SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Farris Bryant, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: July 16, 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

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. 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. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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.

FOR COURT REPORTERS: The Court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If you want to have a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

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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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	17CV314386	Fora Financial West, LLC vs Faris Alsoukhelah	**Order of Examination (Faris A. Alsoukhelah aka Faris A. Alsouknelah).** No Proof of service on file. If there is no appearance, the matter will be ordered OFF CALENDAR.
LINE 2	21CV383107	Giuliani Construction and Restoration, Inc. vs Rancho Homeowners Association	**Demurrer**. This case has been reassigned.
LINE 3	21CV383107	Giuliani Construction and Restoration, Inc. vs Rancho Homeowners Association	**Motion to Withdraw as Attorney.** This case has been reassigned.
LINE 4	23CV424128	Laddi Jhuty vs Vikram Purbia et al	**Demurrer.** Scroll down to Lines 4 and 5 for Tentative Ruling.
LINE 5	23CV424128	Laddi Jhuty vs Vikram Purbia et al	**Motion to Strike**. Scroll down to Lines 4 and 5 for Tentative Ruling.
LINE 6	23CV426924	Anthony Colucci et al vs David Bettinger et al	**Demurrer and Motion to Strike**. Scroll down to Line 6 for Tentative Ruling.
LINE 7	23CV414579	Bahareh Olfatpour et al vs Subaru of America, Inc.	**Motion to Compel (Discovery)**. OFF CALENDAR. Notice of Settlement of Entire case filed July 5, 2024.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	23CV415947	James Fok et al vs Peter Wong et al	**Motion to Compel (Discovery—Form Interrogatories)**. Defendants Tung Kuen Lau and Peter Wong's motion to compel responses to form interrogatories (set one) from Plaintiff Mabel Fok and request for sanctions in the amount of $572. Defendants' form interrogatories (set one) were served on Plaintiff on February 29, 2024. Defendant wrote a meet and confer letter on April 23, 2024, to which no response was received. The motion to compel was filed and served on May 15, 2024, to Plaintiff's counsel's email address, eric@gruberlawgroup.com, the same email address listed by Plaintiff's counsel on the Complaint. No opposition to this motion was filed by Plaintiff. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Plaintiff should have served a response within 30 days of service of the form interrogatories (Code Civ. Proc., §2030.260 (a)). Moving parties meet their burden of proof. Good cause appearing, the Motion is GRANTED and sanctions of $300 are awarded to Defendants. (Code Civ. Proc., §§2030.290(c) and (c)). Plaintiff Mabel Fok shall serve verified, code-compliant responses to the form interrogatories and shall pay the sanctions awarded – all within 10 days of service of this order. Defendants shall prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	23CV415947	James Fok et al vs Peter Wong et al	**Motion to Compel (Discovery—Special Interrogatories)**. Defendants Tung Kuen Lau and Peter Wong's motion to compel responses to special interrogatories (set one) from Plaintiff Mabel Fok and request for sanctions in the amount of $572. Defendants' special interrogatories (set one) was served on Plaintiff on February 29, 2024. Defendant wrote a meet and confer letter on April 23, 2024, to which no response was received. The motion to compel was filed and served on May 15, 2024, to Plaintiff's counsel's email address, eric@gruberlawgroup.com, the same email address listed by Plaintiff's counsel on the Complaint. No opposition to this motion was filed by Plaintiff. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) There is also good cause to grant this motion. Plaintiff should have served a response within 30 days of service of the special interrogatories (Code Civ. Proc., §2030.260 (a)). Moving parties meet their burden of proof. Good cause appearing, the Motion is GRANTED and sanctions of $200 are awarded to Defendants. (Code Civ. Proc., §§2030.290(c) and (c)). Plaintiff Mabel Fok shall serve verified, code-compliant responses to the special interrogatories and shall pay the sanctions awarded – all within 10 days of service of this order. Defendants shall prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 10	20CV369379	Cathy Ettenger et al vs Vahe Tashjian et al	**Motion to Sever/Bifurcate Claims.** Plaintiff Cathy Ettenger's Motion to sever claims pursuant to Code of Civil Procedure § 1048(b), on the grounds that the automatic stay of this action as to defendant Dutchints Development, LLC does not apply to non-bankrupt defendant Vahe Tashjian, and that in furtherance of convenience and to avoid prejudice by way of California Code of Civil Procedure § 583.310, a separate trial should be ordered against non-bankrupt Defendant Tashjian. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendant has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 489.) Moving party meets her burden of proof. The Court finds bifurcation would be in the furtherance of justice and will allow this action to proceed against Defendant Vahe Tashjian despite Defendant Dutchints Development, LLC's bankruptcy filing and the automatic stay in effect against that corporate defendant. (*Global Fin. Group v. Precision Forging Dies, 2023 Cal. Super. LEXIS 75833*). Good cause appearing, the Motion is GRANTED. Moving party shall prepare a formal order after hearing.

