SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

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"Every case is important" . . . . . "No case is more important than any other."—United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Thursday, 28 September 2023
TIME: 9:00 A.M.

Please note that for the indefinite future, all hearings will be conducted remotely as the Old Courthouse will be closed. This Department prefers that litigants use Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
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Meeting ID: 961 4442 7712

One tap mobile
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APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if

any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	21CV380952	JPMorgan Chase Bank, N.A. vs Viet Le, Sr.	**Order of Examination.** There appears to be an appropriate proof of service in Odyssey. Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM via the Zoom virtual platform. The appropriate oath will be administered by the Court and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely. NO FORMAL TENTATIVE RULING.
LINE 2	22CV398037	NBT Bank vs Zulma Salazar	**Order of Examination.** There is not appear to be an appropriate proof of service in Odyssey. Should the matter be continued? Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM via the Zoom virtual platform. The appropriate oath will be administered by the Court and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 3	22CV406652	Sean Axani; Jerry Chang; Mentor NYC, LLC; Waterdrip Capital Co.: Susan Zhou vs Frederick Hsu; Edward W. Brennan; Mobile Gaming Technologies, Inc.;Opsjet LLC; Opsjet Services, LLC; Michael P. Reaves.	Moving Defendants' demurrer to the fourth cause of action of 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 common law fraudulent conveyance is SUSTAINED with 10 days' leave to amend. Moving Defendants' demurrer to Plaintiff's FAC is otherwise OVERRULED. To the extent defendants Reaves and Brennan have joined in Moving Defendants' demurrer to Plaintiffs' SAC, defendants Reaves and Brennan's demurrer to Plaintiffs' SAC is SUSTAINED as to the fourth cause of action, but otherwise OVERRULED. SEE ATTACHED TENTATIVE RULING.
LINE 4	22CV406652	Sean Axani; Jerry Chang; Mentor NYC, LLC; Waterdrip Capital Co.: Susan Zhou vs Frederick Hsu; Edward W. Brennan; Mobile Gaming Technologies, Inc.;Opsjet LLC; Opsjet Services, LLC; Michael P. Reaves.	**Joinder by Defendants Michael Reaves and Edward Brennan in Demurrer of Defendants Frederick W Hsu, Mobile Gaming Technologies Inc, Opsjet LLC, and Opsjet Services LLC's Notice Of Demurrer To Plaintiffs' AMENDED Complaint.** In general, it is common practice for attorneys to join in another party's motion by simply filing a pleading captioned "Joinder in Motion of … for …," stating that the joining party adopts the requests and the points and authorities contained in the joined motion. (Weil & Brown, Civil Procedure Before Trial, Law & Motion (2019) § 9:27.) When serving a notice of joinder, the safest course for the party is to file and serve its own notice of motion asking for relief specific to the client. The joinder can incorporate the evidence and points and authorities filed by the first moving party. A joinder may not be in order if there are different facts or authorities, or if the relief sought by the moving party would not, on its own terms, benefit the client. (Weil & Brown, ***Civil Procedure before Trial***, Law & Motion (2019) § 9:27.2.) In determining whether or not a joinder in motion may or may not be sufficient to place a party before the court in connection with affirmative relief of another party, the court will examine the nature of the claim. (***Barack v. Quisenberry Law Firm*** (2006) 135 Cal.App.4th 654, 693.) In this matter, plaintiffs did not file opposition and the notice of joinder appears in proper form. The request for joinder is GRANTED. NO FORMAL TENTATIVE RULING.
LINE 5	22CV406652	Sean Axani; Jerry Chang; Mentor NYC, LLC; Waterdrip Capital Co.: Susan Zhou vs Frederick Hsu; Edward W. Brennan; Mobile Gaming Technologies, Inc.;Opsjet LLC; Opsjet Services, LLC; Michael P. Reaves.	**Case Management Conference**. The case will be set for a further Case Management Conference on 12 March 2024 at 10:00 AM in Department 20. The parties should be well underway with discovery and discuss alternate dispute resolution.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 6	20CV371776	April Mallord vs M Asian Fusion; Avalera, Inc.; Intuit, Inc.; Ashwini Kumar; M Events LLC;	**Motion of Defendant Avalera For Summary Judgment.** Defendant Avalara's motion for summary judgment is GRANTED. SEE ATTACHED TENTATIVE RULING.
LINE 7	20CV371776	April Mallord vs M Asian Fusion et al	**Motion of Defendant Intuit For Summary Judgment.** Defendant Intuit's motion for summary judgment is GRANTED. SEE LINE #6.
LINE 8	22CV403834	American Express National Bank vs Myong Jang	**Motion of Plaintiff for Summary Judgment.** No opposition has been filed. The motion is in good order and is GRANTED. Plaintiff is to prepare an appropriate Judgment and submit it to this Department via the e-filing queue for execution. SEE ATTACHED TENTATIVE RULING.
LINE 9	20CV38593	Terri Le; Anh Le; Jason Le v. Kim Chung; Hong Dat Investment	**Motion of Plaintiffs/Cross-Defendants to Compel Defendants to Provide Further Responses To Special Interrogatories.** According to plaintiffs' reply papers, all issues are resolved except for Special Interrogatories - Set Two, Hong Dat Investment, LLC, interrogatory numbers 16 and 17 and Special Interrogatories, Set Four, Kim Chung interrogatory numbers 33 and 34. The declaration of counsel for defendants has been reviewed and should remain under seal. The motion is GRANTED. These defendants are to provide code-compliant responses within 10 days of the filing and service of this Order. NO FORMAL TENTATIVE RULING.
LINE 10	20CV372277	John Doe by and through his guardian ad litem, Violet Nishimwe vs San Jose Unified School District; Saratoga Springs Picnic & Campgrounds, Inc. and related cross-complaint.	**Motion of Defendant Saratoga Springs Picnic & Campgrounds, Inc. for an Order to Deem the Truth of Matters in Request for Admissions (Set One) to Be Admitted/Conclusively Established and for Monetary Sanctions.** A Notice of Settlement Of the Entire Case Was Filed on 20 September 2023. The settlement agreement conditions dismissal of this matter on the satisfactory completion of specified terms that are not to be performed within 45 days of the date of the settlement. A request for dismissal will be filed no later than 30 December 2023. The motions set for today and all future dates will be taken OFF CALENDAR WITHOUT PREJUDICE.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 11	20CV372277	John Doe by and through his guardian ad litem, Violet Nishimwe vs San Jose Unified School District; Saratoga Springs Picnic & Campgrounds, Inc. and related cross-complaint.	**Motions Of Saratoga Springs Picnic & Campgrounds, Inc.to Compel San Jose Unified School District to Respond to Form Interrogatories (Set One) and Special Interrogatories, (Set Two) and for Monetary Sanctions.** SEE LINE #10.
LINE 12	20CV372277	John Doe by and through his guardian ad litem, Violet Nishimwe vs San Jose Unified School District; Saratoga Springs Picnic & Campgrounds, Inc. and related cross-complaint.	**Motions Of Saratoga Springs Picnic & Campgrounds, Inc.to Compel San Jose Unified School District to Respond to Request for Production of Documents (set one) and for Monetary Sanctions.** SEE LINE #10.
LINE 13	22CV402869	Robert Close vs State Farm Mutual Automobile Insurance Company.	**Motion of Petitioner to Compel Respondent to Provide Further Responses to Plaintiff's Discovery Requests and for Monetary Sanctions.** NO TENTATIVE RULING.
LINE 14			SEE ATTACHED TENTATIVE RULING.
LINE 15			SEE ATTACHED TENTATIVE RULING.
LINE 16			SEE ATTACHED TENTATIVE RULING.
LINE 17			SEE ATTACHED TENTATIVE RULING.
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
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LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

