SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: July 25, 2024 TIME: 9:00 A.M.

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV370683	Nalini Kapur et al. v. Warren Trumbly et al.	Click on LINE 1 or scroll down for ruling.
LINE 2	23CV426689	Itria Ventures LLC v. Evolving Palate Inc. et al.	Click on LINE 2 or scroll down for ruling.
LINE 3	21CV391677	Jennifer Stradtman v. John Schloemann et al.	Click on LINE 3 or scroll down for ruling.
LINE 4	23CV427742	Anthony Moran v. FCA US, LLC et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	23CV427904	Eric F. Hartman v. Lynn Dornon Kuehn	Click on LINE 5 or scroll down for ruling.
LINE 6	17CV310152	Bank of America, N.A. v. Wira A. Soedarmono	Claim of exemption: parties to appear.
LINE 7	21CV391798	Al Nievas v. County of Santa Clara	OFF CALENDAR per 7/17/24 order.
LINE 8	22CV397608	Dung Mai v. Trish Thuy Than Ngo	Motion to be relieved as counsel: parties to appear.

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Calendar Line 1
Case Name: *Nalini Kapur et al. v. Warren Trumbly et al.*
Case No.: 20CV370683

Plaintiffs Nalini Kapur, Rishi Kapur, and Ravi Kapur (collectively, "the Kapurs") initiated this action against defendants Warren Trumbly, Linda Trumbly, Jeremy Noonan, Robyn Noonan, and KAXT, LLC (collectively, "Defendants") in connection with the sale of KAXT, LLC, a television station. Jeremy Noonan and Robyn Noonan bring the present motion for judgment on the pleadings ("JOP") as to the Kapurs' breach of fiduciary duty and constructive fraud causes of action. For the reasons that follow, the court denies the motion as to the fiduciary duty cause of action but grants the motion as to the constructive fraud cause of action with leave to amend.

I. BACKGROUND

According to the complaint, Warren Trumbly and his wife Linda Trumbly, along with other associates and family members, formed a company with the Kapurs called KAXT, LLC ("KAXT"), which "was" a television station run by Warren Trumbly. (Complaint, ¶ 2.)[1] The family members who formed KAXT included Jeremy Noonan and Robyn Noonan, the Trumblys' son-in-law and daughter, respectively. (*Ibid*.) The Kapurs invested a total of $300,000 into KAXT, giving them a 42% ownership interest in the company under the company's operating agreement ("Operating Agreement"). (*Ibid.*) In 2014, over the objections of the Kapurs, the Trumblys and Noonans sold KAXT for $10,100,000, despite having a valid offer from at least one other prospective purchaser for at least $15,000,000. (*Ibid*.) The Kapurs allege they did not receive notice of material and critical information regarding this sale in 2014; in addition, they allege that Warren Trumbly filed for dissolution and cancellation of KAXT in January 2020 without any notice. (*Id.* at ¶ 3.) According to the Kapurs, they are entitled to $4,242,000 from the sale of KAXT, but Warren Trumbly, supposedly acting on behalf of KAXT, is holding "hostage" a payment to the Kapurs in the amount of $3,677,421.10 until the Kapurs' agree to forego any right to challenge their receipts from the sale of KAXT. (*Id*. at ¶ 4.) The Kapurs also allege that Warren Trumbly has not provided them with any detailed accounting or basis for distributions from the sale of KAXT. (*Ibid*.)

On September 15, 2020, the Kapurs filed their complaint asserting the following causes of action against Warren Trumbly, Linda Trumbly, Jeremy Noonan, Robyn Noonan, and KAXT, LLC: (1) fraud; (2) breach of fiduciary duty; (3) wrongful dissolution and cancellation of LLC; (4) constructive fraud; (5) trespass to chattels; (6) conversion; (7) alter ego liability; (8) revocation of cancellation and dissolution of LLC; and (9) an accounting. Defendants answered on May 10, 2021.

The Noonans filed the present JOP motion on June 5, 2024. Trial is now set for August 19, 2024.[2]

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[1] Presumably, the LLC *owned and operated* the station, although this is not clear from the complaint.
[2] The Kapurs opposition mentions an attempt by KAXT, Warren Trumbly, and Linda Trumbly to join the Noonans' motion. (Plaintiffs' Opposition to Defendants Jeremy Noonan's and Robyn Noonan's Motion for Judgment on the Pleadings, p. 12:2-12.) But this joinder is not in the court file, as it was apparently rejected by

II. REQUEST FOR JUDICIAL NOTICE

The Noonans have submitted requests for judicial notice with their JOP motion. "Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