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LAW AND MOTION TENTATIVE RULINGS

LINE 11	23CV423715	Marco Cabrales et al vs Ramiro Cabrales, Jr.	**Motion for Leave to Amend.** Plaintiffs Delena Cabrales and Marco Cabrales seek leave to amend their First Amended Complaint to add a cause of action for Cancellation of Recorded Instruments. The parties have not completed discovery, no trial date has been set and the mediation has not yet taken place. No opposition was filed. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendant has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 489.) "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading." (Code of Civil Procedure, section 473 subd. (a)(1).) Judicial policy favors the liberal exercise of discretion to permit amendment of the pleadings so as to resolve all disputed matters between the parties in the same lawsuit. The court's discretion is typically exercised liberally so as not to deprive a party of the right to assert a meritorious cause of action or a meritorious defense. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) Plaintiffs have adequately described the amendments they propose and have met their burden. The Court will exercise its discretion and will permit the amendment that Plaintiffs seek and GRANTS the motion. Plaintiffs shall file their Second Amended Complaint within 10 days of this Order. Counsel for Plaintiffs is instructed to prepare the formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 12	23CV425911	Joeanna DeFranco vs Target Corporation	**Motion to Vacate Default and Default Judgment**. Plaintiff Joeanna DeFranco brings this motion pursuant to Code Civ. Proc., §473 (b). No opposition to this motion was filed by Defendant. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Defendant has no meritorious arguments. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) Good cause appearing, the Court finds a plausible showing of mistake, inadvertence, and excusable neglect and GRANTS the motion (incorrect minute order, the difficulties encountered by Plaintiff's counsel appearing at the May 21, 2024 hearing, and the reasons provided in support of this motion). The minute order from the May 21, 2024 hearing incorrectly recites the tentative ruling – the tentative ruling, which was adopted, denied the motion *without* (and not *with*) prejudice. This case is REINSTATED. The default entered against Defendant Target Corporation on January 2, 2024, is VACATED. Defendant Target Corporation shall file a responsive pleading to the Complaint within 15 court days of the service of the order on this motion or on a date agreed upon by the parties. The Case Management Conference set for August 27, 2024 at 10 a.m. in Department 18b shall REMAIN AS SET. Moving party to prepare a formal order

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LAW AND MOTION TENTATIVE RULINGS

LINE 13	23CV426550	Bizheng Wang et al vs Doris Messineo et al	**Petition Compel Arbitration**. Defendants Doris Messineo and Messineo Doris Living Trust petition the Court to compel binding arbitration of those disputes set forth in the Petition on the grounds, *inter alia*, that Defendants and Plaintiffs executed a C.A.R. California Residential Purchase Agreement And Joint Escrow Instructions dated November 5, 2021 and initialed the arbitration clause contained in paragraph 22(B) of that purchase contract and Code Civ. Proc., §§ 1281 and 1281.2. The motion was served on May 29, 2024. No opposition was filed by Plaintiffs. Parties to appear. The Court would like counsel to address if any mediation has taken place pursuant to paragraph 22(A) of the purchase contract or if there has been any refusal to mediate. Further, only page 1 of the Declaration of David Hamerslough was filed – the Court requests that a full copy of the declaration be provided at the hearing (and filed).

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LAW AND MOTION TENTATIVE RULINGS

LINE 14	23cv428147	Dwayne Harris vs Ben Yadegar	**Motion to Set Aside.** Plaintiff's motion to set aside is DENIED. The order following Defendant's Demurrer to Plaintiff's First Amended Complaint, filed June 7, 2024, confirms that although Plaintiff's opposition to the Demurrer was filed late, the court *did* consider the late filed opposition on the merits. Plaintiff to prepare formal order.

Calendar Lines 4 and 5
Case Name: *Laddi Jhuty et al. v. Vikram Purbia et al.*
Case No.: 23CV424128

I. Factual and Legal Background[1]

Plaintiff Laddi Jhuty ("Plaintiff"), individually and derivatively on behalf of Tech Rabbit Inc. ("Tech Rabbit" or "the Corporation") dba Tech Firefly, brings this First Amended Complaint ("FAC") against Vikram Purbia ("Purbia"), Jonathan Yee ("Yee"), Shivani Choudhary ("Choudhary") (collectively, "Defendants"), and TSupport, LLC.

Tech Rabbit was founded by Plaintiff and then incorporated in the State of California on December 27, 2016. (FAC, ¶ 24.) Plaintiff funded Tech Rabbit with $305,000 in seed money. (*Ibid*.) Tech Rabbit had three directors: Plaintiff, Purbia, and Yee. (*Id*. at ¶ 26.)

