

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 18b

Honorable Shella Deen, Presiding

Catherine Pham and Thomas Duarte, Courtroom Clerks

191 North First Street, San Jose, CA 95113

DATE: July 30, 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.

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV427952	Anil Godbole vs Satish Soman	Demurrer. Scroll down to Line 1 for Tentative Ruling.
LINE 2	23CV413255	Osceola Lead Generation Holdings, LLC vs HI.Q, INC.	Order to Show Cause. This hearing is set for 10a.m. in Department 18b; the parties are to appear at that time.
LINE 3	21CV387145	MYOUNG HWANG vs JIKHAN JUNG et al	Motion for Sanctions (Spoliation). Defendant Jung complied with this Court's order from the June 27, 2024, hearing by timely serving (and filing) responses to the three discovery requests. He also filed a declaration as to the status of compliance with the discovery orders on July 15, 2024, as was requested by the Court. Plaintiff did not file any declaration, although one was ordered by the Court. Defendant has now complied with this Court's order; the motion for sanctions (spoliation) is DENIED. Plaintiff to prepare the formal order.
LINE 4	23CV415947	James Fok et al vs Peter Wong et al	Motion to Compel (Discovery). OFF CALENDAR.
LINE 5	23CV415947	James Fok et al vs Peter Wong et al	Motion to Compel (Discovery). OFF CALENDAR.

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LAW AND MOTION TENTATIVE RULINGS

<u>LINE 6</u>	22CV402218	Dolores Mattson vs Adi De La Zerda et al	Motion to Withdraw as attorney. Parties to appear.
<u>LINE 7</u>	22CV402218	Dolores Mattson vs Adi De La Zerda et al	Hearing re: Compromise. Parties to appear.
<u>LINE 8</u>	22CV402218	Dolores Mattson vs Adi De La Zerda et al	Hearing re: Dismissal after settlement. Parties to appear.

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LAW AND MOTION TENTATIVE RULINGS

LINE 9	22CV408173	Mircea Dragomir et al vs Ryan Lotz	<p>Motion to Set Aside Default/Judgment.</p> <p>Defendant Ryan Lotz's motion to set aside the judgment entered in this action and recall the writ of possession, pursuant to Code Civ. Proc., §473, subdivision (b), on the grounds that the judgment was entered due to his surprise, inadvertence, and excusable neglect. Newly retained defense counsel submitted a declaration in support of this motion with no language or exhibits attached. An answer was purportedly attached to be filed if this motion was granted. However, an answer was already filed on May 2, 2023. A judgment was entered in this case on April 10, 2024, following an unopposed summary judgment motion. Based on Defendant's declaration and the record itself, Defendant, although apparently represented by counsel at the time (Attorney Charles A. Wagner), key matters were left unopposed and without responses, including no service of discovery responses, no opposition to the resulting motion to compel, no compliance with a discovery order, and no opposition to a motion for summary judgment, which resulted in a judgment in Plaintiff's favor. Good cause appearing, the Court finds a plausible showing of mistake, inadvertence, and excusable neglect and GRANTS the motion. The judgment that was entered on April 10, 24 is VACATED and the case is reinstated. Defendant has requested to file an answer, but that has already been filed. Defendant shall fully comply with the discovery order within 20 days of service of the order on this motion. The writ that issued is hereby recalled and extinguished. The Court sets this matter for a case management conference on November 5, 2024 at 10 a.m. in Department 18b.</p> <p>Moving party to prepare a formal order.</p>
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LAW AND MOTION TENTATIVE RULINGS

LINE 10	23CV416606	Zhao Zheng vs Ming Lin	Motion to Declare Certain Funds as Separate Property and to Stay Proceedings. This appears to be a motion by Defendant for a family law issue regarding the designation of separate property. This cannot be adjudicated in this civil action. Defendant has also not provided any grounds to stay the current civil action. The motions are DENIED without prejudice. Defendant to prepare the formal order.
LINE 11	24CV440901	MARIA LOPEZ vs ROY ABBOTT	Motion for Interlocutory Judgment for Partition and Appointment of Partition Referee. Scroll down to Line 11 for Tentative Ruling.