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Calendar Line 2

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Calendar Line 3

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 22CV406 652 **Sean Axani, et al. v. Frederick W. Hsu, et al.**

DATE: 28 September 2023 **TIME: 9:00 am** **LINE NUMBER: 3 – 4**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on the 27 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Orders On:

(1) Defendants Frederick W. Hsu, Mobile Gaming Technologies, Inc., Opsjet LLC, and Opsjet Services LLC's Demurrer To Plaintiffs' Amended Complaint; and

(2) Defendants Michael P. Reaves And Edward W. Brennan's Joinder In Demurrer.

I. Statement of Facts.

In 2018, defendant Mobile Gaming Technologies, Inc. ("MGT") and its wholly-owned subsidiary, Cashbet Alderney Limited, Inc., were in the online gambling business. (First Amended Complaint ("FAC"), ¶25.) MGT operated online gambling websites where players could place wagers and win money through online games. (FAC, ¶28.)

Defendant MGT's chairman and founder, defendant Frederick W. Hsu ("Hsu"), was a wealthy venture capitalist who boasted to others about having made hundreds of millions of dollars through his prior business ventures. (FAC, ¶¶14 and 26.) Defendant Hsu touted "monetization" as a principal business skill. (FAC, ¶27.)

Defendant Hsu and defendant Michael P. Reaves ("Reaves"), the CEO of defendant MGT and a member of defendant MGT's Board of Directors, raised money for defendant MGT by selling Cashbet Coins ("CBCs") to the public through an initial coin offering ("ICO"). (FAC, ¶¶1, 15 and 29.)

Defendant MGT promoted CBCs as a way for gamblers around the globe to wager and win cryptocurrency at online gambling sites maintained by defendant MGT and other companies. (FAC, ¶30.) In their sales pitches, defendants claimed CBCs were investments that would increase in value as demand for the tokens rose. (FAC, ¶31.) Defendants told prospective buyers that CBCs would be traded

on multiple cryptocurrency exchanges and would be supported by "market makers" to ensure a high trading value. (FAC, ¶32.)

In addition to selling CBCs to the general public, defendants Hsu, Reaves, and MGT sold larger blocks of CBCs through private placements ("Private Placements") to buyers, including plaintiffs Sean Axani ("Axani"), Jerry Chang ("Chang"), Mentor NYC LLC ("Mentor"), Waterdrip Capital Co. Ltd. ("Waterdrip"), and Susan Zhou ("Zhou") (collectively, "Plaintiffs"). (FAC, ¶33.)

To maximize their profits on Private Placements, defendants Hsu, Reaves, and MGT knowingly made a series of false statements to Plaintiffs including the following: (a) MGT was a profitable company; (b) MGT had millions of players for its online gambling businesses; (c) Lottery.com had committed to accepting CBCs for its billion dollar lotteries based on a partnership with MGT; and (d) MGT had raised more than $40 million in the ICO. (FAC, ¶34.)

As part of their scheme to sell CBC at inflated prices, defendants Hsu, Reaves, and MGT knowingly made false statements to each of the Plaintiffs. (FAC, ¶¶35 – 95.) In reliance thereon, each of the Plaintiffs paid cash and/or Ethereum to MTG to buy CBCs. (*Id.*)

After each of the Plaintiffs purchased CBCs, the tokens suffered a precipitous drop in value. (FAC, ¶96.) By the fall of 2018, CBCs were virtually worthless, trading only for a penny or two. (FAC, ¶97.) In 2022, CBCs have continued to trade for less than a cent. (FAC, ¶98.)

In September 2018, defendant MGT's board appointed defendant Edward W. Brennan ("Brennan") to replace defendant Reaves. (FAC, ¶99.) Defendant Brennan became MGT's president. (FAC, ¶100.) Defendant Brennan knew MGT had made knowingly false statements to sell CBCs. (FAC, ¶101.) As MGT's president, defendant Brennan actively concealed the fraudulent representations. (FAC, ¶¶102 – 109.)

In January 2019, defendant Brennan continued to hide the fact that MGT never had any contractual relationship with Lottery.com by falsely stating, "[w]e are partnering with some of the largest gaming companies in the world." (FAC, ¶110.)

In August 2020, defendant Brennan misled Plaintiffs in connection with a scheme by him and defendant Hsu to wrongfully seize control of MGT's trademark rights. (FAC, ¶112.) Hsu had defendants Opsjet LLC and Opsjet Services LLC ("Opsjet Companies"), companies formed and controlled by defendant Hsu, register for a "Casino Betting Coin" trademark. (FAC, ¶¶6, 14, and 113.) Defendants Brennan and Hsu changed the name of MGT's tokens from "Cashbet Coins" to "Casino Betting Coins." (FAC, ¶114.)

To prevent Plaintiffs from knowing the actual reason for the change, defendant Brennan deceitfully informed Plaintiffs on 4 August 2020 of the name change explaining "we felt the new name better reflected the opportunities which lay ahead for CBC." (FAC, ¶¶115 and 130.) By 21 August 2020, the Opsjet Companies had filed for the "Casino Betting Coin" trademark. (FAC, ¶131.)

Defendants Hsu, Brennan and other members of MGT's senior management had obtained millions of CBCs in connection with the ICO. (FAC, ¶119.) After the ICO, CBCs had no utility because they could not be used for online gambling websites maintained by MGT or any other company. (FAC, ¶120.) As a result, the CBC trading price collapsed and CBCs traded on cryptocurrency exchanges for a penny or less. (FAC, ¶121.)

In March 2020, defendants Hsu and Brennan surrendered MGT's remaining assets (CBCs held in treasury and underlying blockchain technologies) to Novomatic in exchange for Novomatic integrating CBCs into its technical systems so CBCs could be used for gambling at hundreds of Novomatic online gaming websites. (FAC, ¶¶122 – 124.)

Afterwards, defendants Hsu and Brennan immediately put MGT into bankruptcy thereby preventing defrauded CBC investors such as Plaintiffs from collecting damages against MGT. (FAC, ¶¶125 – 126.) Through the Opsjet Companies, defendants Hsu and Brennan were able to divert the economic benefits of the Cashbet Coin trademark from the bankrupt MGT to themselves. (FAC, ¶132.)