Due to its growth, the Corporation decided to set up subsidiary companies in foreign countries to support operations in the United States. (FAC, ¶ 31.) Tech Rabbit's board tasked Purbia with setting up the subsidiary companies in India and Portugal, with the corporation being the 100% owner of the subsidiaries. (*Id*. at ¶ 32.) Instead, Purbia set the subsidiaries up with himself as the sole owner and took efforts to conceal his ownership by refusing to allow Plaintiff to conduct accountings and provide documents concerning the financial operations of the foreign entities. (*Id*. at ¶ 33.)

In or around 2018, Plaintiff, Purbia, and Yee decided that Purbia would travel to India to purchase property on behalf of the Corporation and in the Corporation's name. (FAC, ¶ 34.) In or around 2021, Plaintiff became aware that Purbia had purchased the property in his own name and never retitled the property correctly in the Corporation's name. (*Ibid*.) Plaintiff confronted Purbia about this but he refused to retitle the property correctly. (*Ibid*.)

On multiple occasions, beginning in 2021, Plaintiff requested that Purbia coordinate an accounting of the money being sent from the Corporation to various foreign accounts. (FAC, ¶ 35.) Purbia refused to do so. (*Ibid*.) Additionally, in 2021, Plaintiff learned that Purbia, with Yee's assistance, had taken more money than needed to cover employees' payroll from the Corporation without approval. (*Id*. at ¶¶ 37-38.) Plaintiff is informed and believes that in 2020 and 2021, Purbia stole between $200,000 and $500,000 from the Corporation with Yee's assistance. Further, Choudhary, Purbia's wife, wrongfully took at least $100,000 from the Corporation, on top of her salary between 2020-2022. (*Id*. at ¶ 41.)

In or around February 2022, Purbia threatened to move the Corporation's business unless his salary was increased to $1,000,000. (FAC, ¶ 52.) Purbia requested that the Corporation deposit the entire amount, untaxed, and that he would handle payment of payroll and corporate taxes at a later date. (*Id*. at ¶ 54.) Purbia continued to take salary and distributions without paying payroll or taxes. (*Id*. at ¶¶ 54-55, 60.)

In 2022 and 2023, Purbia caused approximately $18,000,000 of Tech Rabbit's funds to be transferred to accounts in foreign countries. (FAC, ¶¶ 63-69, 87.) On August 9, 2023,

[1] The FAC contains numerous factual allegations. For clarity, the Court includes the allegations most relevant to the instant demurrer.

Plaintiff transferred $500,000 from the Corporation's bank account to a different corporate account and thereafter, Purbia transferred that money out of the bank account. (*Id.* at ¶¶ 71, 74.) The FAC alleges Purbia wrongfully misappropriated corporate funds for personal use and using corporate funds to make personal payments. (*Id.* at ¶¶ 75, 77-79.)

On January 1, 2024, Plaintiff filed his FAC, asserting twenty causes of action:

Derivative Causes of Action:

1) Breach of fiduciary duty;
2) Aiding and abetting breach of fiduciary duty;
3) Unjust enrichment;
4) Corporate mismanagement and waste;
5) Abuse of control;
6) Intentional misrepresentation;
7) Negligent misrepresentation;
8) Declaratory relief;
9) Concealment;
10) Conversion;
11) Constructive fraud;
12) Violation of right to inspect corporate books and records;
13) Accounting;
14) Appointment of receiver and/or provisional director; and
15) Conversion;

Individual Causes of Action:

16) Breach of fiduciary duty;
17) Conversion;
18) Breach of contract;
19) Breach of implied covenant of good faith and fair dealing; and
20) Violation of right to inspect corporate books and records.

On March 15, 2024, defendants Purbia, Yee, and Choundhary filed a demurrer and motion to strike portions of the FAC. Plaintiff opposes both motions.

II. Demurrer

Defendants demur to the fifth, sixth, seventh, twelfth, and twentieth causes of action on the ground they fail to state facts sufficient to constitute a cause of action.

a. Legal Standard

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, 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. 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." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

b. Fifth Cause of Action – Abuse of Control

Defendants first argue that unpublished California authority indicates that there is no cause of action for abuse of control or corporate abuse. (Demurrer, p. 5:14-16.) Defendants continue that while the unpublished decisions cannot be cited, their reasoning should be relied on and, additionally, Defendants direct the Court to two federal court decisions. (*Id*. at p. 5:16-20, citing *In re Zoran Corp. Derivative Litig.* (N.D.Cal. 2007) 511 F.Supp.2d 986 (*Zoran*) and *Clark v. Lacy* (7th Cir. 2004) 376 F.3d 682 (*Clark*).)