Calendar Line 1**Case Name:** *Anil Godbole v. Satish Soman, et al.***Case No.:** 23CV427952

Before the court is defendant Satish Soman's demurrer to first amended complaint. Pursuant to California Rule of Court 3.1308, the court issues its tentative ruling as follows.

I. Background.

Plaintiff Anil Godbole ("Godbole") invested \$500,000 into a company called Silicon Sage Builders LLC ("SSB") pursuant to a referral from defendant Satish Soman ("Soman"), a long time friend of plaintiff Godbole since the eighth grade, whom plaintiff Godbole met in approximately 1973. (First Amended Complaint ("FAC"), ¶4.) Defendant Soman touted SSB as a sound investment based on his own involvement but concealed his knowledge about SSB's refusal to pay back investors. (*Id.*)

On or about August 20, 2019, defendant Soman emailed plaintiff Godbole touting an investment opportunity with SSB, a real estate development company. (FAC, ¶6.) Defendant Soman claimed that for a \$500,000 minimum investment, SSB offered consistent and lucrative payouts ranging from 12-15% returns per year, citing his own successful investment experience with SSB for years as evidence of SSB's legitimacy and profitability track record. (*Id.*)

Based on his deep friendship and trust with defendant Soman built over decades, plaintiff Godbole invested his entire \$500,000 personal savings into SSB in December 2019 pursuant to defendant Soman's advice. (FAC, ¶7.)

On or about December 21, 2020, the United States Securities and Exchange Commission filed a civil complaint against SSB for an alleged \$119,000 securities offering fraud. (FAC, ¶8.) It was revealed that SSB was operating an expansive Ponzi scheme involving over 200 investors who were refused repayment on investments and principal owed. (*Id.*)

A federal receiver, Stapleton Group, was appointed in February 2021 to formally investigate the Ponzi scheme, freeze assets, and halt SSB's fraudulent operations. (FAC, ¶9.) Based on complaints from multiple victims, plaintiff Godbole believed defendant Soman was likely aware of repayment issues and cashed out his own investment capital in full just before

referring plaintiff Godbole to invest more funds into the failing enterprise. (*Id.*) Defendant Soman then remained evasive about plaintiff Godbole's chances of recuperating any of his investment after the allegations emerged, furthering plaintiff Godbole's suspicion that defendant Soman deliberately misled plaintiff Godbole to maximize defendant Soman's personal investment payoffs anticipating SSB's imminent collapse. (*Id.*)

On December 19, 2023, plaintiff Godbole filed a complaint against defendant Soman asserting causes of action for:

- (1) Actual Fraud
- (2) Constructive Fraud
- (3) Deceit in Violation of California Civil Code §§1709 and 1710
- (4) Negligent Misrepresentation
- (5) Breach of Implied Covenant of Good Faith and Fair Dealing
- (6) Promissory Estoppel
- (7) Violation of Business and Professions Code §17200

On March 5, 2024, defendant Soman filed a demurrer to plaintiff Godbole's complaint.

On May 2, 2024, the court sustained defendant Soman's demurrer with 20 days' leave to amend based upon the lack of any opposition.

On May 22, 2024, plaintiff Godbole filed the operative FAC which eliminated the fifth cause of action (breach of implied covenant of good faith and fair dealing) from the original complaint, but otherwise asserts the same causes of action asserted in the original complaint. [The causes of action in the FAC are numbered one through four and six through seven, just as in the original complaint.]

On June 25, 2024, defendant Soman filed the motion now before the court, a demurrer to plaintiff Godbole's FAC.

II. Defendant Soman's demurrer to plaintiff Godbole's FAC is SUSTAINED, in part, and OVERRULED, in part.

A. Fraud/ Deceit.

"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.’ 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.” (*Lazar, supra*, 12 Cal.4th at p. 645.)

In demurring, defendant Soman takes issue with the level of specificity with which plaintiff Godbole pleads fraud. For instance, defendant Soman acknowledges plaintiff Godbole’s allegation at paragraph 14 which states, “Defendant had actual knowledge that such an investment scheme was a Ponzi scheme and that it was highly likely—or nearly certain—that Plaintiff would not see any of the money that he invested,” but contends there are no allegations stating how defendant Soman had this knowledge.