In April or May 2022, each of the Plaintiffs learned for the first time about an arbitration commenced by a group of six CBC purchasers ("Claimants") against Hsu, Reaves, MGT, and two other respondents in 2020 resulting in an arbitration award in favor of those Claimants in December 2021. (FAC, ¶¶136 – 171.)

On 31 October 2022, Plaintiffs commenced this action by filing a complaint against defendants Hsu, Reaves, Brennan, MGT and the Opsjet Companies.

On 18 January 2023, defendants filed a demurrer to the Plaintiffs' complaint.

On 28 April 2023[1], Plaintiffs filed the operative FAC asserting the following causes of action:

(1) Intentional Misrepresentation [against Hsu, Reaves, and MGT]

(2) Intentional Fraudulent Transfers [against Hsu, Brennan, MGT, and the Opsjet Companies]

(3) Constructive Fraudulent Transfers [against Hsu, Brennan, MGT, and the Opsjet Companies]

(4) Common Law Fraudulent Conveyances [against Hsu, Brennan, MGT, and the Opsjet Companies]

(5) Civil Conspiracy [against Hsu, Brennan, MGT, and the Opsjet Companies]

On 13 June 2023, defendants Hsu, MGT, and the Opsjet Companies ("Moving Defendants") filed the motion now before the court, a demurrer to Plaintiffs' complaint.

Also on 13 June 2023, defendants Reaves and Brennan filed a joinder in the Moving Defendants' demurrer.

II. Analysis.

A. Moving Defendants' demurrer to Plaintiff's FAC.

1. Request for judicial notice.

In support of their demurrer, the Moving Defendants request judicial notice of (1) a 12 December 2018 complaint filed against defendants MGT, Hsu, Reaves, and George Weinberg in *Nirvana Capital Limited et al. v. Mobile Gaming Technologies, Inc., et al.*, case number 4:18-cv-07483-PJH, United States District Court, Northern District of California ("Strong Complaint"); (2) online news articles; and (3) CBC's price history and historical data.

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

Moving Defendants' request for judicial notice in support of demurrer to Plaintiffs' FAC is DENIED as unnecessary. (See *Duarte v. Pacific Specialty Insurance Company* (2017) 13 Cal.App.5th 45, 51, fn. 6—denying request where judicial notice is not necessary, helpful or relevant.)

2. Moving Defendants' demurrer to the first cause of action [intentional misrepresentation] of Plaintiffs' FAC is OVERRULED.

a. Statute of limitations.

"Where the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, it fails to state facts sufficient to constitute a cause of action." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 833.) However, "[t]he running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint might be barred. 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.'" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324 – 325; internal citations omitted.)

"In assessing whether plaintiff's claims against defendant are time-barred, two basic questions drive our analysis: (a) What statutes of limitations govern the plaintiff's claims? (b) When did the plaintiff's causes of action accrue?" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.) In demurring to Plaintiffs' FAC, the Moving Defendants contend the limitations period for a claim predicated on fraud is three years from the date of "the discovery, by the aggrieved party, of the facts constituting the fraud." (Code Civ. Proc., § 338, subd. (d); see *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 734.)

Moving Defendants point to Plaintiffs' own allegations in the FAC which aver the purported misrepresentations occurred between February and May 2018. (FAC, ¶¶35 – 95.) Moving Defendants go on to suggest that the date of the misrepresentations operate as the accrual date and since Plaintiffs did not file the original complaint until 31 October 2022, more than four years after the last alleged misrepresentation, the claim for fraud is barred. However, by their own recognition and by the express terms of Code of Civil Procedure section 338, subdivision (d), the cause of action accrues upon "discovery, by the aggrieved party, of the facts constituting the fraud."

Moving Defendants acknowledge Plaintiffs' allegations in the FAC that in April or May 2022, the Plaintiffs "learned for the first time that an arbitrator had made a fraud finding in the arbitration award against Defendants Hsu, Reaves, and [MGT]" and, prior to that April to May 2022 time frame, Plaintiffs "had no knowledge that any Defendant had intentionally lied to sell CBCs to [Plaintiffs] or other investors." (FAC, ¶¶137 – 142, 148 – 149, 154 – 155, 159 – 160, 164 – 165, and 170 – 171.) Moving Defendants recognize such allegations as Plaintiffs' attempt to plead the delayed discovery rule.

> 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. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period.

(*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 – 809.)

Moving Defendants contend Plaintiffs' own allegations and judicially-noticed facts overcome Plaintiffs' allegations concerning delayed discovery. In the FAC, plaintiff Mentor alleges that its director, Bill Yao, "followed crypto markets generally, and monitored developments related to [MGT] through internet searches." (FAC, ¶144.) Plaintiff Axani alleges he "read news articles related to [MGT], CBCs, and cryptocurrency markets in general." (FAC, ¶151.) Plaintiff Waterdrip's founder and his colleagues "reviewed public information about Cashbet Coins, and actively discussed the reasons for the token's low price." (FAC, ¶157.) Plaintiff Zhou "was active in the crypto legal space, and her investigations included her Cashbet Coin investment." (FAC, ¶162.) Plaintiff Chang "carefully tracked information relating to all his investments, including Cashbet Coins." (FAC, ¶167.) According to Moving Defendants, these allegations, together with publicly available information[2], should lead the court to the conclusion that Plaintiffs had presumptive knowledge of facts sufficient to put them on inquiry in 2018, thereby triggering the statute of limitations. The court declines to reach such a conclusion as a matter of law.

> "When a plaintiff reasonably should have discovered facts for purposes of the accrual of a case of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the evidence (or, in in this case, the allegations in the complaint and facts properly subject to judicial notice) can support only one reasonably conclusion."

(*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 193.)

b. Specificity.

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*); see also CACI, No. 1900.)

"Fraud actions are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) "The pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 518.) The Lazar court did not comment on how these particular allegations met the requirement of pleading with specificity in a fraud action, but the court did say that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Lazar*, *supra*, 12 Cal.4th at p. 645.)

Moving Defendants also cite *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 763 where the court found, "These allegations, however, are not sufficiently specific to support a claim for fraud: they do not allege with particularity who made the statements, when they were made, what was actually stated, or ***why they were false.***" (Emphasis added.) Moving Defendants contend, on demurrer, that Plaintiffs' complaint does not specify how the purported representations were false at the time they were made.

At paragraph 173 of the FAC, Plaintiffs allege, "Defendants Hsu, Reaves, and [MGT] made various material misrepresentations to sell CBCs to Plaintiffs, including the following: (a) that [MGT] was a profitable company; (b) that [MGT] had millions of players for its on-line gambling businesses; (c) that Lottery.com had committed to accepting CBCs for is billion-dollar lotteries based on a partnership agreement with [MGT]; and (d) that [MGT] had raised more than $40 million in the ICO." "Plaintiffs did not know that Defendants' misrepresentations were false when they were made…." (FAC, ¶174.)