As an initial matter, and as Plaintiff notes in opposition, "while federal authority may be regarded as persuasive, California courts are not bound by decisions of federal district courts and courts of appeals." (*People v. Uribe* (2011) 199 Cal.App.4th 836, 875.) In this instance, the Court does not find either case persuasive. First, neither case relies on California authority. Moreover, *Zoran* did not address the plaintiff's abuse of control claim because plaintiff did not appear to oppose defendant's motion as to that claim. (*Zoran*, *supra*, 511 F.Supp.2d at p. 1019.) The federal court additionally commented that claims such as constructive fraud, abuse of control, gross mismanagement, and recission "are often considered a repackaging of claims for breach of fiduciary duties instead of being a separate tort" citing to *Clark*. (*Ibid*.)

In *Clark*, the Seventh Circuit Court of Appeals addressed a claim for abuse of control in the context of "parallel actions" to determine if the cases were "substantially" the same. There, the plaintiff argued the district court abused its discretion by finding that two related actions (one filed in federal court and one filed in New York state court) were parallel. After reviewing the two complaints, the court agreed that "no meaningful distinction can be made between [the two] lawsuits." (*Clark*, *supra*, 376 F.3d at p. 686.) The plaintiff argued that it had additional claims including abuse of control that were not brought in the state lawsuit. The *Clark* Court determined that "Clark ha[d] not presented any authority that casts doubt on the likelihood that in resolving the fiduciary duty issue, the state litigation will dispose of all claims presented in this case. Just as the parallel nature of the actions cannot be destroyed by simply tacking on a few more defendants, neither can be dispelled by repackaging the same issue under different causes of action." (*Id.* at p. 686-687.)

As Plaintiff argues in opposition, neither of the federal court opinions cited by Defendants state that a cause of action for abuse of control is improper, duplicative, or unsustainable as a separate cause of action. (See Opposition, p. 7:15-17.) Plaintiff further contends that there are "dozens of cases in California in the last 10 years alone" which recognized an abuse of control cause of action in additional to a breach of fiduciary duty. (*Id.* at p. 7:19-27.) For example, Plaintiff cites *Dr. V Productions, Inc. v. Rey* (2021) 68 Cal.App.5th 793, 796 and *Beachcomber Management Crystal Cove, LLC v. Superior Court* (2017) 13 Cal.App.5th 1105, 1113, both of which recognize the plaintiffs' abuse of control claim, in addition to their breach of fiduciary duty claim.

Accordingly, the Court is not persuaded by Defendants' argument regarding abuse of control and the demurrer to the fifth cause of action is OVERRULED.

c. Sixth Cause of Action – Intentional Misrepresentation and Seventh Cause of Action – Negligent Misrepresentation

Defendants argue that Plaintiff's sixth and seventh causes of action are not pled with the requisite specificity.

To state a cause of action for intentional misrepresentation, Plaintiff must allege 1) a misrepresentation; 2) knowledge of falsity; 3) intent to induce reliance; 4) actual and justifiable reliance; and 5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) The elements of negligent misrepresentation are similar, but Plaintiff is not required to allege knowledge of falsity. (*Borman v. Brown* (2021) 59 Cal.App.5th 1048, 1060.)

Both intentional and negligent misrepresentation must be pled with specificity. (See *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 185; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*).) "The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made[.]" (*West, supra*, at p. 793.)

Defendants contend that the FAC's allegations that the representations were made "on or around" or "on or about" a certain set of years is not sufficiently particular and that allegations that representations were made in or about "2021 or 2022" is too great of a time span. (Demurrer, p. 7:6-11.) Additionally, they argue that the FAC is devoid of allegations regarding when the representations were made, to whom, how, where, or by what means. (*Id.* at p. 7:17-18.)

While the FAC contains numerous allegations, the Court is persuaded by Defendants' arguments that the sixth and seventh causes of action are not pled with the requisite particularity. For example, Plaintiff alleges three separate years that the misrepresentations could have taken place (2018, 2021, or 2022); he does not allege how the representations were made or by what means they were made, or where the representations were made. In opposition, Plaintiff asserts that the identification of individual who made the representation and a general time frame is sufficient to survive a demurrer (Opposition, p. 9:16-19, quoting *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384 (*Alfaro*)); however, the Court does not find that language in the cited case and further, *Alfaro* is not an affirmative misrepresentation cause, but a non-disclosure case. Moreover, Plaintiff's argument that less specificity is required where the defendant possesses the full information is not well taken given that Plaintiff alleges the misrepresentations were made directly to him. (Opposition, p. 10:3-9; FAC, ¶¶ 128-129, 132.)

