago in this case, as Johnson herself acknowledges in her opposition brief, any new filings in this closed case will also count as a "new litigation."

IT IS SO ORDERED.

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