The Noonans initially requested that the court take judicial notice of three documents (Exhibits A-C). (Defendants' Request for Judicial Notice, pp. 1-2.) In support of their reply, the Noonans have requested that the court take judicial notice of two additional documents (Exhibits E-F). (Defendants' Request for Judicial Notice in Support of Defendants' Reply to Plaintiffs' Opposition, pp. 1-2.) Exhibit A is a copy of a final award issued by arbitrator David M. Heibron from an arbitration in American Arbitration Association Case No. 74-140-00012-13 SM. (Declaration of Stephan Choo in Support of Defendants' Motion and Motion for Judgment on the Pleadings ("Choo Decl."), Ex. A.) Exhibit B is a judgment after a hearing denying the Kapurs' petition to vacate the arbitration award in Sacramento County Superior Court, Case Nos. 34-2014-00159970 and 34-2013-00148233. (*Id.* at Ex. B.) Exhibit C is a Third District Court of Appeal opinion affirming the Sacramento Superior Court's denial of the Kapurs' petition to vacate the arbitration award, Case No. C076804. (*Id*. at Ex. C.) Exhibit E is a copy of the U.S. Court of Appeals' decision in *Kapur v. Federal Communications Commission* (D.C. Cir. 2021) 991 F.3d 193. (See Declaration of Stephan Choo in Support of Defendants Jeremy Noonan's and Robyn Noonan's Reply to Plaintiffs' Opposition to Defendants' motion for Judgment on the Pleading ("Choo Reply Decl."), Ex. E.) Exhibit F is a copy of the Statement of Information filed with the California Secretary of State on May 17, 2017 for KAXT. (*Id*. at Ex. F.)

The court GRANTS judicial notice of Exhibit A pursuant to Evidence Code section 452, subsection (d). (See *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 525 ["The trial court properly took judicial notice of the arbitration award. (See Evid. Code, § 452, subd. (d).)"].) Evidence Code section 452, subsection (d), provides that a court may take judicial notice of records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States. This arbitration award is a part of the court records in the Sacramento County case. Similarly, the court GRANTS judicial notice of Exhibits B and C, as these are also court records.

These court records are relevant to the collateral estoppel issues raised in this motion, and so it is proper for the court to consider them. (See *Key v. Tyler* (2019) 34 Cal.App.5th 505, 532 [appellate court may consider probate court's prior findings for purposes of determining the collateral estoppel effect of those findings]; *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299 [court may take judicial notice of court records in ruling on an

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the Clerk's Office and no further attempts were made to file it. Accordingly, no joinder is presently before the court.

issue of res judicata].) "[E]ven though a factual finding in a prior judicial decision may not establish the truth of that fact for purposes of judicial notice, the finding itself may be a proper subject of judicial notice if it has a res judicata or collateral estoppel effect in a subsequent action." (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 148.)

The court DENIES judicial notice of Exhibits E and F. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252 [same]; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316 [same]; *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 783 [points raised in the first time in reply should not be considered].)

III. MOTION FOR JUDGMENT ON THE PLEADINGS

A. Threshold Service Issue

The Noonans first contend that the Kapurs failed to serve the opposition on them properly. (Defendants Jeremy Noonan and Robyn Noonan's Reply to Plaintiffs' Opposition to Motion for Judgment on the Pleadings, p. 2:12-23 ("Reply").) They "only learned about Plaintiffs' Opposition when Kathryn Diemer's office, Counsel for Mr. and Mrs. Trumbly and KAXT, LLC, emailed [them] a copy of the Opposition on July 17, 2024 at 9:19 a.m. after [the Noonans] informed Mrs. Diemer that [the Kapurs] never filed or served their Opposition in the evening of July 16, 2024." (*Id.* at 2:12-16.) According to the Noonans, the Kapurs served the opposition papers to the old office address for their counsel, despite counsel having filed a notice of change of address on June 15, 2023 and the Kapurs having sent other papers to this new address. (*Id.* at 2:16-23.) The Noonans suggest that the Kapurs intentionally mis-served them. (*Ibid*.)

The proof of service for the Kapurs' opposition lists an address for the Noonans' counsel at 535 Middlefield Road, Suite 245, Menlo Park, CA 94025, but counsel's current address is at 505 Sansome Street, Suite 1925, San Francisco, CA 94111, and so it does appear that the Kapurs failed to serve the Noonans at the correct address.

The court has discretion to refuse to consider papers that are not timely filed or served. (See Cal. Rules of Court, rule 3.1300(d).) Given that the Noonans submitted a substantive reply brief, the court will exercise its discretion to consider the late-served papers on this occasion. Future service failures may not meet the same result.

B. Legal Standards on a Motion for Judgment on the Pleadings

A JOP motion is proper when the complaint does not state facts sufficient to constitute a cause of action against the defendant. (Code Civ. Proc., § 438, subd. (c)(1)(B)(2).) "The grounds for motion provided in this section shall appear on the face of the challenged pleading or from any mater of which the court is required to take judicial notice." (Code Civ. Proc., § 438, subd. (d).) A JOP motion is the functional equivalent of a general demurrer made after the time to demur has expired and more than 30 days before trial. (See Code Civ. Proc., § 438; see also *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999 (*Cloud*); *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254 (*Shea*).) "The court accepts as true all material factual allegations, giving them a liberal construction,

but does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts." (*Shea, supra*, 110 Cal.App.4th at p. 1254.)

As with a demurrer, facts appearing in exhibits attached to the complaint are given precedence over inconsistent allegations in the complaint. (See *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."].) Also, just as with a demurrer, the court may not consider extrinsic evidence when ruling on a motion for JOP. (See *Sykora v. State Dept. of State Hospitals* (2014) 225 Cal.App.4th 1530, 1534, citing *Cloud, supra,* 67 Cal.App.4th at p. 999 ["Presentation of extrinsic evidence . . . is not proper on a motion for judgment on the pleadings."].)

