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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

MARCIA PELLITTERI, Plaintiff and Appellant, v. WELLQUEST INTERNATIONAL, INC., et al., Defendants and Respondents.	B289865 (Los Angeles County Super. Ct. No. BC490541)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark Mooney, Judge. Affirmed.

Greines, Martin, Stein & Richland and Marc J. Poster; Krane & Smith, Jeremy D. Smith and Daniel Redback for Plaintiff and Appellant.

Steven G. Madison for Defendants and Respondents.

Marcia Pellitteri (appellant) sued Wellquest International, Inc. (Wellquest); Edward Mishan; Michael Ackerman; Knott Direct, Inc.; Emson, Inc.; and E. Mishan & Sons, Inc. (collectively "respondents") for breach of oral and written agreements, breach of fiduciary duty, fraud, and conversion, among other claims.[1] The trial court sustained demurrers to most of appellant's causes of action, with only the breach of written contract cause of action surviving demurrer. The trial court then granted summary judgment in favor of respondents on appellant's breach of written contract claim. Appellant appeals, arguing that the trial court committed error in disposing of her causes of action by sustaining the demurrers and granting summary judgment in respondents' favor.[2]

We find no reversible error, therefore we affirm the judgment.

FACTUAL BACKGROUND

Appellant's operative second amended complaint (SAC) alleged that she is engaged in the business of "developing new products and shows for retail and wholesale including, but not limited to, television infomercials, and shopping clubs, and print,

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[1] Appellant's initial complaint against respondents was filed in August 2012. (*Pellitteri v. Wellquest International, Inc.* (Feb. 1, 2016, B264094) [nonpub. opn.], p. 2 (*Pellitteri II*).) On January 11, 2014, respondent Ackerman died, and on May 18, 2015, the parties filed a stipulation and order for Lydia Ackerman as Executrix of the Estate of Michael Ackerman to be substituted as a defendant in this litigation.

[2] Wellquest filed a motion for summary judgment, or in the alternative, summary adjudication of legal issues. The trial court granted the motion for summary judgment on October 19, 2017.

advertising and catalogues for all marketing venues worldwide and related commercial activities." Since the early 1990's, appellant engaged in various business ventures with respondents Ackerman and Mishan, and their related entities, whereby appellant introduced various products and parties to the respondents, and appellant would work with respondents "to maximize the profitability of the products." Appellant alleged that these business ventures were memorialized by "various written and oral agreements."

Appellant alleged that all respondents are interrelated, and that each is the "employee, agent, principal, officer, partner, joint venturer, alter ego, co-conspirator, director or other representative of one or more of the remaining [respondents]." Appellant further alleged that:

> "By written assignment prior to the commencement of this action, [appellant] is a successor in interest and assignee of Progressive Consulting Services, Inc., ('PCS'), a Nevada corporation, to all rights, title and interest PCS may have under agreements that are the subject matter of this Complaint."

Pursuant to the alleged agreements between appellant and respondents, appellant "made introductions of parties and products to [respondents] Ackerman and Mishan and their related entities in consideration for payment of compensation calculated by a percentage of the gross purchases and/or sales of products derived from [appellant's] services." Such payments varied by each venture product, ranging from $.50 per unit to in excess of $1.25 per unit. In addition to these introductions, appellant "contributed her knowledge, skill, expertise and time to maximize the profitability of the products." Appellant's work

included strategy and marketing of the products. Appellant was not paid a salary for her work. If the products were not purchased or sold, appellant received nothing.

Appellant alleged that in 2002, appellant and respondents entered an oral joint venture agreement memorializing the business relationship set forth above. The joint venture agreement was to remain in effect for the duration of the business relationship between the parties. Appellant alleged that the joint venture agreement was "memorialized by various written and oral agreements and communications between [appellant] and [respondents] Mishan, Ackerman, Wellquest, Emson and their affiliated persons and entities." As an example, appellant referenced a June 13, 2002 email in which respondents Wellquest, Emson and Ackerman agreed not to enter into a contract with a company called Modern Media "until we reach an agreement with Creative Campaigns." Appellant alleged that Creative Campaigns was her entity.

Appellant further alleged that since the agreement in 2002, appellant invested substantial time, money and assets in introducing respondents to parties and products, including "Topstyler, Instyler, Multi-Styler Pro, Superstyler, Magic Bullet, RevoStyler and the Michel Mercier Detangling Brush." During the period from 2002 to 2011, respondents allegedly compensated appellant for her services under the joint venture agreement.

Appellant alleged that in 2011, she discovered that respondents Mishan and Ackerman breached the joint venture agreement by:

> "[F]ailing and refusing to pay [appellant] monies due and owing to her for introducing parties and products to them; failing to provide explanations for various payments made by them to [appellant] without any

> description; failing to provide accurate reporting and/or an accounting of purchases and sales of products and other projects derived from the introduced parties; concealing and misrepresenting the amount of purchases and sales of introduced products; misappropriating payments due to [appellant] for themselves, and persons and/or entities they own or control; entering into secret third party arrangements to circumvent their obligations to [appellant] under the Joint Venture Agreement; secretly contracting directly with introduced parties, including, but not limited to, Modern Media and Michel Mercier in order to circumvent their obligations to [appellant]; purporting to reject introductions of products and parties by [appellant] and then contracting directly with the introduced parties (e.g. Michel Mercier); and misappropriating [appellant's] intellectual property and product designs by rejecting products and then developing 'knockoffs' based on [appellant's] engineered drawings including, but not limited to, the Topstyler, to benefit themselves and persons and/or entities they control."

Appellant's fourth cause of action for breach of written contract alleged that on September 10, 2002, PCS and Wellquest entered into a written agreement. The agreement was attached to the SAC as exhibit B. The written agreement listed certain parties, referred to as the "introduced parties," and set forth the agreement by which Wellquest would compensate PCS for the specified parties.[3] The agreement further provided that "Should

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[3] The "Introduced Parties" were "Dave Richmond, Mark Levine, Gary Kohn, Lenny Sands, Jacqueline Amenta, Richard Mazzaglia as individuals, and Modern Media, Revolutionary

[Wellquest] and any of The Introduced Parties enter into additional Agreements, amendments, etc. for the subject matter herein, [Wellquest] shall first work out its deal with PCS as it did with The Product in this agreement and . . . they shall automatically . . . become a part of this Agreement . . . ." The written agreement included a non-circumvention clause and allowed for assignment, as follows:

> "PCS has the right to assign and/or sell its rights in its agreements at any time without any further written notice required. PCS shall notify [Wellquest] of it's [*sic*] intention to assign it's [*sic*] rights and [Wellquest] has the right to know the company who will be the assignee and PCS will request that such assignee hold confidential all of the terms and conditions that PCS has with [Wellquest]."