Accordingly, the demurrer to the sixth and seventh causes of action is SUSTAINED with 15 days leave to amend. (See *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 [leave to amend is liberally allowed as a matter of fairness, unless the pleading shows on its face that it is incapable of amendment].)

d. Twelfth Cause of Action and Twentieth Cause of Action – Violation of Right to Inspect Corporate Books and Records

Defendants assert that the twelfth and twentieth causes of action are statutory and must be pled with specificity. (See e.g., *Covenant Care, Inc. v. Superior Court* (2004) 32

Cal.4th 771, 790 ["general rule that statutory causes of action must be pleaded with particularity"].)

The twelfth cause of action relies on California Corporations Code section 1602, which states, in part:

> Every director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director and also of its subsidiary corporations, domestic or foreign. Such inspection by a director may be made in person or by agent or attorney and the right of inspection includes the right to copy and make extracts. (Corp. Code, § 1602.)

Defendants argue that the FAC does not allege that Plaintiff is currently the director of the corporation and that he fails to allege with any specificity the elements of the claim. (Demurrer, p. 8:16-23.) As to Defendants' first argument, Paragraph 26 of the FAC states: "At all times relevant herein, the three directors of the Corporation were Plaintiff, Defendant PURBIA, and Defendant YEE." (FAC, ¶ 26.) Defendants appear to acknowledge this allegation in their own restatement of the facts. (Demurrer, p. 3:2.) Thus, the FAC sufficiently alleges Plaintiff was a director of the Corporation at the relevant time periods. As to Defendants' second argument that the FAC lacks the requisite particularity because it does not allege which books, records, or documents Plaintiff requested, the Court is not persuaded.

As Plaintiff notes in opposition, the language of Corporations Code section 1602 states that every director may inspect and copy "***all*** books, records and documents ***of every kind*** . . ." (Corp. Code, § 1602 [emphasis added].) Thus, the Court may infer that Plaintiff intended to inspect *all* books, records, and documents. (See *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1111-1112 [in reviewing sufficiency of complaint against general demurrer, court treats as true "not only the complaint's material factual allegations, but also facts that may be implied or inferred from those expressly alleged"].) Moreover, the FAC alleges on several occasions that Plaintiff requested to inspect specific documents, including documents concerning financial operations of the foreign entities. (FAC, ¶¶ 33, 186-190.) The Court finds the allegations of the twelfth cause of action to be sufficient.

The twentieth cause of action relies on California Corporations Code section 1601, subd. (a)(1) which states:

> The accounting books, records, and minutes of proceedings of the shareholders and the board and committees of the board of any domestic corporation, and of any foreign corporation keeping any records in this state or having its principal office in California, or a true and accurate copy thereof if the original has been lost, destroyed, or is not normally physically located within this state shall be open to inspection at the corporation's principal office in California, or if none, at the physical location for the corporation's registered agent for service of process in this state, upon the written demand on the corporation of any shareholder or holder of a voting trust certificate at

> any reasonable time during usual business hours, for a purpose reasonably related to the holder's interests as a shareholder or as the holder of a voting trust certificate. (Corp Code., § 1601, subd. (a)(1).)

Defendants contend that the twentieth cause of action is likewise not pled with sufficient particularity because Plaintiff does not state what books, records, or other documents Plaintiff requested to inspect. Similar to the above, the statute specifies the documents that Plaintiff may inspect. Further, reviewing the allegations of the FAC in its entirety, Plaintiff alleges that on several occasions he requested to review the relevant records and his request was refused. (FAC, ¶¶ 33, 234-236.) These allegations are sufficient to survive a demurrer.

Based on the foregoing, the demurrer to the twelfth and twentieth causes of action is OVERRULED.

III. Conclusion

The demurrer to the fifth, twelfth, and twentieth causes of action is OVERRULED. The demurrer to the sixth and seventh causes of action is SUSTAINED with 15 days leave to amend.

IV. Motion to Strike

Defendants move to strike the following from the FAC:

1) Paragraph 81, p. 18:13-26 [paragraphs quoting and citing case law]
2) Portions of Paragraphs 136, 170, 183, 234, 242 ["attorneys' fees"]
3) Paragraph 193, p. 33:25-28 [request for attorneys' fees based on Corp. Code, § 1604]
4) Paragraph 4, Prayer for Relief, p. 41:12 [special and/or non-economic damages]
5) Paragraph 6, Prayer for Relief, p. 41:15 [reasonably attorneys' fees]
6) Paragraph 8, Prayer for Relief, p. 41:17 [penalties available under applicable law]

a. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) Courts do not read allegations in isolation. (*Ibid.*)

b. Analysis

i. Item No. 1 – Paragraph 81

Defendants move to strike the entirety of paragraph 81 which contains case law related to fiduciary duties. The Court declines to strike Paragraph 81, as the paragraph is relevant to Plaintiff's theory of the case, including his breach of fiduciary duty cause of

action. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 ["use of the motion to strike should be cautious and sparing. We have no intention of creating a procedural 'line item veto' for the civil defendant"].)