C. Discussion

1. Second Cause of Action: Breach of Fiduciary Duty

The Noonans argue that the Kapurs have failed to state a cause of action for breach of fiduciary duty because the Noonans did not fraudulently attempt to dissolve KAXT without notice, and the doctrine of issue preclusion bars the claim in any event. (See Memorandum of Points and Authorities in Support of Motion for Judgment of the Pleadings, pp. 5-6 ("MPA").)

a) The Existence of an Alleged Breach

The Noonans' interpretation of the Operating Agreement is that it did not require the co-managing members of KAXT to provide any notice to the other members of KAXT if the company were to dissolve; as a consequence, they argue that the Kapurs have failed to allege a breach of fiduciary duty based on the absence of such notice. (MPA, p. 5:5-13.) In support of this argument, the Noonans quote the following language from the Operating Agreement: "The Company shall be dissolved on the first to occur of the following events: . . . (d) The sale or other disposition of substantially all of the Company assets." (*Id*. at p. 5:7-10.)

In opposition, the Kapurs respond that this argument requires the court to make a legal conclusion based on disputed facts. (Opposition, pp. 8:1-9:6.) According to the Kapurs, KAXT could not have disposed of "substantially all" of its assets because they "had not, and still have not, received their disputed proceeds from KAXT, which are substantial." (*Id*. at p. 8:14-19.) Furthermore, the complaint alleges that the Noonans improperly withheld financial information about KAXT from the Kapurs for years, including information about the status of any of KAXT's assets at the time of the alleged wrongful dissolution and cancellation. (*Id*. at p. 9:1-6.) These are factual allegations that must be accepted as true on a JOP motion.

The Noonans argue in reply that the Kapurs provide no support for the notion that Jeremy Noonan was required to give notice, as no language in the Operating Agreement explicitly requires a co-managing member to provide any notice to the other members of KAXT in the event of the company's dissolution. (Reply, p. 3:3-12.) Furthermore, the Noonans argue that the U.S. Court of Appeals issued a decision on March 16, 2021 confirming KAXT's sale, and so issue preclusion bars the Kapurs from disputing whether a sale of KAXT's assets actually occurred under the Operating Agreement. (*Id.* at pp. 3:13-19, 4:1-20.)

The court ultimately finds the Noonans' arguments to be unpersuasive. The complaint alleges that, as a co-managing member and President of KAXT, Warren Trumbly owed the Kapurs fiduciary duties of loyalty and care. (Complaint, ¶ 89.) The complaint further alleges that Jeremy Noonan currently serves as a co-managing member of KAXT, and he therefore owed similar fiduciary duties to the Kapurs. (*Id*., ¶¶ 90, 91.) These fiduciary duties, according to the complaint, required Jeremy Noonan to "act in the utmost good faith towards Plaintiffs and to avoid acts and omissions adverse to Plaintiffs' business interests." (*Id*., ¶ 91.) Jeremy Noonan allegedly breached these fiduciary duties by fraudulently attempting to dissolve and cancel KAXT and then concealing this from (*i.e.*, providing no notice to) the Kapurs. (*Id*., ¶ 92.) The Kapurs' second cause of action is not dependent on a determination that the Operating Agreement expressly required Jeremy Noonan (or any other managing member) to provide notice to the other members. A cause of action for breach of fiduciary duty does not require the citation of explicit language in a governing agreement in order to prove the existence of a breach, and the Noonans do not argue, in connection with the second cause of action, the complete absence of any possible fiduciary relationship . (See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820-821 ["The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages. [Citation.]"].) The Noonans' other arguments are similarly unpersuasive. The Kapurs are not contesting the validity of the sale of KAXT with their breach of fiduciary duty cause of action – they are contesting whether the Noonans complied with alleged fiduciary duties as they relate to KAXT.[3]

b) Issue Preclusion

As for the doctrine of issue preclusion, the Noonans argue that because the Kapurs previously raised the propriety of the Noonans' membership interests in KAXT in the AAA arbitration, because the arbitrator issued a final award finding that the Noonans properly made contributions to KAXT, and because the award was confirmed in subsequent litigation, the Kapurs cannot relitigate this issue. (MPA, p. 5:14-6:6.) The Kapurs respond that because the FAC asserts different "operative facts" from those previously found, the doctrine does not apply to this cause of action. (Opposition, p. 9:20-26.)

Collateral estoppel, or issue preclusion, bars relitigation of issues argued and decided in prior proceedings. (*Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 556.) "Collateral estoppel precludes the relitigation of an issue only if (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding." (*Zenvik v. Superior Court* (2008) 159 Cal.App.4th 76, 82.) An arbitration award can have collateral estoppel effect. (See *Gavriiloglou v. Prime Healthcare Management, Inc*., (2022) 83 Cal. App. 5th 595, 602.)