Defendant Soman apparently ignores the allegations at paragraphs 22 – 23 wherein plaintiff Godbole alleges, “after the scam was revealed, Defendant told Plaintiff that Sanjeev Acharya, the owner of [SSB], had been refusing to give Defendant his money back from his own investment for some time, and that Defendant was only getting his money back by referring other victims to participate in the scam. Defendant had actual knowledge ... that [SSB] was struggling with insolvency issues and unable to pay back investors like himself.” In

other words, defendant Soman acquired knowledge of SSB's Ponzi scheme through his own personal experience.

Defendant Soman also takes issue with plaintiff Godbole's allegation at paragraph 17 which alleges that, "Defendant had scammed other individuals with these same schemes," but plaintiff Godbole does not provide the names of the other individuals who were scammed by defendant Soman. In the court's reading, this allegation provides an explanation as to how defendant Soman had actual knowledge of the Ponzi scheme [addressing defendant Soman's previous concern]. In the court's opinion, the specificity requirement as set forth in *Lazar* does not require the level of specificity that defendant Soman complains about on demurrer.

Defendant Soman next argues that plaintiff Godbole's allegations are contradictory apparently pointing to paragraph 22 where plaintiff Godbole alleges, "after the scam was revealed, Defendant told Plaintiff that Sanjeev Acharya, the owner of [SSB], had been refusing to give Defendant his money back from his own investment for some time, and that Defendant was only getting his money back by referring other victims to participate in the scam." Defendant Soman contends such allegations are in conflict with plaintiff Godbole's subsequent allegation at paragraph 24 where plaintiff Godbole alleges, "Defendant kept reassuring Plaintiff that his investments were safe and not to investigate further or take any action on retrieval of his funds." The court does not read these allegations to be contradictory. The court views the allegations at paragraph 24 as an attempt by plaintiff to plead equitable estoppel.¹

Finally, defendant Soman contends plaintiff Godbole's fraud claims are not sufficiently specific because plaintiff Godbole does not state "when Defendant discovered that [SSB] was a Ponzi scheme."² However, *Lazar* requires a plaintiff to plead when the representation was tendered, not when the defendant learned of the falsity of his own representation.

¹ In *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43, the court wrote, "A defendant will be estopped to invoke the statute of limitations where there has been 'some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action.' It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. 'Whether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law.'"

² See page 5, lines 3 – 4 of the Memorandum of Points and Authorities in Support of Demurrer to First Amended Complaint.

Consequently, defendant Soman's demurrer to the first and third causes of action of plaintiff Godbole's FAC on the grounds that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for actual fraud and deceit, respectively, is OVERRULED.

B. Constructive Fraud.

Constructive fraud is defined by Civil Code section 1573 to consist of, "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or, any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." (See also CACI, No. 4111.) "In addition to the traditional liability for intentional or actual fraud, a fiduciary is liable to his principal for constructive fraud even though his conduct is not actually fraudulent. Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship." (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562.) "[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent." (*Ibid.*)

Defendant Soman demurs to plaintiff Godbole's second cause of action for constructive fraud on the basis that plaintiff Godbole has not adequately alleged the existence of a fiduciary relationship between them. "Whether a fiduciary duty exists is generally a question of law." (*Marzec v. California Public Employees Retirement System* (2015) 236 Cal.App.4th 889, 915.) "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." [Citation.] (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386.)