An explanation about the falsity of at least one of these misrepresentations is found in other paragraphs of the FAC. At paragraph 106, it is alleged, in relevant part, "[MGT] did not have any contractual relationship with any 'partner' who was committed to using CBCs for online gambling." "[MGT] never had any contractual relationship

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[2] Even if the court took judicial notice of the information requested by Moving Defendants to show that publicly available information existed, it does not answer the question as to whether Plaintiffs should have reasonably discovered facts for purposes of accrual. For that reason, the court deems Moving Defendants' request for judicial notice to be unnecessary.

with Lottery.com." (FAC, ¶110.) [In 2019], "[MGT] still had no partnerships for the use of CBCs – let alone any partnership with 'some of the largest gaming companies in the world,' as falsely claimed." (FAC, ¶111.)

At the very least, these allegations explain why the representation concerning Lottery.com's commitment to use CBCs was false. This is sufficient to overcome the Moving Defendants' demurrer since a defendant cannot demur to a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action;" *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 274—" A demurrer challenges a cause of action and cannot be used to attack a portion of a cause of action.")

For the reasons stated above, Moving Defendants' demurrer to the first cause of action of 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 intentional misrepresentation is OVERRULED.

3. Moving Defendants' demurrer to the second, third, and fourth causes of action [fraudulent transfers] of Plaintiffs' FAC is OVERRULED.

"A debtor's transfer or obligation is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor." (Civil Code §3439.04, subd. (a).) A creditor may bring an action for relief from a fraudulent transfer or obligation. (See Civil Code §3439.07, subd. (a)(1).)

" 'Creditor' means a person that has a claim, and includes an assignee of a general assignment for the benefit of creditors, as defined in Section 493.010 of the Code of Civil Procedure, of a debtor." (Civ. Code §3439.01, subd. (c).) " 'Claim,' except as used in 'claim for relief,' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." (Civ. Code §3439.01, subd. (b).)

In demurring to the second and third causes of action for fraudulent transfer, Moving Defendants contend Plaintiffs are not "creditors" because they do not have a "claim" or "right to payment" since their right to any payment is dependent upon their first cause of action for misrepresentation. Moving Defendants contend that since the first cause of action is barred by the statute of limitations, Plaintiffs have no "right to payment," and thus, no "claim" upon which to assert that they are "creditors," and therefore no action for fraudulent transfer.

In light of the court's ruling above, Moving Defendants' demurrer to the second through fourth causes of action of 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 intentional fraudulent transfer, constructive fraudulent transfer, and common law fraudulent conveyance, respectively, is OVERRULED.

4. Moving Defendants' demurrer to the fourth cause of action [common law fraudulent conveyance] of Plaintiffs' FAC is SUSTAINED.

Moving Defendants demur, additionally, to Plaintiffs' fourth cause of action for common law fraudulent conveyance by citing the federal trial court decision of *Airborne Am., Inc. v. Kenway Composites* (S.D.Cal. 2021) 554 F. Supp. 3d 1066, 1073 – 1074 (*Airborne*), where the court wrote:

> a cause of action for common-law fraudulent transfer survives alongside its [**14] statutory counterpart in California. *Id.* However, unlike the UFTA, California common law has an additional requirement that the creditor "have a specific lien on the property or . . . prosecute[] his claim to judgment." *In re Kalt's Estate*, 16 Cal. 2d 807, 811, 108 P.2d 401 (1940); see also *Moore v. Schneider*, 196 Cal. 380, 387, 238 P. 81 (1925) (discussing how it is "universally held" that for a creditor to have a claim for fraudulent conveyance, it must hold a lien on the property or reduce its claim to judgment)
>
> …
>
> California courts continue to recognize that a creditor must have a judgment or a lien in order to assert a claim against a debtor for common-law fraudulent transfer. See, e.g., *Wisden*,

124 Cal. App. 4th at 759 ("[P]rior to the passage of the UFTA and its predecessor statute,11 it was necessary for a creditor to obtain a judgment, or a specific lien on the property, before an action could be brought to set aside a fraudulent transfer." (citation omitted)); *Cortez v. Vogt*, 52 Cal. App. 4th 917, 930 n.12, 60 Cal. Rptr. 2d 841 (1997) (same). Given that Plaintiff does not have a judgment or a lien, Plaintiff lacks standing under California law to assert a cause of action for common-law fraudulent conveyance.

In opposition, Plaintiffs make the same argument made and rejected by the *Airborne* court, i.e., that a defrauded creditor with no judgment lien still has various remedies to collect its debt. (See *Airborne*, *supra*, 554 F.Supp.3d at p. 1073.) This argument is neither here nor there. Plaintiffs do not address the requirement that a creditor must have a judgment or lien in order to assert a claim against a debtor for common-law fraudulent transfer.

Accordingly, Moving Defendants' demurrer to the fourth cause of action of 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 common law fraudulent conveyance is SUSTAINED with 10 days' leave to amend.

5. Moving Defendants' demurrer to the fifth cause of action [civil conspiracy] of Plaintiffs' FAC is OVERRULED.

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."

> Conspiracy is not a cause of action. It is a theory of liability under which persons who, although they do not actually commit a tort themselves, share with the tortfeasor or tortfeasors a common plan or design in its perpetration. One who participates in a civil conspiracy, in effect, becomes liable for the torts of the coconspirators. ***But the conspiracy does not result in tort liability unless an actual tort is committed.*** (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510–511 [28 Cal. Rptr. 2d 475, 869 P.2d 454].) As the Supreme Court explained, " ' "***A civil conspiracy***, however atrocious, ***does not per se give rise to a cause of action unless a civil wrong has been committed resulting in damage.***"' [Citation.] 'A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement. Therefore, it is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action.' [Citation.]" (*Id.* at p. 511.)

(*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 968; emphasis added.)

Moving Defendants contend that since Plaintiffs cannot state a claim for fraudulent transfer (or fraudulent misrepresentation), then Plaintiffs cannot state a claim for civil conspiracy.

In light of the court's ruling above, Moving Defendants' demurrer to the fifth cause of action of 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 civil conspiracy is OVERRULED.

B. Defendants Reaves and Brennan's joinder in Moving Defendants' demurrer to Plaintiff's FAC.

To the extent defendants Reaves and Brennan have joined in Moving Defendants' demurrer to Plaintiffs' SAC, defendants Reaves and Brennan's demurrer to Plaintiffs' SAC is SUSTAINED as to the fourth cause of action, but otherwise OVERRULED.

III. Order.

Moving Defendants' demurrer to the fourth cause of action of 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

common law fraudulent conveyance is SUSTAINED with 10 days' leave to amend. Moving Defendants' demurrer to Plaintiff's FAC is otherwise OVERRULED.

To the extent defendants Reaves and Brennan have joined in Moving Defendants' demurrer to Plaintiffs' SAC, defendants Reaves and Brennan's demurrer to Plaintiffs' SAC is SUSTAINED as to the fourth cause of action, but otherwise OVERRULED.