ii. Item Nos. 2 & 3- Portions of Paragraphs 136, 170, 183, 193, 234, and 242[2]

Defendants move to strike the language regarding attorney's fees from Paragraphs 136, 170, 183, 193, 234, and 242 on the ground that attorney's fees are not available for any of Plaintiff's claims other than the twentieth cause of action. In opposition, Plaintiff argues that he is entitled to claim attorney's fees and costs under Code of Civil Procedure section 128.5, given the misconduct and bad faith of Defendants. (Opposition, pp. 14:26:15:6.) Section 128.5 provides that a trial court may order a party to pay attorney's fees incurred by another party as a result of actions or tactics made in bad faith or that are frivolous. (Code Civ. Proc., § 128.5, subd. (a).) The Court finds this argument persuasive and declines to strike Item Nos. 2-3.

iii. Item No. 4 - Paragraph 4, Prayer for Relief, p. 41:12

Defendants move to strike the prayer "[f]or special and/or non-economic damages according to proof" in Paragraph 4 of the Prayer for Relief. They argue that Plaintiff sets forth no factual allegations to support a claim for special or noneconomic damages. In opposition, Plaintiff argues special/non-economic damages are recoverable where they are reasonably foreseeable result of Defendants' misconduct and breach.

"Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). Special damages 'will not be presumed from the mere breach' but represent loss that 'occurred by reason of injuries following from' the breach. Special damages are among the losses that are foreseeable and proximately caused by the breach of a contract." (*Lewis Jorge Construction Mgmt., Inc. v. Pomona Unified School District* (2004) 34 Cal. 4th 960, 968-969 [internal citations omitted].)

Plaintiff asserts that any number of special damages to the Corporation are reasonably foreseeable from Defendants' misconduct. Specifically, the allegations that Purbia's misrepresentations about failing to pay taxes on payroll funds and other distributions would cause the Corporation to incur substantial expenses, penalties, or fines. (Opposition, p. 13:18-23, citing FAC, ¶¶ 52-60.) The FAC alleges that the damages were communicated to Purbia, or at the very least, Purbia should have been aware of the damages given Plaintiff's communications with him. Accordingly, the Court declines to strike Item No. 4.

iv. Item No. 5 - Paragraph 6, Prayer for Relief, p. 41:15

Defendants move to strike a portion of Paragraph 6 of the Prayer for Relief, which states: ". . . reasonable attorney's fees incurred herein." Given that Plaintiff is entitled to attorney's fees for his twentieth cause of action under Corporations Code section 1604, the Court declines to strike Item No. 5. (See Corp. Code, § 1604 ["In any action or

[2] The numbering of the FAC includes duplicate paragraph numbering in the nineteenth and twentieth causes of action (both include paragraphs numbered 236-242). Attorney's fees language in the twentieth cause of action does not appear to be the subject of Item Nos. 2 or 3.

proceeding under Section 1600 or Section 1601, if the court finds the failure of the corporation to comply with a proper demand thereunder was without justification, the court may award an amount sufficient to reimburse the shareholder or holder of a voting trust certificate for the reasonable expenses incurred by such holder, including attorneys' fees, in connection with such action or proceeding."].)

v. Item No. 6 - Paragraph 8, Prayer for Relief, p. 41:17

Finally, Defendants move to strike Paragraph 8 of the Prayer for Relief "[f]or penalties available under applicable law[.]" Defendants contend that Plaintiff is not entitled to penalties because he does not set forth what penalties he is seeking or any statutory basis for such penalties. Plaintiff fails to address Item No. 6 in his opposition. Accordingly, the Court will treat the argument as meritorious. (See *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal. App. 4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].) The motion to strike Item No. 6 is granted with 15 days leave to amend.

V. Conclusion

The motion to strike Item Nos. 1-5 is DENIED. The motion to strike Item No. 6 is GRANTED with 15 days leave to amend.

The Court will prepare the final order.

Calendar Line 6
Case Name: *Robert M. Branch, et al. v. SpaceLink Corporation SV, et al.*
Case No.: 23CV426924

Before the court is defendant SG Service Co. LLC's demurrer to plaintiffs' first amended complaint and motion to strike portions of plaintiffs' first amended complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

Plaintiffs Robert Branch, Michael Brooks, Anthony Colucci, Robert Conrad, Alyssa Domres, Venugopal Eyyunni, Sara Fanous, Behzad Koosha, Thomas Leisgang, Erik Levine, Jessica Fulk, Lenny Low, Laurie Marzi-Diba, Gabriel McDonald, Craig Moll, David Nemeth, Wendy Newman, Nicholas Orsay, Himanshu Pandey, David Pattillo, Jeanette Quinlan, Chitta Ratana, Phillip Robinson, Larry Rubin, Cameron Sanders, Christopher Schroll, James Schwenke, Christopher Silva, Rabindra Singh, and James Spicer (collectively, "Plaintiffs") were employees of defendant SpaceLink Corporation SV ("SpaceLink"), all of whom had employment agreements with guaranteed salaries, accrued performance bonuses, and severance packages in the event of termination. (First Amended Complaint ("FAC"), ¶¶1 and 22.)