Fiduciary duties arise as a matter of law “in certain technical, legal relationships.” (*GAB Business, supra*, 83 Cal.App.4th at p. 416, 99 Cal.Rptr.2d 665.) While this list of special relationships is one that “is not graven in stone” (Chodos, *The Law of Fiduciary Duties, supra*, p. 1), it is useful to identify many of the relationships that give rise to fiduciary duties. They include relationships between: (1) principal and agent (*Recorded Picture Company [Productions] Ltd. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 369–370, 61 Cal.Rptr.2d 742 (Recorded Picture)), [footnote] including real estate broker/agent and client (*Smith v. Zak* (1971) 20 Cal.App.3d 785, 792–793, 98 Cal.Rptr. 242), and stockbroker and customer (*Black v. Shearson, Hammill & Co.* (1968) 266 Cal.App.2d 362, 367, 72 Cal.Rptr. 157); (2) attorney and client (*Rader v. Thrasher* (1962) 57 Cal.2d 244, 250, 18 Cal.Rptr. 736, 368 P.2d 360); (3) partners (*Koyer v. Willmon* (1907) 150 Cal. 785, 787–788, 90 P. 135; Corp.Code, § 16404); (4) joint venturers (*Sime v. Malouf* (1949) 95 Cal.App.2d 82, 98, 212 P.2d 946); (5) corporate officers and directors, on the one hand, and the corporation and its shareholders, on the other hand (*Bancroft–Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 345, 49 Cal.Rptr. 825, 411 P.2d 921); (6) husband and wife, with respect to the couple's community property (*Vai v. Bank of America* (1961) 56 Cal.2d 329, 337, 15 Cal.Rptr. 71, 364 P.2d 247; see also Fam.Code, § 1100, subd. (e)); (7) controlling shareholders and minority shareholders (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108–112, 81 Cal.Rptr. 592, 460 P.2d 464 (*Jones*)); (8) trustee and trust beneficiary (*Estate of Vokal* (1953) 121 Cal.App.2d 252, 257, 263 P.2d 64); (9) guardian and ward (*Estate of Kay* (1947) 30 Cal.2d 215, 226, 181 P.2d 1; Prob.Code, § 2101); (10) pension fund trustee and pensioner beneficiary (*Lix v. Edwards* (1978) 82 Cal.App.3d 573, 578, 147 Cal.Rptr. 294), (11) executor and decedent's estate (*Estate of Boggs* (1942) 19 Cal.2d 324, 333, 121 P.2d 678); and (12) trustee and trust beneficiaries. (*Penny v. Wilson* (2004) 123 Cal.App.4th 596, 603, 20 Cal.Rptr.3d 212; Prob.Code, §§ 16004, 16081, subd. (a).)

(*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 632–633.)

Apart from these certain technical, legal relationships, the court in *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 140 explained:

A fiduciary duty under common law may arise “when one person enters into a confidential relationship with another.” (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, *supra*, 83 Cal.App.4th at p. 417, 99 Cal.Rptr.2d 665.) It is a question of fact whether one is ... a party to a confidential relationship that gives rise to a fiduciary duty under common law (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, *supra*, 83 Cal.App.4th at p. 417, 99 Cal.Rptr.2d 665; see *Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 960–962 [85 Cal.Rptr.3d 817]).

Plaintiff Godbole contends he has alleged the existence of a confidential relationship based upon the decades long friendship and history of trust as alleged in the FAC. Plaintiff Godbole cites *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 272-273 (*Richelle*) for the proposition that close, trusting relationships can give rise to fiduciary duties. This is not an accurate interpretation of *Richelle*.

We review first the basic principles of fiduciary and confidential relations. The two terms are often said to be synonymous, but there are “significant differences.” [Citation.] Both relationships give rise to a fiduciary duty, that is, a duty “to act with the utmost good faith for the benefit of the other party.” [Citation.] “ ‘Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client ... whereas a “confidential relationship” may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship.’ ” [Citation.] A confidential relation may exist where there is no fiduciary relation. [Citation. Footnote.] “Because confidential relations do not fall into well-defined categories of law and depend heavily on the circumstances, they are more difficult to identify than fiduciary relations.” [Citation.] The existence of a confidential relationship is a question of fact, and

“ ‘the question is only whether the plaintiff actually reposed such trust and confidence in the other, and whether the other “accepted the relationship.” ’ ”
[Citation.]

(*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1160-1161 (*Persson*).)

...because of “[t]he vagueness of the common law definition of the confidential relation that gives rise to a fiduciary duty, and the range of the relationships that can potentially be characterized as fiduciary,” the “essential elements” have been distilled as follows:

“ ‘1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself.’ ” [Citation.]

(*Persson*, *supra*, 125 Cal.App.4th at p. 1161.)

Plaintiff Godbole cherry-picks the word “friend” from *Richelle* to support his assertion that a decades-long friendship is sufficient to give rise to a fiduciary relationship. Instead, the *Richelle* court actually focused on the concept of vulnerability as the basis for finding the existence of a confidential relationship:

The vulnerability that is the necessary predicate of a confidential relation, and which the law treats as "absolutely essential" (Bogert, Trusts & Trustees (2d ed. 1978) § 482, at pp. 288–289), usually arises from advanced age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity.