Wellquest had a similar assignment right, and the assignment provision was "binding on all parties and each of their successors, assigns and/or heirs."[4]

Products,, Inc., Evolutionary Products, Inc., Modern Interactive Technology, Inc., Lasco, Lohan Media, and each of their officers, shareholders, directors and companies . . . which are owned by or wholly owned subsidiaries of each of the Introduced Parties companies and each of the parties and/or entities officers, shareholders, directors and referrals that are introduced to WQ by PCS who WQ has not entered into agreements with nor done business with prior to PCS's promotion of WQ to the Introduced Parties and introduction of WQ to The Introduced Parties."

[4] On March 19, 2008, appellant emailed Ackerman with a subject line "assignment." The email stated that PCS assigned "its things to a new corp that eric [*sic*] opened up so the new corp bank account I'm opening today will be under Direct 2 Market,

The written agreement contemplated that the parties may do business through the use of different entities in the future. Specifically, it provided that "Business with the Introduced Parties" would include products marketed and sold by Wellquest, as well as Wellquest and the introduced parties' "successors, sub-licensees, heirs, assigns, referrals, and companies that now exist and/or that may arise in the future," so long as the rights were assigned in compliance with the written agreement.

The written agreement contained an arbitration clause, as well as a clause specifying that:

> "This Agreement constitutes the entire understanding between the parties hereto with respect to the subject matter hereof and supersedes any prior understandings or agreements between the parties hereto with respect thereto. There are no representations, agreements, arrangements or understandings, oral or written, between the parties relating to the subject matter of this Agreement which are not fully expressed herein."

Appellant alleged that the written agreement "did not cover each of the parties or products, which are the subject matter of this SAC."

Appellant's cause of action for breach of the written agreement alleged that Wellquest breached its obligations to appellant under the agreement "by failing and refusing to pay the money due thereunder; by misrepresenting and failing to account

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Inc., a California Corporation." Appellant further indicated that she would "use Direct 2 Market, Inc. as the primary corp." On July 8, 2008, appellant provided Ackerman with the new banking information for Direct 2 Market, stating, "please make this company the payee from now on, on all."

for the purchases and sales of certain products, shows and projects including, but not limited to, Topstyler, Instyler, Multi-Styler Pro, Superstyler and Magic Bullet; and avoid [*sic*] paying [appellant] money due thereunder; by entering into undisclosed arrangements with third parties to circumvent the Wellquest Agreement; and by misappropriating [appellant's] intellectual property and product designs including, but not limited to, the Topstyler, to benefit themselves and persons and/or entities they own and control, to the exclusion of [appellant]."

In her cause of action for fraud, appellant alleged that respondents represented to her that they could be trusted, would provide correct records to her with disclosure of all material facts, that they would pay her in accordance with the various agreements, and that they would compensate appellant for the products and parties introduced by her, among other things. Appellant alleges that these representations were false, and that she relied upon them in doing business with respondents.

PROCEDURAL HISTORY

Arbitration proceedings

Appellant filed this action in 2012. Her first amended complaint (FAC) was filed in August 2013. Following service of the FAC, respondents moved to compel arbitration and stay the litigation, contending that arbitration was mandated by the written agreement between the parties. Appellant opposed the motion, arguing that the arbitration clause was narrow and did not apply to any of the FAC's claims. The trial court denied respondents' motion in February 2014. Respondents appealed the denial of the motion to compel arbitration. In an unpublished opinion, *Marcia Pellitteri v. Wellquest International, Inc., et al.,*

case No. B255062 (filed Jan. 29, 2015) (*Pellitteri I*), we reversed, finding that certain claims were arbitrable. (*Id.* at pp. 2-4.)

Following remand, appellant filed a motion to stay arbitration pending litigation of the nonarbitrable claims. The same day, respondents filed a motion to stay litigation pending arbitration. The trial court granted appellant's motion and denied respondents,' allowing the matter to proceed to litigation before arbitration. In *Pellitteri II*, we affirmed the trial court's order. (*Pellitteri II, supra*, B264094, at pp. 4, 8.)

Demurrers

On May 27, 2016, respondents filed a demurrer to the FAC. One of respondents' arguments was that appellant had no standing to enforce the written agreement between PCS and Wellquest, because she had not attached a written assignment of rights from PCS to appellant, nor had she alleged that she gave the required notice of assignment of rights to respondent. The trial court overruled the demurrer as to the second cause of action for breach of written contract and 10th cause of action for declaratory relief, but sustained demurrers as to the remaining causes of action with 20 days leave to amend. The trial court accepted as true appellant's allegations that an assignment existed. The court noted that it did not believe there was a requirement that the assignment be attached to the complaint, and "assume[d]" that there was an assignment "because that's what they allege."

Appellant filed the SAC on September 6, 2016.[5] Appellant again alleged that she had a written assignment of PCS's rights

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[5] The SAC set forth the following causes of action: (1) breach of oral joint venture agreement; (2) breach of oral partnership agreement; (3) breach of oral agreement; (4) breach of written

under the written agreement between PCS and Wellquest. On October 20, 2016, respondents filed a motion to strike the pleading and a demurrer. Respondents demurred to all causes of action except the fourth cause of action for breach of written agreement. Following argument the trial court took the matter under submission. On December 14, 2016, the court issued a written order sustaining the demurrer in its entirety, without leave to amend.[6]

Summary judgment and requests for leave to file third amended complaint (TAC)

On July 7, 2017, respondents filed a motion for summary judgment as to appellant's remaining claim for breach of written contract. Wellquest sought summary judgment on two grounds: first, that appellant was not a party to the written agreement between PCS and Wellquest, therefore, she lacked standing; and second, that appellant's claims for royalties reached products not covered by the written agreement. As to the first argument, respondents pointed out that nowhere was appellant mentioned in the agreement, she did not sign the agreement on behalf of PCS, and was not formally registered as an agent, officer or

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agreement; (5) breach of fiduciary duty; (6) fraud; (7) conversion; (8) money had and received; (9) unjust enrichment; (10) quantum meruit; (11) accounting; (12) declaratory relief; and (13) unfair competition.

[6] As the demurrer was sustained in its entirety, the motion to strike was rendered moot.

director of PCS in its Nevada articles of incorporation.[7] As to its second argument, respondents pointed out that the written agreement between Wellquest and PCS only identified a royalty obligation as to two products: "Revostyler" and "Superstyler," while appellant's SAC alleged that she was owed royalties for any product "'that derives from the relationship between the introduced parties and [Wellquest].'"

Appellant opposed the summary judgment, declaring that she could not locate the original written assignment, but that PCS in fact assigned its rights to her in 2008. Appellant also attested that she recently reinstated the corporation, and executed another assignment of its rights to her.