On November 15, 2023, defendant SpaceLink shuttered its operations and terminated each Plaintiffs' employment effective immediately. (*Id.*; see also FAC, ¶17.) Defendant SpaceLink failed to pay any of the Plaintiffs the severance payment and other benefits and failed to provide Plaintiffs due notice of their termination. (*Id.*)

For months leading up to Plaintiffs' termination, defendant SpaceLink and its parent company, defendant Electro Optic Systems Pty. Ltd. ("EOS") knew that defendant SpaceLink lacked the funds to pay severance benefits and that defendant EOS had no intention of paying those and other benefits to Plaintiffs. (FAC, ¶2.) Members of the Board of Directors of defendants SpaceLink and EOS deliberately induced Plaintiffs not to leave defendant SpaceLink by withholding the fact that they had no intention to pay those benefits. (*Id.*) Had Plaintiffs known they would be terminated without any severance benefits, Plaintiffs would have looked for employment elsewhere months before termination. (*Id.*)

On November 15, 2022, defendant EOS publicly announced that "an orderly wind-up process [of SpaceLink's business] has been initiated in the United States by way of an

Assignment for the Benefit of Creditors (ABC). Under the ABC process, an Assignee will control SpaceLink and act in the interests of SpaceLink's creditors. EOS expects that the Assignee will manage SpaceLink while working to liquidate SpaceLink's assets and using the proceeds to pay creditors." (FAC, ¶33.) Defendant SpaceLink purportedly made an assignment for the benefit of creditors under California state law, whereby defendant SG Service Co. LLC ("SG") was designated the assignee for the purpose of liquidating all remaining SpaceLink assets and distributing them to SpaceLink's creditors. (FAC, ¶¶5, 10, and 35.)

On November 27, 2023, Plaintiffs filed a complaint against defendant SpaceLink and related entities, officers, and directors.

On February 20, 2024, defendant SG filed a demurrer to the Plaintiffs' complaint. Prior to a hearing on defendant SG's demurrer, Plaintiffs filed the operative FAC on April 5, 2024. The FAC asserts the following causes of action:

(1) Breach of Contract

(2) Breach of the Duty of Good Faith and Fair Dealing

(3) Fraudulent Concealment/ Deceit

(4) Violation of Federal WARN Act, 29 U.S.C. § 2102 et seq.

(5) Violation of California Labor Code § 1400 et seq.

(6) Breach of Fiduciary Duty

On May 6, 2024, defendant SG filed the motion now before the court, a demurrer and motion to strike portions of Plaintiffs' FAC.

II. Defendant SG's demurrer to the Plaintiffs' FAC.

A. Defendant SG's demurrer to the third cause of action [fraudulent concealment/ deceit] of Plaintiffs' FAC is SUSTAINED.

The required elements for fraudulent concealment are (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the

concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact.

(*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606.)

As a general rule, each element in a fraud cause of action must be pleaded with specificity. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 645; *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) The court in *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 stated that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' A plaintiff's burden in asserting a claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written."

Defendant SG initially demurs to Plaintiffs' third cause of action for fraudulent concealment on the basis that Plaintiffs have not alleged fraud against defendant SG with the requisite specificity instead referring to the multiple defendants as a group without differentiation. Defendant SG also argues that there are no allegations to support a duty to disclose owed by defendant SG. Nor are there allegations that defendant SG even knew of the existence or materiality of the concealed matters.

In opposition, Plaintiffs explain the reason the third cause of action lacks specificity as against defendant SG is because SG's liability for fraudulent concealment is not direct. Instead, Plaintiffs assert SG's liability for fraudulent concealment is based on its alleged role as a conspirator and/or aider and abettor.

In *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510 – 511, the court wrote, "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." "The elements of a civil conspiracy are (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting." (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1048; see also CACI, No. 3600.)

"The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective." (*Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1328.) "Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. [Citation.] They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. [Citation.] It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree—expressly or tacitly—to achieve it. Unless there is such a meeting of the minds, 'the independent acts of two or more wrongdoers do not amount to a conspiracy.'" (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333.)

"Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574; see also *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879; see also *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325 – 1326; see also *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 653–654; see also CACI, No. 3610.) "[W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749, superseded by statute on other grounds.)