For example, in *Stenger v. Anderson* (1967) 66 Cal.2d 970 [59 Cal. Rptr. 844, 429 P.2d 164], an ***elderly*** woman ***in a weakened mental and physical condition*** was induced by a friend to make an unfair agreement. The Supreme Court sustained rescission of the agreement, holding that the relationship was "confidential" and the agreement obtained by undue influence. (*Id.* at p. 979.) Similarly, in *O'Neil v. Spillane* (1975) 45 Cal. App. 3d 147 [119 Cal. Rptr. 245] this court upheld an order directing the reconveyance of real property to the plaintiff, "an ***aging*** and lonely woman ... ***increasingly dependent*** upon a few

friends," who had been subjected to undue influence by a friend and his wife.

(*Id.* at p. 151; see also *Kent v. First Trust & Savings Bank of Pasadena* (1951)

101 Cal. App. 2d 361 [225 P.2d 625].)

(*Richelle, supra*, 106 Cal.App.4th at p. 273; emphasis added.)

While the existence of a confidential relationship is a question of fact, the mere allegation of a friendship is not sufficient to allege the existence of a confidential fiduciary relationship. Accordingly, defendant Soman's demurrer to the second cause of action of plaintiff Godbole's FAC on the grounds that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for constructive fraud is SUSTAINED with 10 days' leave to amend.

C. Negligent misrepresentation.

Defendant Soman demurs to plaintiff Godbole's fourth cause of action for negligent misrepresentation on the ground that it is barred by the applicable statute of limitations. A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315 (*E-Fab*)). A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading [and matters of which the court may properly take judicial notice]. (*Id.*, at pp. 1315-1316.) When evaluating whether a claim is time-barred, the court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*Id.*, at p. 1316.)

Defendant Soman contends a negligent misrepresentation claim is subject to Code of Civil Procedure section 339 which provides a two-year statute of limitations for "[a]n action upon a contract, obligation or liability not founded upon an instrument of writing." Defendant Soman also cites *Ventura County Nat. Bank v. Macker* (1996) 49 Cal.App.4th 1528, 1530-1531, but there the court explained, "courts consider 'the nature of the right sued upon, not the form of action or the relief demanded' to determine the applicable statute of limitations" and made the determination that "the essence of this cause of action is negligence, not fraud," thereby applying a two-year statute of limitations rather than a three-year statute of limitations

normally associated for claims of fraud. “Negligent misrepresentation is born of the union of negligence and fraud. If negligence is the mother and misrepresentation the father, it more closely resembles its mother.” (*Id.* at p. 1531.) This conclusion was based on allegations that defendant accountants made false and inaccurate representations concerning an audit report of a company’s financial statements and that the defendant accountants “did not possess sufficient knowledge, expertise, or experience to accurately evaluate the company’s financial condition.” (*Id.* at p. 1530.)

Here, on the other hand, plaintiff Godbole’s fourth cause of action more closely resembles fraud than negligence. Thus, it is this court’s opinion that a three-year statute of limitations applies. Under Code of Civil Procedure section 338, subdivision (d), “The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.” In opposition, plaintiff Godbole admits he “did not discover the fraud until December 2020, when the SEC filed its complaint against [SSB].” Even if plaintiff Godbole discovered the fraud on December 21, 2020, the specific date plaintiff Godbole alleges the SEC filed its complaint against SSB, plaintiff Godbole timely filed this action on December 19, 2023.

Accordingly, defendant Soman’s demurrer to the fourth cause of action of plaintiff Godbole’s FAC on the grounds that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)], i.e., barred by the applicable statute of limitations, for negligent misrepresentation is OVERRULED.

D. Promissory estoppel.

“The doctrine of promissory estoppel is set forth in section 90 of the Restatement of Contracts. It provides: ‘A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.’” (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 637 (*Signal Hill*)). “California recognizes the doctrine. ‘Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement.’”

(*Signal Hill*, *supra*, 96 Cal.App.3d at p. 637.) “The required elements for promissory estoppel in California are ... (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.” (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890; see also *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901 (*US Ecology*)).)