DATED:	**HON. SOCRATES PETER MANOUKIAN** ***Judge of the Superior Court*** ***County of Santa Clara***

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Calendar Line 6

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 20CV371776 **April Mallord v. M Asian Fusion, et al.**
DATE: 28 September 2023 **TIME: 9:00 am** **LINE NUMBERS: 06, 07**
This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on the 27 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Orders On Motions of Defendants Avalara, Inc. and Intuit, Inc. for Summary Judgment.

I. Statement of Facts

On or about 7 November 2019, plaintiff April Mallord ("Plaintiff") was at defendant M Asian Fusion, a restaurant located at 98 South 2nd Street in San Jose ("Subject Premises"). (Complaint, ¶GN-1.) Plaintiff was attending an event hosted and planned by defendants M Asian Fusion, M Events LLC, Avalara, Inc. ("Avalara"), and Does 1-100. (*Id.*) The Subject Premises was crowded and understaffed. (*Id.*) Defendants allowed the floor to be wet. (*Id.*) Plaintiff slipped and fell on liquid on the floor in an exit route of the Subject Premises. (*Id.*)

On 8 October 2020[3], Plaintiff filed a Judicial Council form complaint against defendants M Asian Fusion, M Events LLC, Avalara, Inc., and Does 1-100, asserting causes of action for:

(1) Premises Liability

(2) General Negligence

On 10 February 2021, defendant Avalara, Inc. filed an answer to Plaintiff's complaint.

On 1 April 2021, Plaintiff filed an amended to the complaint, naming Doe 1 as defendant Inuit Inc. ("Intuit").

On 26 April 2022, default was entered against defendant M Asian Fusion in favor of Plaintiff.

On 31 May 2022, defendant Intuit filed a cross-complaint against cross-defendant M Events LLC, asserting causes of action for:

(1) Apportionment of Fault

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[3] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

(2) Indemnification

(3) Declaratory Relief

(4) Contribution

On 8 June 2022, defendant Avalara filed a cross-complaint against cross-defendant M Events LLC, asserting causes of action for:

(1) Apportionment of Fault

(2) Indemnification

(3) Declaratory Relief

(4) Contribution

On 9 January 2023, default was entered against cross-defendant M Events, LLC, in favor of cross-complainant Avalara.

On 22 May 2023, defendant Avalara filed the first motion now before the court, a motion for summary judgment/adjudication of Plaintiff's complaint.

On 13 June 2023, defendant Intuit filed the second motion now before the court, a motion for summary judgment/adjudication of Plaintiff's complaint.

On 4 August 2023, pursuant to a stipulation reached by the parties, the court ordered the hearings on both Avalara and Intuit's motions for summary/adjudication moved to September 28, 2023.

II. Analysis

A. Defendant Intuit's Motion for Summary Judgment is GRANTED.

1. Summary Judgment

The party moving for summary judgment bears the burden of persuasion that there are no triable issues of material fact. (***Aguilar v. Atlantic Richfield Co.*** (2001) 25 Cal.4th 826, 850 (***Aguilar***).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (***Ibid.***)

A defendant moving for summary judgment "bears the burden of persuasion that 'one or more elements of' the 'case of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (***Aguilar***, supra, 25 Cal.4th at p. 850; ***Code Civ. Proc.***, § 437c, subd. (o).) A party moving for summary judgment bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (***Aguilar***, supra, 25 Cal.4th at p. 850.)

Once the moving party caries their burden of production, this "causes a shift, and the opposing party is then subject to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (***Ibid.***) Thus, when a moving defendant meets their initial burden of production, the "burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action defense thereto." (***Code Civ. Proc.***, §437c, subd. (p)(2).)

2. Analysis

Defendant Intuit seeks summary judgment/adjudication of the entire complaint, specifically, the first cause of action for premises liability and the second cause of action for negligence.[4]

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[4] In support of its motion for summary judgment/adjudication, defendant Intuit requested the court take judicial notice of plaintiff Mallord's complaint filed on 8 October 2020 and amendment to the complaint, dated 1 April 2021. These documents are already part of the record in this matter. Accordingly, defendant Intuit's request for judicial notice of the complaint and amendment to the complaint is DENIED as unnecessary and/or irrelevant. (See ***Duarte v. Pacific Specialty Insurance***

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was the proximate cause or legal cause of injuries suffered by the plaintiff." (***Ann M. v. Pacific Plaza Shopping Center*** (1993) 6 Cal.4th 666, 673 (***Ann M.***). See also ***Kenser v. Superior Court*** (2016) 1 Cal.5th 1132, 1158—"The elements of a negligence claim and premises liability claim are the same.")

"Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (***Delgado v. American Multi-Cinema, Inc.*** (1999) 72 Cal.App.4th 1403, 1406 –citing ***Ann M.***, *supra*, 6 Cal.4th at p. 674.) "Premises liability is a form of negligence … and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (***Brooks v. Eugene Burger Management Corp.*** (1989) 215 Cal.App.3d 1611, 1619 (***Brooks***).)

As part of plaintiff Mallord's prima facie case against defendant Intuit, plaintiff Mallord must establish that defendant Intuit owes her a duty. In moving for summary judgment, defendant Intuit initially argues that plaintiff Mallord cannot establish that Intuit owed her a duty. "Duty is not universal; not every defendant owes every plaintiff a duty of care." (***Brown v. USA Taekwondo*** (2021) 11 Cal.5th 204, 213 (***Brown***).) "The 'general rule' governing duty is set forth in **Civil Code** section 1714 (section 1714).)"[5] (***Ibid.***)

"Generally, the 'person who has not created a peril is not liable in tort for failure to take affirmative action to assist or protect another' from that peril. (***Brown***, *supra*, 11 Cal.5th at p. 214—quoting and citing ***Williams v. State of California*** (1983) 34 Cal.3d 18, 23.) "Where the defendant has neither performed an act that increases the risk of injury to the plaintiff nor sits in a relation to the parties that creates an affirmative duty to protect the plaintiff from harm … our cases have uniformly held the defendant owes no legal duty to the plaintiff." (***Brown***, *supra*, 11 Cal.5th at p. 216.)

"[T]the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises." (***Sprecher v. Adamson Companies*** (1981) 30 Cal.3d 358, 368.) "A defendant need not own, possess, *and* control property in order to be held liable; control alone is sufficient." (***Alcaraz v. Vece*** (1997) 14 Cal.4th 1149, 1162; italics original (***Alcaraz***).)

> In premises liability cases, summary judgment may properly be granted where a defendant unequivocally establishes its lack of ownership, possession, or control of the property alleged to be in a dangerous or defective condition. This follows from the rule that the duty to take affirmative action for the protection of individuals coming onto one's property is grounded in the possession of the premises and the attendant right to control and manage the premises. **Without the crucial element of control over the subject premises, no duty to exercise reasonable care to prevent injury on such property can be found**.

(***Gray v. Am. W. Airlines*** (1989) 209 Cal.App.3d 76, 81 [emphasis added, internal quotation marks and citations omitted].)