In conjunction with her opposition to summary judgment, appellant filed a petition for leave to file a TAC. The petition was based on newly discovered evidence which, appellant alleged, revealed new causes of action. In addition, a new defendant was discovered, "Better Look International, LLC," which Mishan allegedly used to avoid compensating appellant. The TAC would also add new causes of action for breach of written agreements between PCS and Wellquest, breach of implied-in-fact contract as to parties named in the written PCS/Wellquest agreement, and intentional interference with contractual relations, citing the "valuable contractual relationship" memorialized in the written PCS/ Wellquest agreement. Appellant argued that new evidence had been discovered only after the court granted appellant's motion to compel, resulting in late discovery of the grounds for these causes of action. The documents revealed three non-

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[7] In addition, respondents pointed out that PCS's corporate charter was revoked in 2008, and its current corporate status was "permanently revoked."

circumvent agreements between PCS and Wellquest, as well as agreements between respondents showing circumvention of their obligations to appellant under the written PCS/Wellquest agreement. In addition, after appellant's motion to compel the deposition of Mishan, Wellquest's person most qualified, was granted, appellant received new evidence, including the existence of Better Look International, LLC, and various admissions that appellant should have been paid for certain products.

The trial court postponed its ruling on respondents' summary judgment motion pending appellant's petition to amend her complaint.

On October 19, 2017, the trial court denied appellant's petition for leave to file a TAC, and granted summary judgment. The court noted that appellant had not shown by a preponderance of evidence that a valid assignment of PCS's rights to appellant existed.

On October 26, 2017, appellant filed a motion for leave to file a revised TAC. The proposed revised TAC added PCS and Direct 2 Market, Inc. as additional plaintiffs. Respondents opposed the motion, and on December 14, 2017, the trial court denied the motion, finding the "sham pleading" doctrine applicable. The court also found the proposed revised TAC would be time barred under the applicable statute of limitations.

Final judgment and appeal

On March 8, 2018, the trial court entered judgment against appellant.

On May 3, 2018, appellant filed her notice of appeal.

DISCUSSION

Appellant challenges three decisions of the trial court: (1) the decision to sustain respondents' demurrers to most of the

causes of action in her SAC; (2) the order granting summary judgment as to appellant's remaining cause of action for breach of written contract; and (3) the order denying appellant leave to file a TAC. We address each issue individually.

I. Summary judgment

A. Standard of review

We review a grant of summary judgment de novo, deciding independently whether the facts not subject to triable dispute, warrant judgment for the moving party as a matter of law. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253.) The appellate court's task is to make "'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court . . . .' [Citations.]" (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 234-235.) Our goal is to determine whether there are triable issues of material fact. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) There is a genuine 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. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845 (*Aguilar*).) If all of the evidence presented by the party opposing summary judgment, and all the inferences drawn therefrom, would not allow a reasonable trier of fact to find in favor of that party, we must affirm the trial court's grant of summary judgment. (*Id.* at p. 857.)

B. Appellant's standing

The parties agree that the primary issue is whether appellant had standing to enforce the written contract between PCS and Wellquest. There is no dispute that she was not a party

to the contract, nor was she an express beneficiary of the contract. The contract contains no reference to her, nor did she sign it on behalf of PCS. PCS registered as a Nevada corporation on August 14, 2002, and appellant was not named in the articles of incorporation or identified as an officer or director in any corporate filing. Generally, someone who is not a party to a contract has no standing to enforce the contract. (*Hatchwell v. Blue Shield of California* (1988) 198 Cal.App.3d 1027, 1034.)

However, appellant argues that there was a triable issue of fact as to whether she has standing to claim breaches of the written PCS/Wellquest agreement. In support of this position, appellant points to her own testimony that she was the sole owner and decision-maker for PCS, and that she is the successor-in-interest to PCS as its assignee. Appellant advances two arguments that a triable issue of fact exists as to whether she was the assignee of PCS's rights. First, she argues that no writing is required for an assignment of contract rights. However, appellant cannot at this stage avoid the fact that she alleged a written assignment of rights. Because appellant never alleged an oral assignment, respondents were not required to negate this theory on summary judgment. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493 ["the burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings"].) Thus, we decline to address appellant's argument and authorities suggesting that a written assignment was not necessary.

Next, appellant argues that even if a written assignment is required, appellant can prove the content of the assignment by

evidence other than the writing itself. Appellant declared under oath that there was a written assignment by which PCS assigned its claims to her in 2008, and there was an executed written assignment the original of which she cannot now locate. Appellant cites several legal authorities for the proposition that the contents of a lost writing may be proved by otherwise admissible secondary evidence.[8]

Here, however, the issue is not the content of an assignment. The issue is whether an assignment existed at all. Appellant's testimony as an alleged assignee is insufficient to show that a written assignment, if lost, ever existed. In order to

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[8] Specifically, appellant cites Evidence Code section 1521 ["The content of a writing may be proved by otherwise admissible secondary evidence"]; Evidence Code section 1523 [oral testimony may be admissible to prove the content of a writing if "the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence;" and "Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means"]. (Evid. Code, § 1523 subd. (b) & (c)(1).) Appellant also cites the following case law: *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1069 [the contents of lost documents may be proved by secondary evidence and the law does not require the contents of such documents to be proved verbatim]; *Meeks v. Autozone, Inc.* (2018) 24 Cal.App.5th 855, 866 [error to exclude plaintiff's testimony as to the offensive content of missing emails that defendant sent to her]; *Westport Ins. Corp. v. Cal. Cas. Mgmt. Co.* (N.D.Cal. 2017) 249 F.Supp.3d 1164, 1172, judgment corrected (N.D.Cal. May 30, 2017, No. 3:16-cv-01246-WHO) 2017 U.S. Dist. LEXIS 82449 [exemplar insurance policy admitted to prove contents of insurance policy at issue].

prove the existence of an assignment, there must be evidence that "'the assignor has . . . manifested an intention to make a present transfer of . . . rights to the assignee.' [Citation.]" (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1002.) The assignor in the alleged assignment here was PCS. Appellant has presented no evidence from any officer or director of PCS regarding the existence of this assignment, or PCS's intention to assign its rights to appellant. Under the circumstances, appellant's testimony that such an assignment existed is insufficient. Without evidence of the assignor's intent and agreement that such an assignment existed, anyone could purport to be an assignee and thereby create a triable issue of material fact. On this record, no reasonable trier of fact could find that such a written assignment existed. (*Aguilar, supra*, 25 Cal.4th at p. 845.) Thus, we must affirm the trial court's grant of summary judgment. (*Id.* at p. 857.)