According to the materials of which the court has taken judicial notice, in January 2013, all of the members of KAXT, except for the Kapurs, voted to approve the sale of KAXT's license and assets for $10.1 million. (Choo Decl., Ex. C, p. 5.) The Kapurs refused

[3] The court agrees with the Noonans that the Kapurs' allegations regarding KAXT's failure to provide accountings concern only Warren Trumbly, per the language of the complaint. (Complaint, ¶ 4.) Nevertheless, the court finds this argument irrelevant in light of its other conclusions. (See Reply, p. 3:22-27.)

to recognize the validity of the vote, so the other members of KAXT commenced an arbitration in Sacramento County under the Operating Agreement, seeking a declaration that the vote was valid. The Kapurs asserted various counterclaims in the arbitration, including that the Noonans never provided the required capital contributions to be proper members of KAXT. In September 2013, the arbitrator issued an initial award affirming the validity of the KAXT sale and rejecting the Kapurs' contentions that the Noonans were not members of KAXT. (*Ibid*.) In January 2014, the arbitrator incorporated the initial award into a final arbitration award. (*Id.* at p. 5.) As noted above, the Sacramento County Superior Court denied the Kapurs' motion to vacate the arbitration award, and the Court of Appeal affirmed that decision. (*Id.* at pp. 7, 18.)

The court agrees with the Kapurs that the prior proceedings do not necessarily involve the same issues alleged in the complaint. For issues to be deemed identical for purposes of precluding subsequent litigation, the two actions must involve identical factual allegations. (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481-482 [finding that a plaintiff made identical allegations when alleging disparate treatment and discrimination in two separate proceedings].) This "is not an easy rule to apply, for the term 'issue' as used in this connection is difficult to define, and the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was raised even though some legal theory, argument or 'matter' relating to the issue was not expressly mentioned or asserted." (*Clark v. Lesher* (1956) 46 Cal.2d 874, 880–881.) The "factual predicate of the legal issue decided in the prior case must be sufficient to frame the identical legal issue in the current case, even if the current case involves other facts or legal theories that were not specifically raised in the prior case." (*Textron Inc. v. Travelers Casualty & Surety Co*. (2020) 45 Cal.App.5th 733, 747 (*Textron*).)

Here, while the prior arbitration focused on whether the Noonans properly made capital contributions to KAXT, the present breach of fiduciary duty allegations focus on whether Warren Trumbly and Jeremy Noonan fraudulently dissolved and cancelled KAXT without giving notice to the Kapurs. (Complaint, ¶ 92.) The two matters involve distinct issues. While there is some overlap in the factual allegations in the present and prior proceedings, the prior decision rests on a different factual and legal foundation from the allegations raised in the present proceeding. In addition, because a JOP motion is "the functional equivalent of a general demurrer," such a motion should ordinarily not be granted as to only a portion of a cause of action, just as "a general demurrer does not lie as to a portion of a cause of action." (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452.) Here, the second cause of action is not based solely (or even primarily) on allegations regarding the Noonans' capital contributions; indeed, in their reply, the Noonans admit that they are not arguing that the entire cause of action is barred by the doctrine of issue preclusion. (Reply, p. 4:15-16.) Thus, even if allegations regarding the Noonans' capital contributions were precluded, the second cause of action would not be subject to a JOP motion.[4]

The court DENIES the Noonans' JOP motion as to the second cause of action.

[4] In fact, in their reply, the Noonans explain

2. Fourth Cause of Action: Constructive Fraud

The Noonans argue the Kapurs have failed state a cause of action for constructive fraud because the complaint does not plead any facts to satisfy the required elements, and the doctrine of issue preclusion also bars the cause of action. (See MPA, pp. 6-7.)

The court addresses the latter contention first: for the same reasons that the court has rejected the application of issue preclusion to the second cause of action, so the court rejects it with respect to the fourth cause of action. The constructive fraud cause of action does not focus on whether the Noonan's properly capitalized their membership interests in KAXT. Rather, the allegations focus on the notion that "Defendants Jeremy Noonan and Robyn Noonan had a legal duty to inform . . ." the Kapurs of the nature of these interests. (Complaint, ¶ 105.)

Second, the Noonans argue that the Kapurs have failed to establish the existence of a fiduciary relationship between them. (MPA, pp. 6:15-7:3.) "Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship. [Citation.] [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." (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 415, citing *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal. App. 4th 555, 563.) The elements of a cause of action for constructive fraud are: (1) a fiduciary or confidential relationship; (2) an act, omission, or concealment involving a breach of that duty; (3) reliance; and (4) damages. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1249-50.)

The Noonans characterize the Kapurs' allegation that they "had a legal duty to inform Plaintiffs" as conclusory, without any other facts or specificity. (MPA, p. 6:19-20.) Further, the Noonans argue that a member of a manager-managed limited liability company does not automatically have a fiduciary duty to any other member of the same LLC, and the only basis the Kapurs provide for any alleged duty owed to them by the Noonans comes from the Noonans' status as members of KAXT. (See MPA, p. 6:23-26.) The Kapurs respond that the complaint specifically alleges that Jeremy Noonan was a *managing* member of KAXT, and that he therefore owed a fiduciary duty to the Kapurs in that capacity. (Opposition, p. 10:4-9.) The Kapurs also argue that because Robyn Noonan is the daughter and wife of two managing members of KAXT and "part of a family-grouping of members which comprise the majority membership of KAXT," she also had a special duty to them. (*Id*. at p. 10:9-14.)