Defendant Intuit proffers evidence that it did not owe plaintiff Mallord a duty of care because it did not own, posses, or control the Subject Premises.[6] T-Sheets (a company acquired by defendant Intuit) and defendant

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Company (2017) 13 Cal.App.5th 45, 51, fn.6 (***Duarte***)—denying request where judicial notice is not necessary, helpful or relevant.)

[5] **Civil Code §1714** provides in pertinent part: "**(a)** Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."

[6] See defendant Intuit's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Intuit UMF"), Issue No. 1, Fact Nos. 1 – 19;. In opposition, Plaintiff asserted evidentiary objections. Plaintiff's evidentiary objections to the Declaration of Brittany Geary in Support of Defendant's Intuit Inc.'s Motion for Summary Judgment ("Geary Decl."), ¶¶ 8-15, Declaration of Brian Rich in Support of Defendant's Intuit Inc.'s Motion for Summary Judgment ("Rich Decl."), ¶¶4-5, are

Avalara agreed to reserve space at defendant restaurant, M Asian Fusion, for a networking event.[7] Defendant Intuit is not affiliated with defendant M Asian Fusion nor with the entity that owns operates M Asian Fusion, defendant M Events, LLC.[8]

On 28 March 2019, defendant Intuit's senior event marketing manager, Brittany Geary ("Geary"), signed a contract on behalf of defendant Intuit to reserve space at M Asian Fusion.[9] Under the contract, defendant M Asian Fusion agreed to provide all food, beverages, and related services for a total cost of $38,647.81.[10] The contract specifies that the restaurant would "provide services under the agreement in accordance with high industry standards and will maintain all permits, licenses and registrations required for the performance of services."[11]

When Geary signed the contract on behalf of defendant Intuit, she understood that the defendant M Asian Fusion would be "performing all regular restaurant duties, including staffing the restaurant, servicing customers, bussing food and glassware, cleaning and monitoring the space, including the floors and other surface areas to maintain them free of any slipping hazard."[12] Defendant M Asian Fusion did staff the event on 6 November 2019, including with staff wearing all-black or dark clothing typical of event staff.[13]

Defendant Intuit had reserved space at defendant M Asian Fusion on multiple occasions prior to the event on 6 November 2019.[14] On each of those prior events at the restaurant, employees of defendant M Asian Fusion were present as staff, and defendant Intuit never assumed responsibility for staffing the events.[15] Based on these past events, when Ms. Geary signed the contract for the event on 6 November 2019, she understood that defendant M Asian Fusion would be providing the same staffing services at the event on 6 November 2019 as they had provided previously.[16]

Defendant Intuit did not own, possess, or control defendant M Asian Fusion on the night of 6 November 2019, or ever.[17] Defendant Intuit never leased the restaurant or its premises and never contracted or agreed to assume the duty of cleaning and monitoring the floors of defendant M Asian Fusion.[18] Defendant Intuit had no role in cleaning the floors of defendant M Asian Fusion and had no control over the restaurant's floors or the operation of defendant M Asian Fusion's staff.[19]

Neither Ms. Geary nor Mr. Rich were made aware of any spills or slippery surface on the floor of defendant M Asian Fusion, and if they had been made so aware, the condition would have been reported to the

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OVERRULED. "In granting or denying a motion for summary judgment or adjudication, the court need only rule on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (**Code Civ. Proc.**, §437c, subd. (q).)

[7] Intuit's UMF, Fact No. 1; Geary Decl., ¶3.)

[8] Intuit's UMF, Fact No. 2; Geary Decl., ¶4.

[9] Intuit's UMF, Fact No. 3; Geary Decl., ¶¶2, 5.

[10] Intuit's UMF, Fact No. 4; Geary Decl., ¶6, Ex. A.

[11] Intuit's UMF, Fact No. 5; Geary Decl., ¶7, Ex. A.

[12] Intuit's UMF, Fact No. 6; Geary Decl., ¶8.

[13] Intuit's UMF, Fact No. 7; Geary Decl., ¶9; Declaration of Arlen Litman-Cleper in Support of Defendant's Intuit, Inc.'s Motion for Summary Judgment ("Litman-Cleper Decl."), Ex. B at pp. 61, 128, 163-164 [excerpt of Plaintiff's deposition transcript]; Rich Decl., ¶4.

[14] Intuit's UMF, Fact No. 8; Geary Decl., ¶10.

[15] Intuit's UMF, Fact Nos. 9-10; Geary Decl., ¶10.

[16] Intuit's UMF, Fact No. 11; Geary Decl., ¶10.

[17] Intuit's UMF, Fact No. 12; Geary Decl., ¶11.

[18] Intuit's UMF, Fact Nos. 13-14; Geary Decl., ¶11.

[19] Intuit's UMF, Fact Nos. 15-16; Geary Decl., ¶11.

staff of the restaurant, defendant M Asian Fusion.[20] Neither Ms. Geary nor plaintiff Mallord are aware of any benefit conferred to defendant Inuit as a result of plaintiff Mallord's presence at the event on 6 November 2019.[21]

Based on the above evidence, defendant Intuit contends it does not owe a duty to plaintiff Mallord to inspect and maintain the Subject Premises because it never owned, possessed, or controlled the Subject Premises. (Mot., pp. 5-7.) In opposition, plaintiff Mallord argues a triable issue of material facts exists as to whether defendant Intuit controlled the property where the event occurred. (Opp., pp. 7-10.) She asserts that defendants Intuit and Avalara leased the entire restaurant for the event and controlled the property where the event occurred. (*Id.*, p. 7.) Plaintiff Mallord further contends that as a host of the event, Intuit had a duty to exercise reasonable care to prevent plaintiff Mallord from being injured. (*Id.*, p. 9.)

However, plaintiff Mallord fails to sufficiently support these contentions with evidence, and the authorities she relies upon are distinguishable. In support of her position that defendant Inuit (and defendant Avalara) leased and therefore controlled the entire restaurant, Plaintiff Mallord directs the court to the agreement signed by Ms. Geary on behalf of Intuit.[22] While the contract shows an anticipated attendance of 650 people, it does not describe the agreement as a lease of the entire Subject Premises.[23] To the contrary, the document states "the Restaurant has **reserved the function space** set forth below…" and defines the function space as "Dining, Lounge, and Patio."[24]

Plaintiff Mallord proffers her own testimony relating to the event on 6 November 2019.[25] Plaintiff Mallord stated that she did not see anyone cleaning while she was at the event.[26] The floors were very wet.[27] The condition of the floor got worse during the two hours that plaintiff Mallord was at the event.[28] There was not one defining puddle, but the walkway, the walkway by the bar, and the dance floor were all sticky and wet.[29] Plaintiff Mallord also asserts that the contract does not specify what staffing was included, there is no evidence that anyone was designated to clean, and there were no conversations regarding proper staffing for the event.[30] Plaintiff Mallord contends defendant Avalara was actively involved in planning the event and setting up items such as signage and glow cups.[31]

The evidence proffered by defendant Intuit is sufficient to establish that defendant Intuit did not have ownership, possession, or control of the Subject Premises. Plaintiff fails to produce evidence establishing that defendant Intuit had ownership, possession, or control of the Subject Premises. The authorities relied upon by plaintiff Mallord do not convince the court otherwise.