Appellant makes the argument that in August 2017, she reinstated PCS as a Nevada corporation and granted herself a second written assignment of PCS's breach of written contract claims. Appellant argues that PCS's assignment was valid, and related back as if its rights had at all times remained in full force and effect.[9] However, as the trial court pointed out, appellant had alleged in the SAC that PCS's rights were assigned to her in 2008. At the summary judgment motion, there was no evidence

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[9] Appellant claims that under Nevada law any corporation may be revived and the revival relates back as if the corporation's rights had at all times remained in full force and effect. (Citing Nev. Rev. Stat. Ann. § 78.180; *AA Primo Builders, LLC v. Washington* (Nev. 2010) 245 P.3d 1190, 1197.)

that PCS undertook the corporate act of assigning its "major, if not only asset," to appellant. The court noted that there were procedural and evidentiary problems with the written assignment that appellant procured approximately a month before the summary judgment hearing.[10] However, even if the court were to accept evidence of the recent assignment, there was other evidence that it was invalid "because there was a previous

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[10] The court indicated that it made evidentiary rulings regarding the recently-procured assignment. Appellant has not provided an adequate appeal as to any specific evidentiary ruling of the court. She includes the single sentence: "For all the same reasons, the trial court erroneously sustained defendants' objections to plaintiff's declarations and exhibits supporting her cause of action for breach of oral agreements." This broad argument is inadequate. Appellant does not give the legal basis for the trial court's decision to exclude her declarations and exhibits, and fails to make any reasoned argument as to the validity of the trial court's grounds for exclusion of specific evidence. Her sweeping statement that the trial court erroneously sustained defendants' objections is insufficient to show that the trial court abused its discretion, and we are not required to search the record to seek grounds for possible error. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 ["'The reviewing court is not required to make an independent, unassisted study of the record in search of error . . . .'"].) Therefore the argument is waived. (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 277 ["When an appellant raises an issue 'but fails to support it with reasoned argument and citations to authority, we treat the point as waived'"].)

assignment to Direct 2 Market." Thus, it was unclear whether PCS had any rights left to assign in 2017.[11]

In sum, the purported 2017 written assignment did not create a triable issue of fact as to whether PCS assigned its rights to appellant in 2008, as she alleged in her complaints.

C. Summary judgment was properly granted

Appellant failed to create a triable issue of material fact as to her standing to enforce the written agreement between PCS and Wellquest. Because she was not a party to the contract, and failed to provide adequate evidence that she was an assignee of PCS's rights in 2008, summary judgment was properly granted.

II. Denial of leave to file revised TAC

In conjunction with her opposition to summary judgment, appellant filed a petition for leave to file a TAC. The trial court denied the motion on the ground that there was no evidence of a valid assignment from PCS to appellant. Thus, appellant sought leave to file a revised TAC, listing both PCS and Direct 2 Market as alternative plaintiffs. The trial court denied the motion, finding the sham pleading doctrine applicable. Appellant's new allegations as to the proper plaintiffs in the matter were irreconcilable with her previous allegations that she was solely authorized to enforce the agreement. Appellant argues that the trial court abused its discretion in denying her leave to add as a plaintiff an entity that would have standing.

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[11] While appellant argues that respondents improperly raised the argument regarding the Direct 2 Market assignment in their reply brief on summary judgment, the trial court found that the presentation of this argument in the reply brief was appropriate, because "this subsequent assignment only came up after the motion for summary judgment was filed."

A. Standard of review

We review an order denying leave to amend a complaint for abuse of discretion. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Under this standard, ""'the trial court's ruling will be upheld unless a manifest or gross abuse of discretion is shown.'"" (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1147.) Where the defendants are not prejudiced by the amendment, leave to amend should be granted. (*Powers v. Ashton* (1975) 45 Cal.App.3d 783, 790.) However, leave to amend is not liberally granted if doing so would result in prejudice. (*M & F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1534.)

B. The trial court did not abuse its discretion

In declining to allow appellant to file her revised TAC, the trial court found the sham pleading doctrine applicable.[12] A plaintiff may not plead facts that contradict facts pleaded in the original complaint or suppress facts which prove the pleaded facts false. (*Larson, supra*, 230 Cal.App.4th at p. 344.) However, the sham pleading doctrine is not intended to prevent the correction of erroneous allegations or ambiguous facts. Instead, it is to prevent abuse of process. (*Ibid.*)

Throughout five years of litigation, appellant took the position that she alone had the right to sue under the written PCS/Wellquest agreement because she received a written

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[12] The sham pleading doctrine prevents plaintiffs from ""'amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment.'"" (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 344 (*Larson*).)

assignment from PCS. She alleged this in her original complaint; in her first amended complaint; and in the SAC. In her motion for leave to file a TAC, appellant made a more specific allegation that "'on or about March 3, 2008, by written assignment, [appellant] is a successor in interest and assignee of [PCS].'" In opposing respondents' demurrer on this issue, appellant took the same position. She also testified repeatedly in her deposition that she received the rights to the written PCS/Wellqueset agreement by written assignment. From the time respondents first demurred to the complaint, to their motion for summary judgment filed five years later, respondents relied on and contested appellant's allegation that she was the formal written assignee of PCS. Appellant litigated and lost on the issue of standing to sue because she could not prove the existence of the written assignment she had insisted for years gave her such standing.

Appellant's proposed revised TAC continued to allege, as had her previous complaints, that a written assignment of rights existed by which PCS assigned all of its rights to appellant. It then alleged that, "to the extent the March 3, 2008 assignment may be invalid, ineffective or limited, each of the causes of action in this TAC is expressly pled, in the alternative, by PCS." The allegations of the TAC further stated that "to the extent any rights in the [written PCS/Wellquest] agreement, or any other rights or claims alleged herein are determined to belong to Direct 2 Market, each of the causes of action in this TAC is expressly pled, in the alternative, on behalf of Direct 2 Market."

Appellant briefly addresses the sham pleading doctrine on appeal. She makes a factual argument that after respondents "convinced" the trial court that there was no evidence of a written

assignment, she attempted to add PCS as a proper plaintiff. Appellant argues that she was merely adding PCS in response to the court's adverse rulings and correcting a "technical defect." However, appellant fails to address the facts suggesting a sham. Her attempts to amend came after years of litigation, during which appellant had repeatedly asserted that she was the beneficiary of a written assignment. Respondents had challenged her standing to sue at every opportunity. Appellant's right to enforce the written contract at issue was a hotly contested question at every turn. Given this background, the trial court did not abuse its discretion in finding that her lack of standing was more than a technical defect. Appellant has failed to show an abuse of the trial court's discretion.