The court concludes that the complaint sufficiently alleges that Jeremy Noonan owed a fiduciary duty to the Kapurs, based on his position as a managing member of KAXT. (Complaint, ¶¶ 90, 91.) California Corporations Code section 17704.09, subdivision (f), states that "managers" of a "manager-managed limited liability company" owe fiduciaries duties of loyalty and care to the other members of a limited liability company.[5] As for Robyn Noonan,

[5] Although the Noonans argue in reply that Jeremy Noonan did not become a co-managing member of KAXT until May 17, 2017, after the sale of KAXT, they rely on Exhibit F to the Choo declaration for this fact, and the court has denied judicial notice of Exhibit F. The court concludes that this exhibit should have been presented with the opening papers, not the reply papers, given the allegations in the complaint that Warren Trumbly

the court concludes that the Kapurs have not sufficiently alleged that she owed them a fiduciary duty. The Kapurs provide no authority for the proposition that a daughter and/or wife of managing members of an LLC owes a similar fiduciary duty to members as the managers themselves. Nor do the Kapurs provide any cognizable support for their argument that as a "part of a family-grouping of members which compromise the majority membership of KAXT," Robyn Noonan owed them a fiduciary duty. (Opposition, p. 10:12-13.) The Kapurs' reliance on California Corporation Code section 17704.09, subsection (d), which simply addresses a member's "obligation of good faith and fair dealing" to other members, is inapt.

Finally, the Noonans also argue that the Kapurs have failed to allege the requisite elements of a constructive fraud cause of action: *i.e.*, that Jeremy Noonan failed to disclose the nature of the Noonans' ownership interests in KAXT, that he intended to conceal these facts from the Kapurs, and that the Kapurs relied on this fraudulent concealment and nondisclosure by Jeremy Noonan. (MPA, p. 7:1-3.) The court is not persuaded. The complaint does state that Warren Trumbly and Jeremy Noonan failed to notify or inform the Kapurs prior to or during the signing of the Operating Agreement of the nature of the Noonans' membership interests. (Complaint, ¶¶ 18, 92.) In addition, although the details in the complaint regarding intent and reliance are somewhat sparse, there are sufficient allegations in the complaint from which it may be inferred that Defendants are accused of having acted intentionally for their own financial gain (and to the Kapurs' detriment) and that the Kapurs detrimentally relied on these alleged non-disclosures by the managing members.

In short, the court GRANTS Robyn Noonan's JOP motion as to the fourth cause of action with 10 days' leave to amend. The 10 days shall run from the date of this order. Under other circumstances, the court would grant a longer leave period, but the trial has been set for August 19, 2024, which is less than four weeks away. The court DENIES Jeremy Noonan's JOP motion as to the fourth cause of action.

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replaced Nalini Kapur with Jeremy Noonan as a co-managing member. (Complaint, ¶ 90.) The court must accept as true the allegations in the complaint for purposes of the JOP motion.

IV. BACKGROUND

This action arises from a contract dispute between plaintiff Itria Ventures, LLC, a Delaware limited liability company doing business in California ("Itria"), and defendants Evolving Palate, Inc., a California corporation ("EPI"), Mohit Nagrath, and Archana Nagrath.

The original and still-operative complaint, filed by Itria on November 28, 2023, states four causes of action: (1) Appointment of Receiver; (2) Preliminary Injunction; (3) Breach of Written Contract; and (4) Breach of Written Warranty. Itria alleges that it entered into a "Receivables Sales Agreement" ("RSA") in July 2023, under which it provided working capital for EPI's operations in exchange for a portion of EPI's accounts receivable. (See Complaint, ¶ 9.) Mohit and Archana Nagrath signed the RSA on behalf of EPI and each separately guaranteed EPI's performance, as well. (*Id*. at ¶ 11.) Itria alleges that its attempt to collect its portion of EPI's accounts receivable on November 6, 2023 was rejected for insufficient funds, and neither EPI nor the Nagraths have paid the amounts due and owing. Itria alleges that this was a material breach of the RSA. (*Id*. at ¶¶ 18-24.)

The complaint attaches a copy of the RSA as Exhibit A. Generally, "[i]t is . . . solely a judicial function to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence." (*Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 724; see also *Sierra Vista Regional Medical Center v. Bonta* (2003) 107 Cal.App.4th 237, 245 ["The interpretation of a contract is a question of law unless the interpretation turns on the credibility of extrinsic evidence."].) Paragraph 15 of the RSA states that the "Agreement and all transactions hereunder" are to be interpreted under New York law.

The three defendants filed a joint answer to the complaint on January 29, 2024, asserting several affirmative defenses. The twenty-fourth affirmative defense alleges that there was no breach of any duty owed to Itria. The thirty-first affirmative defense (misstated as a defense to a demand for arbitration) asserts that the RSA is void and unenforceable under New York law.

Currently before the court is Itria's motion for summary judgment or summary adjudication, filed on April 23, 2024. Defendants filed a joint opposition on July 12, 2024.

V. ITRIA'S MOTION FOR SUMMARY JUDGMENT

D. General Standards

The pleadings limit the issues presented on a motion for summary judgment or adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

The moving party bears the initial burden of production, to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, affirmative defense, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.) Code of Civil Procedure section 437c, subdivision (t), provides that the only means by which a party may seek summary adjudication of only part of a cause of action or of an issue other than an "issue of duty" is by submitting a joint stipulation of the parties to the court, specifying the issue(s) to be adjudicated, which the court must then approve before the motion can be filed.