Plaintiff's reliance on ***Alcaraz***, *supra*, 14 Cal.4th 1149, is misplaced. In ***Alcaraz***, the plaintiff sued his landlords, alleging that "he was injured when he stepped into a utility meter box embedded in the lawn next to the sidewalk in front of the building in which he was renting an apartment." (***Id.***, p. 1153.) The Supreme Court said "a

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[20] Intuit's UMF, Fact Nos. 17-18; Geary Decl., ¶¶12-14; Rich Decl., ¶¶5-7.

[21] Intuit's UMF, Fact No. 19; Geary Decl., ¶15; Litman-Cleper Decl., Ex. B at pp. 131-132 (excerpt of plaintiff's Mallord's deposition transcript).

[22] See plaintiff Mallord's Separate Statement of Undisputed Material Facts in Opposition to Inuit's MSJ ("Plaintiff's UMF re Intuit"), Fact No. 13; Declaration of David S. Brown ("Brown Decl.), Exhibit 1; Intuit's UMF, Fact No. 4; Geary Decl., Ex. A.

[23] Brown Decl., Exhibit 1; Geary Decl., Ex. A.

[24] Brown Decl., Exhibit 1; Geary Decl., Ex. A [emphasis added].

[25] Brown Decl., Exhibit 7 [transcript of deposition of plaintiff Mallord].

[26] Brown Decl., Exhibit 7, pp. 62, 67.

[27] Brown Decl., Exhibit 7, pp. 67-68.

[28] Brown Decl., Exhibit 8, p. 73.

[29] Brown Decl., Exhibit 8, p. 81.

[30] Plaintiff's UMF re Intuit, Fact Nos. 4-6.

[31] Plaintiff's UMF re Intuit, Fact No. 25.

reasonable trier of fact could infer that defendants exercised control" over the narrow strip of land where plaintiff fell because the defendants maintained the lawn that covered the narrow strip and constructed a fence that enclosed the entire lawn. (***Id.***, p. 1161-1162.) Here, in contrast, there is no evidence that defendant Intuit owned any property adjacent to where plaintiff Mallord fell, nor is there any evidence that defendant Intuit affirmatively exercised control over the location, such as by ongoing maintenance.

Similarly, ***Hacala v. Bird Rides, Inc.*** (2023) 90 Cal.App.5th 292 (***Hacala***), does not help plaintiff Mallord. In ***Hacala***, the City of Los Angeles granted defendant Bird Rides, Inc. ("Bird") a permit under which Bird agreed to comply with standards relating to parking of the dock-less electric scooters it intended to deploy. (***Id.***, p. 300.) The plaintiff tripped over an improperly-parked Bird scooter during busy holiday shopping. (***Ibid.***) The Supreme Court found that "the default duty of care under section 1714 broadly encompasses Bird's obligation to remove or relocate its property when a Bird scooter is in a location where it poses a risk of harm to others." (***Id.***, p. 314.) The court "emphasiz[ed] again that plaintiff's negligence claims are grounded on *Bird's* conduct in managing *its property*." (***Id.***, p. 314, fn. 8—italics original.) The facts here are readily distinguishable because there is no contention that defendant Intuit was negligent in managing its own property.

Accordingly, the court finds there is no triable issue of material fact as to whether defendant Intuit owed duty to plaintiff Mallord because it owned, possessed, or controlled the Subject Premises. As a separate argument in support of its motion for summary judgment/adjudication, Defendant Intuit contends it did not owe a duty to plaintiff Mallord because there was no special relationship. (Mot., pp. 8-10.)

"Under some circumstances, a defendant may have an affirmative duty to protect the plaintiff from harm at the hands of a third party, even though the risk of harm is not of the defendant's own making." (***Brown***, *supra*, 11 Cal.5th at p. 215.) "[A] person may have an affirmative duty to protect the victim of another's harm if that person is in what the law calls a 'special relationship' with either the victim or the person who created the harm. [Citations.]" (***Ibid.***) "A special relationship between the defendant and the victim is one that 'gives the victim a right to expect' protection from the defendant, while a special relationship between the defendant and the dangerous third party is one that 'entails an ability to control [the third party's] conduct." [Citations.] (***Id.***, p. 216.) "Where the defendant has neither performed an act that increases the risk of injury to the plaintiff nor sits in a relation to the parties that creates an affirmative duty to protect the plaintiff from harm, however, our cases have uniformly held the defendant owes no legal duty to the plaintiff." (***Ibid.***) If such a special relationship does exist, the court then asks whether "particular policy considerations may weigh in favor of limiting that duty in certain circumstances." (***Id.***, p. 209 [citing ***Rowland v. Christian*** (1968) 69 Cal.2d 108 (***Rowland***)].)

Here, defendant Intuit proffers evidence that there was no special relationship between itself and plaintiff Mallord.[32] Plaintiff's presence at the event provided no benefit to defendants Intuit or Avalara.[33] Defendant Inuit asserts that reserving space in a restaurant is not sufficient to create a special relationship. (Mot., p. 9 [citing ***Melton v. Boustred*** (2010) 183 Cal.App.4th 521, 536 (***Melton***)—"plaintiffs have not alleged facts supporting the existence of any special relationship recognized by law that would trigger a legal duty on defendant's party to protect them. The complaint alleges that plaintiffs came to defendant's house to attend a party. Those facts do not warrant application of the special relationship doctrine…"].)

In opposition, plaintiff Mallord contends that the duty of defendant Intuit is analogous to that of an innkeeper and a guest. (Opp., p. 16:21-22.) Plaintiff Mallord asserts her attendance benefited defendants Intuit and Avalara because defendant Avalara listed its objectives for the event as "Lead gen" "Nurture partner relationships" and "Brand awareness."[34] Plaintiff Mallord's opposition does not appear to specifically identify any other evidence in support of her position that there was a special relationship between her and defendant Intuit.

The evidence proffered by defendant Intuit is sufficient to establish that there was no special relationship between itself and plaintiff Mallord. Plaintiff fails to produce evidence supporting her position that there was a

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[32] See Intuit UMF, Issue No. 2, Fact Nos. 1 – 19.

[33] Intuit UMF, Fact No. 19, Geary Decl., ¶15, Litman-Cleper Decl., Ex. B at pp. 131-132 (excerpt of plaintiff's Mallord's deposition transcript).

[34] Brown Decl., Ex. 2.

special relationship giving rise to a duty owed to her by defendant Intuit. Having found no duty arising from a special relationship, the court need not address whether the ***Rowland*** factors would limit any duty owed.[35]

As to both causes of action, premises liability and negligence, plaintiff must establish a duty owed by the defendant. (***Brooks***, *supra*, 215 Cal.App.3d at p. 1619.) Defendant Intuit has sufficiently established the absence of triable issue of material fact as to whether it owed a duty to plaintiff Mallord, and she has failed to meet her burden of rebutting this in opposition.[36]

Accordingly, defendant Intuit's motion for summary judgment against plaintiff Mallord is GRANTED.