C. The cases cited by appellant are distinguishable

None of the cases appellant cites suggests a different outcome is required in this matter. *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717, 720-721 (*Jensen*) is cited for the proposition that substitution of a proper plaintiff is not barred by the statute of limitations when the claims remain based on the same set of facts. In *Jensen,* the complaint was amended after the statute of limitations expired to add individual plaintiffs in the place of a condominium association. An appellate opinion had been published during the pendency of the case, which indicated that condominium owners' associations did not have standing to sue for damages to common areas of a condominium. (*Id.* at p. 720.) Thus, there was a change in the law affecting the plaintiffs' standing -- not a change in the factual allegations. (*Id.* at p. 722.)

Cloud v. Northrop Grumman Corp. (1998) 67 Cal.App.4th 995 (*Cloud*) is also distinguishable. In a wrongful termination case, the plaintiff filed for bankruptcy before filing her action

against her former employer. Because the claim was the property of her bankruptcy estate, she was not the proper plaintiff. However, the appellate court reversed the trial court's grant of judgment on the pleadings without leave to amend. The technical defect in the pleading was due to the plaintiff's ignorance of the fact that her bankruptcy was related to her wrongful termination claim. (*Id.* at p. 1000.) The plaintiff's pleading was defective, but amendable. (*Id.* at p. 1010.) Unlike appellant here, the plaintiff in *Cloud* did not make repeated factual allegations concerning her standing to sue that she was ultimately unable to prove.

Appellant relies heavily on *Pasadena Hospital Assn., Ltd. v. Superior Court* (1988) 204 Cal.App.3d 1031 (*Pasadena*). In *Pasadena*, a physician was permitted to amend his complaint eight months after the filing of the original complaint to state all claims in his corporate, as well as his individual, capacity. (*Id.* at p. 1034.) He had formed a professional corporation in his own name before any controversy arose at the hospital. (*Id.* at p. 1033.) The trial court overruled the hospital's demurrer on statute of limitations grounds because the physician and his corporation were "'one and the same insofar as having standing to prosecute.'" (*Id.* at p. 1034.) The Court of Appeal agreed, explaining that adding the physician's professional corporation merely remedied a technical defect to reflect the physician's status at the time of the events at issue. (*Id.* at p. 1036.)

The matter before us is different. Appellant had no apparent connection to PCS other than her own allegations that PCS had provided her a written assignment of rights. Respondents challenged this allegation at every opportunity. It was only after she could not establish the existence of the written

assignment, and lost on summary judgment, that she attempted to amend her complaint to add alternative plaintiffs. Unlike the actions of the plaintiffs in *Jensen*, *Cloud*, and *Pasadena*, appellant's attempt to add additional plaintiffs five years after the start of litigation could be interpreted as an attempt to avoid her previously pleaded facts and to avoid the attacks raised in respondents' demurrers and motion for summary judgment. This abrupt change of tactic after years of litigation could be considered an abuse of process. Under the circumstances, we cannot find that the trial court's actions show a manifest abuse of its discretion.

III. Demurrers to all other causes of action

The trial court sustained respondents' demurrers to appellant's causes of action for breach of oral joint venture agreement; breach of oral partnership agreement; breach of oral agreement; breach of fiduciary duty; fraud; conversion; money had and received; unjust enrichment; quantum meruit; accounting; declaratory relief; and unfair competition.

A. Standard of review

On appeal from the sustaining of a demurrer, we undertake de novo review. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) "[W]e examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]" (*Ibid.*)

The granting of leave to amend involves the trial court's discretion. (*Lee v. Los Angeles County Metrpolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 853.) "'Where a demurrer is sustained without leave to amend, the

reviewing court must determine whether the trial court abused its discretion in doing so.' [Citation.]" (*Id.* at pp. 853-854.)

B. Breach of alleged oral joint venture agreement; oral partnership agreement; and oral agreement

Appellant addresses her breach of oral joint venture agreement; breach of oral partnership agreement; breach of oral agreement and breach of fiduciary duty causes of action together. She argues that whether the parties were joint venturers or partners, she successfully alleged that they had confirmed agreements through which respondents agreed to pay appellant compensation, and that they breached those agreements. Appellant claims that she needed to allege nothing more than: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. (Civ. Code, § 1550.)

We discuss each cause of action separately.

1. Breach of oral joint venture agreement

In order to find the existence of a joint venture agreement, the following elements must be present: "(1) A community of interest in the object of the undertaking; (2) an equal right to direct and govern the conduct of each other with respect thereto; (3) share in the losses, if any; (4) close and even fiduciary relationship between the parties [citation]." (*Buck v. Standard Oil Co.* (1958) 157 Cal.App.2d 230, 239.)

The trial court noted that appellant failed to allege that the parties had an equal right to direct, govern, or control each other's conduct. Absent this element, appellant cannot state a cause of action for oral joint venture.

Appellant does not argue on appeal that she adequately alleged this element of a joint venture agreement. Therefore, we

conclude that the demurrer to this cause of action was properly sustained.

2. Breach of oral partnership agreement

The essential elements of a partnership are "a sharing of profits as well as losses and a right to joint management and control of the business. [Citations.]" (*People v. Park* (1978) 87 Cal.App.3d 550, 564.) The trial court sustained respondents' demurrer to this cause of action on the ground that appellant did not sufficiently allege "joint management and control of the business." Appellant's SAC contained only one allegation concerning control, which was that she would have oversight and control over all aspects of the "products, strategy and marketing." This allegation -- that one person had control over certain aspects of the business -- was insufficient to show a partnership agreement.

Again, appellant does not cogently argue on appeal that she satisfactorily alleged the required element of joint management. In the absence of this essential element, the demurrer to this cause of action was properly sustained.

3. Breach of oral agreement

In the SAC, appellant generally alleged that she had been involved in "various business ventures" with respondents "since the early 1990s," and that such business ventures were "memorialized by various written and oral agreements." As to her third cause of action for breach of oral agreement, appellant specifically alleged:

> "In or about 2002, [appellant and respondents] entered into an oral agreement whereby the parties agreed, inter alia, as follows: (a) that [appellant] would introduce [respondents] and their related persons and entities to certain parties and products

> for funding and worldwide distribution for retail and wholesale by [respondents'] various entities; (b) that certain introduced products were owned by [appellant] and licensed to [respondents] in order to sell for shared profit; (c) that in addition to introducing [respondents] to the parties, [appellant] would have oversight and control over all aspects of the products, strategy and marketing; (d) that [appellant] would also contribute her knowledge, skill, expertise and time to maximize the profitability of the products; (e) that [respondents], and their affiliated persons and entities would share the profits with [appellant] by compensating her, or her related entities, a percentage of the purchases of the products . . . ."