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of an opponent's claim or defense. While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 [evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party].)

Generally, the moving party may not rely on additional evidence filed with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.) The court has therefore not considered the declarations of Helen Chang or Harrison Smalbach submitted with Itria's reply, or considered any of the attached exhibits.

Where a plaintiff has moved for summary judgment, it has the burden of showing that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a).) That burden can be met if the plaintiff has proved each element of the cause of action entitling it to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (Code Civ. Proc., § 437c, subd. (p)(1). (See *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965.) "A plaintiff moving for summary adjudication meets its burden if it proves each element of the cause of action." (*Quidel Corp. v. Superior Court* (2020) 57 Cal.App.5th 155, 163.) "If the plaintiff meets its burden, the defendant must set forth specific facts showing a triable issue of material facts exist. (*Id*. at p. 164.) It is not part of a plaintiff's initial burden to disprove affirmative defenses and cross-complaints asserted by a defendant. (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co*. (2009) 170 Cal.App.4th 554, 564-565.)

E. The Basis for Itria's Motion

Itria states that it seeks summary judgment or, in the alternative, summary adjudication of the complaint's third and fourth causes of action. The motion is brought on the grounds

"that there is no triable issue as to any material fact as to the causes of action for Breach of Written Contract and Breach of Written Warranty." (Notice of Motion at P. 2:11-12.)

As an initial matter, Itria's motion can only be considered one for summary adjudication, as it does not dispose of the action as a whole; indeed, it does not even mention the first and second causes of action. The first and second causes of action for "Appointment of a Receiver" and "Preliminary Injunction" are not really standalone causes of action, in any event, as they are remedies. "[T]he appointment of a receiver is a drastic remedy to be employed only in exceptional circumstances." (*City and County of San Francisco v. Daley* (1993) 16 Cal.App.4th 734, 744.) "[A] trial court must consider the availability and efficacy of other remedies in determining whether to employ the extraordinary remedy of a receivership." (*Id*. at 745.) "Where an injunction will protect all the rights to which the applicant for the appointment of a receiver appears to be entitled, a receiver will not be appointed." (*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1953) 116 Cal.App.2d 869, 873 (citations omitted).)

Moreover, as noted above, summary adjudication of general issues or facts is not available and, unless the parties comply with Code of Civil Procedure section 437c, subdivision (t), any motion for summary adjudication must completely dispose of a cause of action or issue of duty. The Notice of Motion lists eleven "issues" for adjudication, none of which present an issue of duty or completely dispose of a cause of action. Rule of Court 3.1350(b) states that "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." None of the eleven enumerated issues are repeated in Itria's separate statement. Instead, the statement has subheadings for only the third and fourth causes of action. Accordingly, those two causes of action are the sole proper focus of this motion.

F. Discussion

Relying solely on a declaration from its corporate counsel, Harrison Smalbach, Itria makes the following factual contentions: that it performed all of its obligations under the RSA; that EPI was, among other things, required to allow Itria to collect 13.08% of EPI's accounts receivables every business day (approximately $337.30 per day) and to notify Itria if its accounts lacked sufficient funds for the collection to take place; that on November 6, 2023, its attempt at collection was rejected for insufficient funds without any prior notice from EPI; that this was a material breach of the RSA; and that all outstanding monies became due from EPI and the Nagraths at that point. According to counsel's declaration, those funds have still not been paid. (See Smalbach Decl., ¶¶ 4-8.)

Attached to the Smalbach declaration are three documents: a copy of the RSA (Exhibit A), a statement that purportedly shows the collections made by Itria under the RSA through November 6, 2023 (Exhibit B), and email communications between a representative of Itria and Archana Nagrath regarding the missed funds, dated November 16, 2023 and January 16, 2024 (Exhibit C). The Smalbach declaration and these exhibits are the sole evidence cited in Itria's separate statement of undisputed material facts.

The opposition submitted by defendants does not dispute that the RSA is to be interpreted according to New York law. The opposition presents two alternative arguments, however.

Defendants' first argument, which is premised on the validity of the RSA, is that there is a triable issue as to whether any material breach of the RSA actually occurred. Defendants argue that Section 7(B) of the RSA ("Limitations on Material Breach") expressly provides that there was no material breach under the circumstances presented here: "Notwithstanding any other provision of this Agreement, (i) if the aggregate Receivables remitted to Purchaser pursuant to this Agreement are less than the stated Amount Sold, despite Merchant's best efforts to operate its business in compliance with this Agreement in good faith, and Merchant had not violated any other provision of this Agreement, such diminution shall not in itself be deemed a Material Breach." (Exhibit A, p. 7.) Defendants claim that they gave Itria notice of EPI's business difficulties on October 23, 2023, well before the claimed date of material breach, and that Section 7(B)(i) therefore applies. (See Opposition, pp. 5:15-6:4.)