B. Defendant Avalara's Motion for Summary Judgment

Defendant Avalara seeks summary judgment/adjudication of the entire complaint, specifically, the first cause of action for premises liability and the second cause of action for negligence.[37] Defendant Avalara argues (similarly to defendant Intuit) that Avalara did not owe a duty to plaintiff Mallord because it did not own, possess or control the Subject Premises and because no special relationship existed.

1. Duty – Ownership, Possession or Control

Defendant Avalara proffers evidence that it did not owe a duty of care because it did not own, posses, or control the Subject Premises.[38] T-Sheets, a company acquired by defendant Intuit, and Avalara co-sponsored the "Connect After Dark" event at defendant M Asian Fusion restaurant on 6 November 2019.[39] T-Sheets entered into a contract with defendant M Asian Fusion to sponsor the event; defendant Avalara did not enter into a contract with the restaurant but verbally agreed with T-Sheets to split the cost of the event.[40]

Defendant M Asian Fusion charged 18% for "food and beverage, and related services" and was in charge of all regular restaurant duties during the event.[41] Defendant Avalara never owned, operated or leased the restaurant or it premises.[42] Defendant Avalara never verbally or in writing agreed to assume the duty of cleaning and monitoring the floors at the Subject Premises on the night of 6 November 2019.[43]

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[35] See ***Brown***, *supra*, 11 Cal.5th at p. 217—"The multifactor test set forth in ***Rowland*** was not designed as a freestanding means of establishing duty, but instead as a means for deciding whether to limit a duty derived from other sources."

[36] A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (**Code Civ. Proc.**, §437c, subd. (p)(2); see also subd. (o) –"A cause of action has not merit if either of the following exists: (1) One or more elements of the cause of action cannot be separately established, even if that element is separately pleaded. (2) A defendant establishes an affirmative defense to that cause of action.")

[37] In support of its motion for summary judgment/adjudication, defendant Avalara requested the court take judicial notice of plaintiff Mallord's complaint filed on 8 October 2020 and amendment to the complaint, dated 1 April 2021. These documents are already part of the record in this matter. Accordingly, defendant Avalara's request for judicial notice of the complaint and amendment to the complaint is DENIED as unnecessary and/or irrelevant. (See ***Duarte***, *supra*, 13 Cal.App.5th at p. 51, fn.6—denying request where judicial notice is not necessary, helpful or relevant.)

[38] See defendant Avalara's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Avalara UMF"), Issue No. 1, Fact Nos. 1-5.) In opposition, Plaintiff asserted evidentiary objections. Plaintiff's evidentiary objections to the Declaration of Deb Kowalski in Support of Defendant's Avalara, Inc.'s Motion for Summary Judgment ("Kowalski Decl."), ¶¶ 5-8, are OVERRULED. "In granting or denying a motion for summary judgment or adjudication, the court need only rule on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (**Code Civ. Proc.**, §437c, subd. (q).)

[39] Avalara UMF, Fact No. 1, Kowalski Decl., ¶2.

[40] Avalara UMF, Fact No. 2, Kowalski Decl., ¶3, Ex. 1.

[41] Avalara UMF, Fact No. 3, Kowalski Decl., ¶5, Ex. 1.

[42] Avalara UMF, Fact No. 4, Kowalski Decl., ¶6.

[43] Avalara UMF, Fact No. 5, Kowalski Decl., ¶6, Ex. 1.

In opposition, plaintiff Mallord states it is irrelevant that defendant Avalara did not sign the contract with defendant M Asian Fusion because Avalara admits it co-sponsored the event.[44] She contends the contract does not specify what staffing was included, that the service charge could be the tip, and there is no evidence that anyone was designated to clean.[45]

Avalara had no conversations at all regarding the proper staffing for the party, such as bussers for cleaning.[46] No one was cleaning during the event, and the floors were very wet and got wetter throughout the two hours that plaintiff Mallord was there.[47] Defendant Avalara was actively involved in planning the event and setting up items such as signage and glow cups.[48] While plaintiff Mallord asserts defendants Avalara and Intuit "rented the entire premises for their networking event,"[49] as discussed above, the agreement states "Restaurant has **reserved the function space** set forth below…" and defines the function space as "Dining, Lounge, and Patio."[50]

As discussed above in relation to defendant Intuit's motion for summary judgment, plaintiff Mallord fails to sufficiently support her contentions with evidence, and the authorities she relies upon are distinguishable.

The evidence proffered by defendant Avalara is sufficient to establish that defendant Avalara did not have ownership, possession, or control of the Subject Premises. Plaintiff fails to produce evidence establishing that defendant Avalara had ownership, possession, or control of the Subject Premises.

2. Duty – Special Relationship

Defendant Avalara also proffers evidence that it did not owe plaintiff Mallord a duty of care because there was no special relationship.[51] Plaintiff Mallord's presence at the Connect After Dark event conferred no known benefit to defendant Avalara.[52] In opposition, plaintiff Mallord asserts that she was an invited guest at a networking event to promote the businesses of defendants Avalara and Intuit, and that the purpose of the event was to establish good relations with customers and potential customers.[53]

For the reasons discussed above, this court is not persuaded that a reasonable trier of fact could find there was a special relationship between plaintiff Mallord and defendant Avalara.

Defendant Avalara has sufficiently established that there is no triable issue of material fact as to whether it owed a duty to plaintiff Mallord, and she has failed to meet her burden in opposition of showing a triable issue as to whether Intuit owed her a duty. (See order, fn. 32.)

Accordingly, defendant Avalara's motion for summary judgment against plaintiff Mallord is GRANTED.

III. Order

Defendant Intuit's motion for summary judgment is GRANTED.

Defendant Avalara's motion for summary judgment is GRANTED.

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[44] See plaintiff Mallord's Separate Statement of Undisputed Material Facts in Opposition to Avalara's MSJ ("Plaintiff's UMF re Avalara"), Fact No. 2.)

[45] Plaintiff's UMF re Avalara, Fact No. 3.

[46] Plaintiff's UMF re Avalara, Fact No. 3.

[47] Plaintiff's UMF re Avalara, Fact No. 3.

[48] Plaintiff's UMF re Intuit, Fact No. 25.

[49] Plaintiff's UMF re Avalara, Fact No. 4.

[50] Brown Decl., Exhibit 1; Geary Decl., Ex. A [emphasis added].

[51] See Avalara UMF, Issue No. 2, Fact Nos. 6-8.)

[52] Avalara UMF, Fact No. 8.

[53] Plaintiff's UMF re Avalara, Fact No. 7.

DATED:	**HON. SOCRATES PETER MANOUKIAN** ***Judge of the Superior Court*** ***County of Santa Clara***

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