Appellant emphasized that the alleged oral agreement was a single agreement created in 2002. Appellant alleged that the oral agreement "was memorialized by various written and oral agreements and communications between [appellant] and [respondents] and their affiliated persons and entities." In furtherance of the alleged oral agreement, on June 13, 2002, appellants and respondents "entered into a non-circumvent agreement" concerning the "introduced party" Modern Media. Appellant alleged that "[s]ince 2002, [appellant] and [respondents] have conducted their business affairs pursuant to the Oral Agreement." Appellant alleged that respondents compensated her pursuant to the oral agreement until 2011, when respondents denounced their obligations and failed to compensate appellant for introducing parties and products to them, among other things.

Appellant consistently alleged that there existed a single oral agreement between the parties. Her allegations suggest the

agreement existed prior to June 2002. However, the written PCS/Wellquest agreement, entered into in September 2002, contained the following clause:

> "Entire Agreement. This Agreement constitutes the entire understanding between the parties hereto with respect to the subject matter hereof and supersedes any prior understandings or agreements between the parties hereto with respect thereto. There are no representations, agreements, arrangements or understandings, oral or written, between the parties relating to the subject matter of this Agreement which are not fully expressed herein."

The trial court held that any oral agreement or partnership would, by the terms of the written contract, be superseded by the written contract.[13]

On appeal, appellant argues that she and respondents had "other agreements with regard to other subject matter." She supports this argument with a citation to an email dated June 13, 2002, in which "Wellquest, Emson and Mike Ackerman" agreed not to enter into a contract with Modern Media on any of their

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[13] At the time the demurrer to the cause of action for breach of oral contract was sustained, the summary judgment regarding appellant's standing to sue under the written PCS/Wellquest agreement had not yet been filed. Thus, the trial court credited appellant's allegations that the written agreement was entered by "PCS, by and through [appellant] and her related persons and entities." In other words, at the time of the demurrer, the trial court took as true appellant's position that she had standing to enforce the PCS/Wellquest agreement. We decide cases on the record and facts before the trial court at the time of its ruling. (*In re Marriage of Jacobs* (1981) 126 Cal.App.3d 832, 835.)

products until they reached an agreement with Creative Campaigns.[14] Modern Media was one of the "introduced parties" discussed in the written PCS/Wellquest agreement, and this email predates the written PCS/Wellquest agreement. Appellant does not elaborate on her argument that this email provides a different agreement. In any event, it is an ineffective argument, since in the SAC she alleged that the June 13, 2002 noncircumvent agreement was made "in furtherance of " the single, overarching oral agreement between the parties.[15]

Appellant further argues that although the written PCS/Wellquest agreement purports to supersede prior written agreements, it does not supersede future agreements. However, as set forth above, the SAC alleged only one oral agreement entered into in 2002. It does not allege any specific oral agreements entered into by appellant with any respondent subsequent to 2002. It alleges only that the single oral agreement was "memorialized" by various written and oral agreements which were entered "in furtherance of " the oral agreement. It alleges no specific details as to any such

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[14] Appellant alleged that this non-circumvent agreement was in fact made with her "through her entity, Creative Campaigns."

[15] In her reply brief on appeal, appellant attempts to get around her allegation in the SAC of a single oral agreement in 2002 by stating that she was merely using a shorthand for all of her agreements with respondents, not just a single 2002 agreement. However, a plain reading of the SAC does not reveal such an allegation. Instead, appellant's breach of oral agreement cause of action alleges a single oral agreement, entered into in 2002, through which the parties allegedly agreed to various terms.

agreement other than the June 13, 2002 non-circumvention agreement.

Appellant further argues that respondents did business with her through entities besides Wellquest. However, the written PCS/Wellquest agreement also provides:

> "In the event that [Wellquest] and any of it's [*sic*] officers currently have other companies and/or open new companies in the future and contemplate entering into agreement(s) with any of The Introduced Parties with such companies, [Wellquest] agrees to cause such companies to abide by all of the terms and conditions in this Agreement in whole and the Agreements and all other [*sic*] attached hereto on Exhibit 'A' and Exhibit 'B' of this agreement."[16]

Thus, any agreement that appellant may have entered with another entity owned or operated by respondents would also be covered by the written agreement, and subject to its terms.

Appellant is bound by her allegations. She alleged a single, overarching oral agreement in 2002. By the terms of her allegations, which described an agreement in furtherance of the oral agreement in June 2002 -- the oral agreement was alleged to have occurred before June 2002. Based on appellant's position that she was properly considered a party to the written PCS/Wellquest agreement, the written PCS/Wellquest agreement subsumed that oral agreement. Appellant cannot now attempt to expand those allegations by claiming she alleged other oral

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[16] The exhibits are not attached to the copy of the contract in the record on appeal.

agreements both before and after the written PCS/Wellquest agreement. The text of the SAC undermines her position.

The trial court did not err in sustaining respondents' demurrer to the third cause of action for breach of oral contract.[17]

C. Fraud

1. Applicable law

The elements of a cause of action for fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud (to induce reliance); (4) justifiable reliance; and (5) resulting damage. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) "[F]raud must be pled specifically; general and conclusory allegations do not suffice. [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) "'This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered."' [Citation.]" (*Ibid.*)

2. The allegations of the SAC

In her sixth cause of action for fraud, appellant alleged that during the course of the parties' business relationship, appellant was in a position of trust and confidence with respondents. The time period spanned from 2002 to the present.

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[17] Because appellant's breach of fiduciary duty cause of action was based on her causes of action for breach of agreements, we decline to discuss it in detail. As her causes of action for breach of agreement fail, her cause of action for breach of fiduciary duty grounded in those agreements also fails.

During this time period,[18] appellant alleged that respondents made the following 10 representations: (1) that they could be trusted; (b) that they would exercise the highest obligation of good faith, fair dealing, and loyalty to appellant; (c) that they would pay, and had paid, appellant the actual money due and owing to appellant; (d) that they would exercise reasonable control and supervision in maintaining records to account for the amounts due to appellant; (e) that they would exercise due care and diligence in the management and administration of amounts due under the joint venture agreement and the written PCS/Wellquest agreement; (f) that they would manage the books and records with candid disclosure of all material facts; (g) that they would compensate appellant for every product or party she introduced to them; (h) that they would negotiate with appellant to give her a percentage of purchases resulting from any party she introduced to them; (i) that respondents would be making less money on the Magic Bullet product in order to induce appellant to accept less money; and (j) that when respondents rejected a product or party introduced by appellant, they would not circumvent appellant by creating a knockoff or selling the product through a third party shell.

Appellant alleged that each of the above representations were false, and were made for the purpose of inducing appellant to accept less money than that to which she was entitled. She alleged justifiable reliance on these representations and that she did not realize they were false until respondents stopped making payments and refused to provide accountings.