Defendants' second argument is premised on the invalidity or unenforceability of the RSA: according to Defendants, the RSA is not a true sales agreement; rather, it is a disguised loan agreement with a fixed term, and its real interest rate is usurious under New York law. (See Opposition, pp. 6:5-8:24.) This argument depends in large part upon a single federal district court decision interpreting New York law, *AKF, Inc. v. Western Foot & Ankle Center* (E.D.N.Y. 2022) 632 F.Supp.3d 66. That decision was recently vacated by the same court. (See *AKF, Inc. v. Foot* (E.D.N.Y. June 14, 2024, No. 1:19-CV-07118-PKC-ST) 2024 U.S. Dist. LEXIS 107571.)[6]

The opposition is supported by a declaration from defendant Mohit Nagrath, executed on July 11, 2024 in Campbell, California and made "under penalty of perjury under the laws of the State of California." Attached to this declaration as Exhibit A is a copy of an October 24, 2023 email from Archana Nagrath to Ben Morris and Aryan Dhiman at "biz2credit.com" (an entity apparently affiliated with Itria) informing them that business difficulties were making payment under the agreement "unmanageable."

The court DENIES Itria's motion for summary adjudication of the third and fourth causes of action for the following reasons.

First, Itria has failed to meet its initial burden of proving each element of the third and fourth causes of action. The only support for the motion is the Smalbach declaration, but that declaration indicates that it was signed by Mr. Smalbach in "New York, New York" on April 23, 2024. He declares "under penalty of perjury that the foregoing is true and correct."

Code of Civil Procedure section 2015.5 states that any statement, declaration or affidavit executed outside of California must state "that it is so certified or declared under the laws of the State of California." This declaration does not comply with that requirement. "'[C]ourts have made clear that a declaration is defective under section 2015.5 absent an express facial link to California or its perjury laws.'" (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 942, citing *Kulshrestha v. First Union Commercial*

[6] The first-named defendant in the subsequent decision is still Western Foot & Ankle Center, but for some reason, the computer-based nomenclature for this case simply lists "Foot" as the defendant.

Corp. (2004) 33 Cal.4th 601, 610-611 (*Kulshrestha*) [a declaration executed out-of-state in opposition to summary judgment motion was invalid where it did not state that it was made "under the laws of the State of California"]; see also *ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 217 [citing *Kulshrestha* and noting that a "declaration in opposition to the motion to quash was not signed under penalty of perjury under the laws of the State of California as required by section 2015.5. It therefore had no evidentiary value and we shall not consider it in our review of the jurisdictional issue."]; *Bombardier Recreational Products, Inc. v. Dow Chemical Canada ULC* (2013) 216 Cal.App.4th 591, 604 [citing *Kulshrestha* and stating: "Out-of-state declarations that do not state they were made 'under penalty of perjury under the laws of the State of California' (Code Civ. Proc., § 2015.5) are not deemed sufficiently reliable to be admitted into evidence."].)

As the Smalbach declaration was executed outside of California and does not state that it was made under penalty of perjury under the laws of the State of California, it cannot be admitted into evidence.[7] This means that it cannot support the summary adjudication motion or authenticate attached Exhibits A-C. (See Evid. Code, § 1401(a) ["Authentication of a writing is required before it may be received into evidence."]; *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 523 [explaining that in law and motion matters, a writing is ordinarily authenticated by declarations establishing how the documents were obtained, who identified them, and their status as "true and correct" copies of the original].)

Second, even if the Smalbach declaration could be admitted into evidence and be deemed sufficient to meet Itria's initial burden on summary adjudication, the court would still find that it fails to establish the absence of triable issues of fact. With the burden shifted to defendants, the Mohit Nagrath declaration raises material issues regarding the existence of a "material breach" of the RSA, as of November 6, 2023. Where declarations or testimony submitted by both sides contain conflicting material facts, the court cannot weigh the evidence in ruling on a motion for summary adjudication. (See *Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 540.) "Typically in summary judgment litigation, equally conflicting evidence requires a trial to resolve the dispute." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 881.) The motion must therefore be denied.

G. Objections to Evidence

Defendants have submitted objections to the Smalbach declaration with their opposition. As the motion is denied for failure to meet the initial burden, it is not necessary for the court to rule on these objections. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only 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).) The objections also do not comply with Rule of Court 3.1354, which requires the filing of two documents, evidentiary objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule.

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[7] The Smalbach reply declaration suffers from the same defect.

Calendar Line 3
Case Name: *Jennifer Stradtman v. John Schloemann et al.*
Case No.: 21CV391677

Plaintiff Jennifer Stradtman moves to quash deposition subpoenas for medical records from four of her medical providers: Dr. Sharon Wright; Heritage Medical Associates; Sherry Ware, LMHC; and Waterside Counseling Services. She argues that these subpoenas invade her constitutional right to privacy, are overbroad, and are not sufficiently relevant to the causes of action in this case. Defendants John Schloemann, DXC Technology Company, and Jennifer Stango (collectively, "Defendants") respond that these subpoenas seek medical information that Stradtman herself has placed at issue in this case, given her cause of action for intentional infliction of emotional distress ("IIED"). In addition, Defendants argue that they have tried to obtain this information directly from Stradtman, but the records she has produced have been heavily redacted.

The court agrees with Defendants that Stradtman has placed her mental health at issue in this case and that the subpoenas are sufficiently limited and targeted such that they seek potentially relevant information. Stradtman relies on *Britt v. Superior Court* (1978) 20 Cal.3d 844, 863-864 (*Britt*) and *In re Lifschutz* (1970) 2 Cal.3d 415, 435 (*Lifschutz*) to argue that Defendants are not entitled to her confidential mental health information, but these cases merely stand for the basic proposition that the act of filing a lawsuit does not constitute an "automatic" waiver of the doctor-patient privilege and does not necessarily open the door to broad discovery of all medical information of the plaintiff, no matter how tangentially related to the case at hand. Under these cases, the discovery sought must still be related to "any physical or mental condition which they have put in issue by bringing this lawsuit." (*Britt*, 20 Cal.3d at p. 864 [citing *Lifschutz*].) The court has reviewed the language of the requests contained in the subpoenas here, and it finds that these requests are indeed relevant to Stradtman's claim for IIED, particularly given that Defendants have limited the timeframe of the requests from January 1, 2018 to the present.[8] Unlike the discovery at issue in *Britt*, *supra*, which was overbroad on its face, the court finds that the requests are suitably tailored to the scope of any IIED claim.

The court has also reviewed the copies of medical records submitted in support of Defendants' opposition, and the court agrees with Defendants that Stradtman's redactions in her document production were excessive. It is difficult to understand many of these documents given the overbroad redactions in them. In addition, as Defendants note, there is nothing in the unredacted portions of the records that discusses any previously diagnosed eating disorder, notwithstanding Stradtman's allegations regarding the recurrence of an eating disorder. (Matta Declaration, Exhibit C.) This indicates that Stradtman has withheld too much information and more must be disclosed. Of course, any production in response to these subpoenas may still be made pursuant to the stipulated protective order in this case, given the confidential nature of these records.

For the foregoing reasons, the motion to quash is DENIED.

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[8] Only Request No. 1 explicitly states the January 1, 2018 date, but given that Defendants have repeatedly argued in their opposition that they are only seeking records since 2018, the court will interpret all of the requests contained in each of the subpoenas as being limited to this same timeframe.

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Calendar Line 4
Case Name: *Anthony Moran v. FCA US, LLC et al.*
Case No.: 23CV427742

This is another motion arising from defendant FCA US LLC ("FCA") missing its deadline to respond to discovery, plaintiff Anthony Moran making no effort to contact FCA about this omission, and then Moran filing a motion to compel initial responses. On June 6, 2024, the court decided Moran's motion regarding form interrogatories; now, he brings this motion regarding special interrogatories.

FCA has apparently served responses, as of May 27, 2024, and so this motion is moot. In addition, even though Moran is technically correct that a motion to compel initial responses does not need to be accompanied by a meet-and-confer declaration, the better practice would have been for Moran's counsel to reach out to FCA's counsel, rather than to burden the court with these serial motions. It is obvious to the court that motion practice could have been obviated if Moran had attempted to meet and confer with FCA in good faith. As a result, the court denies Moran's request for monetary sanctions.

The motion is DENIED as MOOT.

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Calendar Line 5
Case Name: *Eric F. Hartman v. Lynn Dornon Kuehn*
Case No.: 23CV427904

Defendant Lynn Dornon Kuehn moves to compel further responses to form interrogatories and requests for production of documents from plaintiff Eric F. Hartman. Hartman has submitted two separate but brief oppositions to the motion.

First, with respect to the form interrogatories, Hartman argues that there were only two incidents between himself and Kuehn, on September 9, 2022 and October 21, 2022, not seven incidents, as Kuehn alleges. Even if this is true—and the court does not have enough information from the parties to decide this factual dispute either way—it does not excuse Hartman from failing to provide any substantive answers to the form interrogatories for those two admitted incidents. Instead, Hartman has interposed objections only. The court finds this to be insufficient and therefore grants the motion to compel in part. Although the number of form interrogatories propounded is quite high (52 items) and answering them will impose some burden on the plaintiff, they are not outside the bounds of reasonableness if limited to the September and October 2022 incidents. Hartman must supplement his responses and provide answers to these interrogatories as to the September 9 and October 21, 2022 incidents within 30 days of notice of entry of this order. Those responses may be provided in a single document addressing both incidents, rather than in separate documents, if that turns out to be less burdensome.

Second, it appears that the requests for production are directed to the same items—videos and photos of interactions between Hartman and Kuehn—that were the subject of a similar motion to compel *between these same parties* in the related case of *Eric F. Hartman v. Koshy P. George* et al., Case No. 21CV390666, in this court. For the same reasons that the court granted that motion to compel on July 9, 2024, it now grants this motion, as well. Hartman must supplement his responses and provide the videos and photos within 30 days of notice of entry of this order.

Kuehn seeks monetary sanctions against Hartman, although the court finds Kuehn's request to be duplicative of the prior motion between these parties in the related case (as to the videos) and extremely simple (as to the form interrogatories). The court also agrees with Hartman that seven separate sets of form interrogatories was overkill, and so the claim of undue burden is not completely devoid of justification. The court therefore denies the request for sanctions.

The motion is GRANTED IN PART and DENIED IN PART as to the form interrogatories, and it is GRANTED as to the requests for production.

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