Plaintiffs assert that there are sufficient allegations to support liability against SG under either a conspiracy theory or an aiding and abetting theory. Specifically, Plaintiffs assert, "As early as August 2022, (FAC ¶ 30), SG agreed to act as the assignee for the distribution of SpaceLink's assets to its creditors … SG specifically assisted in this endeavor [of concealment]: the letter ultimately refusing to pay severance came directly from SG, and it was sent before any discussion with or specific claim by any Plaintiff for that severance—making

clear that SG had discussed, negotiated, and conspired with SpaceLink to preemptively reach that conclusion. Likewise, SG specifically informed Bettinger that he should not provide anyone with advanced notice of the intended assignment."[3] The court disagrees with Plaintiffs' assertion that the referenced allegations lead, directly or by inference, to the conclusion that SG had conspired with SpaceLink let alone conspire to commit fraud. The referenced allegations do not support liability under an aiding and abetting theory either.

Accordingly, defendant SG's demurrer to the third cause of action in Plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for fraudulent concealment is SUSTAINED with 10 days' leave to amend. [The court declines to address defendant SG's additional arguments (misjoinder/ economic loss rule) except to say that the court does not find them to be persuasive.]

B. Defendant SG's demurrer to the sixth cause of action [breach of fiduciary duty] of Plaintiffs' FAC is OVERRULED..

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432; see also CACI, No. 4100.) There is apparently no dispute that an "assignee for the benefit of [] creditors, does owe a fiduciary duty to the creditors … and [] its role is akin to that of a trustee or administrator of an estate who owes fiduciary duties to the estate's beneficiaries." (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 825.)

Defendant SG nevertheless demurs on the basis that Plaintiffs "failed to plead in the FAC that they actually filed timely, sworn Proofs of Claim in the SpaceLink ABC." Defendant SG does not cite any legal authority to support an assertion that a creditor lacks standing to assert breach of fiduciary duty against an assignee if they fail to file a timely and sworn Proof of Claim. The court finds Plaintiffs' authority more persuasive and that the fiduciary duty owed by an assignee arises immediately upon assignment, not only when a creditor files a claim.

Likewise, the court is not persuaded by defendant SG's assertion that a breach of fiduciary claim is premature since SG has not yet completed its administration of the

[3] See page 9, line 22 to page 10, line 4 of Plaintiffs' Opposition, etc.

SpaceLink estate. As Plaintiffs point out in opposition, SG's argument is dependent upon the assertion of an extrinsic fact not found in the FAC, i.e., that administration of the SpaceLink estate is not yet completed. A "demurrer tests the pleading alone and not the evidence or other extrinsic matters which do not appear on the face of the pleading or cannot be properly inferred from the factual allegations of the complaint." (*Executive Landscape Corp. v. San Vicente Country Villas IV Assn.* (1983) 145 Cal.App.3d 496, 499.)

Accordingly, defendant SG's demurrer to the sixth cause of action in Plaintiffs' FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of fiduciary duty is OVERRULED.

III. Defendant SG's motion to strike portions of Plaintiffs' FAC.

A. Attorney's fees.

"Under California law, 'each party to a lawsuit must pay its own attorney fees unless a contract or statute or other law authorizes a fee award.'" (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237, 149 Cal.Rptr.3d 440; see Code Civ. Proc., § 1021.) Thus, unless specifically provided by statute or agreement, attorney fees are not recoverable." (*K.I. v. Wagner* (2014) 225 Cal.App.4th 1412, 1420–1421.)

Defendant SG moves to strike Plaintiffs' prayer for attorney's fees as Plaintiffs have not alleged either a contractual or statutory basis for the recovery of attorney's fees. In opposition, Plaintiffs explain they are not seeking attorney's fees in connection with the claims being asserted against defendant SG. The prayer for attorney's fees is, according to Plaintiffs, directed at the other defendants on the other causes of action.

Based upon Plaintiffs' assertion that the prayer for attorney's fees is not directed at defendant SG, defendant SG's motion to strike Plaintiffs' prayer for attorney's fees is DENIED.

B. Punitive damages.

Defendant SG also moves to strike Plaintiffs' allegations concerning and prayer for punitive damages. In *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 26 (*Searle*), the court wrote, "In California the award of damages by way of example or

punishment is controlled by Civil Code section 3294, which authorizes that kind of award against a tortfeasor who has been guilty of 'oppression, fraud or malice, express or implied.'"

Defendant SG argues here that since Plaintiffs have not sufficiently alleged fraud (as discussed above), Plaintiffs' punitive damage allegations and prayer should be stricken. Plaintiffs, on the other hand, argue in opposition that they have adequately alleged defendant SG's liability for fraud under either a conspiracy or aiding and abetting theory.

In light of the court's ruling above, defendant SG's motion to strike Plaintiffs' allegations concerning and prayer for punitive damages is GRANTED with 10 days' leave to amend.

The court will prepare the formal order.