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[18] The SAC was filed in September 2016.

3. The demurrer to the fraud case of action was properly sustained

The trial court sustained respondents' demurrer to appellant's sixth cause of action for fraud on the ground that appellant did not allege fraud with sufficient particularity. The trial court found the allegations of 10 different representations, made over a lengthy period, insufficient. The allegations grouped numerous representations together, "saying that they were each made at some point over many years in different formats."

Appellant argues that the trial court was in error in that the number of representations made is not the determining factor, and that even one false representation of a material fact is sufficient. (Citing *Feckenscher v. Gamble* (1938) 12 Cal.2d 482, 492; *Vogelsang v. Wolpert* (1964) 227 Cal.App.2d 102, 111.) Appellant further argues that her allegations met the purpose for the particularity requirement in fraud pleading, as they informed the respondents of the charges to be met, and allowed the court to weed out meritless claims without factual foundation. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793.)

Appellant relies on *Douglas v. Superior Court* (1989) 215 Cal.App.3d 155 (*Douglas*), where that appellant filed suit against his former employer and others (collectively "Weiner") to recover commissions he allegedly earned selling home improvement services. The following allegations were held to be sufficient to state a cause of action for fraud:

> "Weiner knowingly made false promises Douglas would be paid commissions when Weiner received signed contracts. Douglas also pleads Weiner made these promises to induce Douglas to work for Weiner and that Douglas relied on those promises by entering into an employment

> relationship with Weiner. Douglas also pleads Weiner failed to pay commissions exceeding $50,000."

(*Douglas, supra*, 215 Cal.App.3d at p. 158.)

Appellant's allegations regarding the misrepresentations respondents allegedly made in this case are far less specific. As the trial court pointed out, she alleged 10 different misrepresentations, ranging from vague assertions that respondents could be trusted to misrepresentations arising from respondents' purported failure to fulfill the obligations of the alleged contracts between the parties. The allegations are too broad and vague to answer the required questions of how the representations were made, when and where they were made, and by what means. (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 645.) Further, to the extent that the representations include allegations arising from respondents' breaches of various alleged contracts, they are not sufficient to state a cause of action for fraud. (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990 ["'a breach of contract is tortious only when some independent duty arising from tort law is violated"'].) Appellant's allegations of fraud fall short of informing the court what actionable representations were made, by whom, when, and by what means.

We find this situation more similar to that of *Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702 (*Hills*), in which the plaintiff alleged false representations occurring during the period of October 1962 through May 1964. (*Id.* at p. 707.) The demurrer to the fraud count was properly sustained, because "[n]o specific facts were pleaded to show how, when, where, to whom, and by what means the representations

were tendered, from what data the falsity of [the respondent's] intentions could be inferred, or how, when, where, through whom, and in what circumstances [the appellant] became justified in relying upon these representations." (*Id.* at p. 707.) The *Hills* court noted that it is essential that the facts and circumstances of fraud be set out "'clearly, concisely, and with sufficient particularity'" to allow the other party to know "'what he is called on to answer, and to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.'" (*Id.* at p. 708.) Further, it is "indispensable to set forth the falsity of the promise at the time it was tendered." (*Id.* at p. 708.) This differentiates a false promise from "the great bulk of broken promises." (*Ibid.*) Like the plaintiff in *Hills*, appellant has set forth various vague promises purportedly made to her in some fashion, with no statement of fact to back up her position that they were false promises made with intent to deceive and without intent to perform. (*Ibid.*)

Appellant attempts to distinguish *Hills*, arguing that she alleged that respondents lied about their intent not to market products she had introduced to them, using shell entities, falsified accountings, and misrepresented compensation. However, appellant does not specify when such lies were told, what shell entities were used, when such falsified accountings were presented, and what compensation was misrepresented. She claims respondents induced her to accept lesser compensation on products "such as the Magic Bullet." The specificity required as to the precise products to which she is referring, is lacking. We cannot find that the trial court erred in sustaining the demurrer to this cause of action.

4. Leave to amend

Appellant argues that if her fraud allegations were not sufficiently detailed, she should have been granted leave to further amend her pleadings. Appellant claims that at the time the trial court sustained her demurrer without leave to amend, she had just uncovered additional evidence to show fraud. In her motion for reconsideration of the trial court's ruling on respondents' demurrer to the SAC, appellant attached new proposed allegations regarding fraud.[19] The trial court denied the motion for reconsideration on the ground that no new facts or law were stated. At the hearing, the court specified, "you don't really give me new facts, new law, nothing that there could not have been presented earlier." The court found there was no basis to change its ruling, but indicated that if there was a basis to file an amended complaint, appellant should seek to do so. The motion for reconsideration was denied. Appellant does not discuss the standards for the granting of a motion for reconsideration, or why the trial court should have granted leave to amend on the basis of a motion for reconsideration. We therefore find no error in the court's decision.

Appellant's later attempts to amend the complaint were also denied. Her motion for leave to file a proposed TAC was filed in October 2017, and was denied simultaneously with the grant of summary judgment. In addressing the new allegations of

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[19] Appellant's new allegations concerned respondents' alleged secret marketing of the Mercier detangling hairbrush, misrepresentations regarding margins, purchases and sales of the Magic Bullet, marketing of a knockoff of the Pin Curlz, which appellant alleges was her intellectual property, and circumventing appellant's rights to share products produced by Modern Media, a company appellant introduced to respondents.

fraud, the trial court found that appellant had failed to establish the element of reliance. The court acknowledged appellant's new allegations, but found they were not sufficient to permit amendment of the complaint a week before trial. The court found that the only allegation that was "really new" was a specific statement by respondent Ackerman that he was passing on certain products, including the Mercier Brush, distributed by Michel Mercier, an Israeli businessman. However, the court did find that this specific statement could not lead to a fraud claim because appellant did not show any sort of justifiable reliance. The court explained, "If they're passing on the products, she's free then to make introductions regarding these products to anyone she wants." Under the circumstances, appellant could not have relied on the statement to her detriment. The other new fraud allegations concerned Modern Media and Magic Bullet, both of which appellant specifically alleged were "expressly identified in the Wellquest Agreement as 'Introduced Parties.'"[20] Thus, appellant merely provided more detail regarding her previously pled breach of contract causes of action. She alleged that respondents secretly and fraudulently concealed sales and pricing of products in violation of the agreement. Because appellant was unable to enforce the written PCS/Wellquest agreement, she cannot show an independent tort arising from a breach of those contractual allegations. (*Robinson Helicopter Co., Inc. v. Dana Corp., supra,* 34 Cal.4th at p. 990.)