In demurring, defendant Soman contends plaintiff Godbole has not sufficiently alleged “a promise clear and unambiguous in its terms.” Defendant Soman also demurs on the basis that this promissory estoppel cause of action is barred by the statute of limitations.

In opposition, plaintiff Godbole does not even address the promissory estoppel cause of action, instead asserting argument to support the previously asserted, but now eliminated cause of action for breach of implied covenant of good faith and fair dealing.

There being no opposition to defendant Soman’s demurrer to the promissory estoppel cause of action, defendant Soman’s demurrer to the sixth cause of action of plaintiff Godbole’s FAC on the grounds that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for promissory estoppel is SUSTAINED with 10 days’ leave to amend.

E. Business and Professions Code §17200.

In demurring to plaintiff Godbole’s seventh cause of action, defendant Soman cites *Consumers Union of United States v. Fisher Dev.* (1989) 208 Cal.App.3d 1433, 1438 where the court wrote:

"Unfair competition is defined to include 'unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising.' (Bus. & Prof. Code, § 17200.) California courts have consistently interpreted such language broadly. An 'unlawful business activity' includes "'anything that can properly be called a business practice and that at the same time is forbidden by law.'" [Citation.] The Legislature 'intended . . . to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur.' [Citation.]" (*People v. McKale*, *supra*, 25 Cal.3d at pp. 631-632.) ... The

Legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur [citations].

Defendant Soman argues that since he is not alleged to have engaged in any business act or practice, he cannot be sued for unfair competition. However, defendant Soman's argument conveniently ignores allegations that "Defendant financially benefitted from [his deceit] in that Defendant received money and compensation from [SSB] ... [and] Defendant had scammed numerous other individuals with these same schemes, [i.e.,] Defendant would 'refer' a victim to 'invest' in [SSB] and would receive financial remuneration from [SSB] and its founder, Sanjeev Acharya." (FAC, ¶¶16 – 17.) Defendant Soman has not provided this court with any persuasive legal authority which holds that such activity would not constitute, as a matter of law, a business act or practice.

Defendant Soman argues additionally that since this case deals with securities claims, the cause of action is preempted by federal law. Defendant Soman's argument is underdeveloped. Defendant Soman has not provided any persuasive legal authority in support of this argument.

Consequently, defendant Soman's demurrer to the seventh cause of action of plaintiff Godbole's FAC on the grounds that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for violation of Business and Professions Code §17200 [et seq.] is OVERRULED.

The Court will prepare the formal order.

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Calendar Line 11**Case Name:** *Maria Lopez v. Roy Abbott***Case No.:** 24CV440901

Before the Court is Plaintiff Maria E. Lopez's motion for an interlocutory judgment of partition and appointment of referee for the single-family residence located at 1906 Somersworth Drive, San Jose, CA 95124, Assessor's Parcel Number 442-18-064 (the "Property"). The motion is made pursuant to Code Civ. Proc., §§ 872.720, 873.070, and 873.060 and on the grounds that Plaintiff is entitled to partition since there is no waiver, the interests of the parties in the Property are undisputed with each holding a 50% interest as tenants-in-common and the manner of partition is by sale because the Property is a single-family residence that cannot be divided, and Plaintiff does not consent to partition by appraisal. The appointment of a referee to facilitate the sale is required by statute. Plaintiff seeks to appoint Attorney Stan Smith as the Partition Referee.

The motion was filed and served on Officer Hummel for Defendant on June 17, 2024. Service may be effectuated on a prisoner by serving process on the sheriff or jailer who has custody of the prisoner. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 4:132, p. 4-20.) This rule is derived from Code Civ. Proc., §416.90 and Penal Code section 4013. Plaintiff has provided a proof of service for both the summons and complaint and a separate proof of service for the instant motion, both indicating that the documents were personally served by providing them to a Sheriff's deputy at the Elmwood facility. It is presumed that the Sheriff completed their duty to provide the documents to the defendant under Evidence Code section 664. (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 859.)

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.) There is also good cause to grant this motion. The motions are GRANTED.

Plaintiff to prepare formal order, proposed Interlocutory Judgment and any necessary appointment papers for the Referee. This matter is set for Status Review on January 16, 2025, at 10 a.m. in Department 18b.

Moving party to prepare formal order.

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