Appellant's motion for leave to file a proposed revised TAC was denied on the ground that it constituted a sham pleading. As

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[20] Magic Bullet was sold by Lenny Sands, one of the "Introduced Parties" identified in the written PCS/Wellquest agreement.

discussed in detail above, the trial court's determination that appellant's revised TAC constituted a sham pleading was not an abuse of discretion. Thus, we conclude that no abuse of discretion occurred in any of the trial court's denials of appellant's attempts to amend the SAC.

D. Conversion

"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession of the property at time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. [Citations.]" (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 543-544.) "Money may be the subject of conversion if the claim involves a specific, identifiable sum; it is not necessary that each coin or bill be earmarked. [Citation.]" (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 209 (*Welco*).) "Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.)

Historically, the tort of conversion was developed as a remedy for "'the dispossession or other loss of chattel.'" (*Welco, supra*, 223 Cal.App.4th at p. 210.) However, it may be appropriate for some modern types of intangible property. (*Ibid.*) The tort of conversion does not apply to ideas. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793

(*Melchior*).) In addition, a "mere contractual right of payment, without more, will not suffice" to state a claim for conversion. (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 452 (*Farmers*).)

In the SAC, appellant alleged conversion based on two sets of facts: First, appellant alleged that respondents concealed and misappropriated money under the agreements. This is not an appropriate conversion claim, as it does not involve a "specific, identifiable sum" of money over which respondents allegedly wrongly took control. (*Welco, supra*, 223 Cal.App.4th at p. 209.) In addition, the breach of an agreement does not amount to a conversion. (*Farmers, supra*, 53 Cal.App.4th at p. 452.)

Second, appellant alleges respondents' conversion of intellectual property, in that respondents "willfully and deliberately converted to their own use" appellant's products and "related intellectual property." This is also an inappropriate basis for a claim of conversion. (See *Melchior, supra*, 106 Cal.App.4th at p. 793.)

The trial court did not err in sustaining respondents' demurrer to appellant's seventh cause of action for conversion.

E. Money had and received; unjust enrichment; quantum meruit; accounting; declaratory relief; and unfair competition

Appellant discusses her eighth through thirteenth causes of action together. The trial court dismissed these causes of action because appellant failed to allege any agreements between herself and respondents that would serve as a basis for these common count claims or the unfair competition cause of action. Appellant contends this was error. She argues generally that for the same reasons her breach of contract and fraud causes of

action withstand demurrer, so should these additional causes of action. Appellant's common count and unfair competition claims are based on her breach of agreement and fraud causes of action. As she appears to acknowledge, the sustaining of demurrers to her breach of agreement and fraud causes of action means that there is no basis for these alternate theories of recovery. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 ["When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable"].) We discuss each cause of action below.

1. Money had and received

"'A cause of action is stated for money had and received if the defendant is indebted to the plaintiff in a certain sum "for money had and received by the defendant for the use of the plaintiff."'" (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 937.) The cause of action lies "'wherever one person has received money which belongs to another, which in equity and good conscience should be paid over to the latter.' [Citation.]" (*Ibid.*) The facts that appellant has alleged attempting to show an indebtedness due to breach of contract or fraud have failed. Thus, appellant cannot state a claim for money had and received.

2. Unjust enrichment

Unjust enrichment "is not a cause of action, . . . or even a remedy, but rather ""a general principle, underlying various legal doctrines and remedies"'. . . .' [Citation.]" (*McBride v. Boughton, supra*, 123 Cal.App.4th at p. 387.) "'It is synonymous with restitution.' [Citation.]" (*Ibid.*) Unjust enrichment exists where a party has received and unjustly retained a benefit at the expense of another. (*Lectrodryer v. SeoulBank* (2000) 77

Cal.App.4th 723, 726.) In the SAC, appellant alleged that respondents had been unjustly enriched "in that they received and retained monies and benefits as a result of their wrongful conduct, alleged above." Appellant's causes of action alleging wrongful or unjust conduct on the part of respondents have failed. Therefore, her unjust enrichment cause of action also fails.

3. Quantum meruit

A party may proceed on the theory of quantum meruit where the party is seeking "'the reasonable value of the services performed.'" (*Earhart v. William Low Co.* (1979) 25 Cal.3d 503, 509.) "[C]ompensation for a party's performance should be paid by the person whose request induced the performance." (*Id.* at p. 515.) Quantum meruit is thus a "quasi-contractual remedy." (*Id.* at p. 514.) In the SAC, appellant alleges that on average she worked 16 hours a day to develop products, that respondents knew of her services, and promised to pay their reasonable value. These allegations are based on her prior allegations that appellant would be compensated for her services through a percentage of the sales of products derived from her efforts. Because appellant's quantum meruit claim is based on her previous breach of contract and fraud claims, it too fails. (*McBride v. Boughton, supra*, 123 Cal.App.4th at p. 394.)

4. Accounting

"A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting. [Citations.]" (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) Appellant alleges that respondents were required to render

an accurate accounting pursuant to the joint venture agreement, the written PCS/Wellquest agreement, and "other Agreements between the parties." Appellant has failed to show that she is an assignee or a beneficiary of the PCS/Wellquest agreement, and has failed to show the existence of any other type of agreement requiring an accounting. Thus, her cause of action for accounting fails.

5. Declaratory relief

"'A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court.' [Citation.]" (*Leonard Carder, LLP v. Patten, Faith & Sandford* (2010) 189 Cal.App.4th 92, 97.) Appellant alleged in the SAC that she sought declaratory relief "with respect to the Joint Venture Agreement, the Wellquest Agreement and the alternative claims for the Oral Partnership and Oral Agreement." Appellant's causes of action regarding these agreements have failed. She has failed to allege the existence of a written instrument to which she is a party that she may seek to have adjudicated. Thus, her cause of action for declaratory relief fails.

6. Unfair competition

Appellant's cause of action for unfair competition is alleged pursuant to the Unfair Competition Law, Business and Professions Code section 17200 et seq. (UCL). The UCL defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus & Prof. Code, § 17200; *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371.) To bring a UCL

action, a private plaintiff "must be able to show economic injury caused by unfair competition. [Citation.]" (*Zhang*, at p. 372.)

In order to show a violation of the UCL, appellant was required to allege an unlawful or unfair practice. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 937-939.) To be considered "unfair," an alleged anticompetitive act must be conduct that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 187, fn. omitted.)

In the SAC, appellant alleged that respondents committed acts of unfair competition, as defined by the UCL, "by engaging in the acts and/or practices described above." As all of her prior causes of action failed, it is apparent that appellant did not successfully allege an unlawful practice. In addition, she has not alleged an unfair practice. Appellant has failed to link this cause of action to any particular law, nor successfully alleged that respondents have significantly threatened or harmed competition. Appellant's allegations of unfair competition are thus insufficient as a matter of law.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT