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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

GREEN MUTUAL PROPERTY & INVESTMENT CO., et al., Plaintiffs and Appellants, v. WILSHIRE BANK et al., Defendants and Respondents.	B275613 (Los Angeles County Super. Ct. No. BC515574)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly Kendig, Judge. Reversed in part and affirmed in part with directions.

Marc I. Zussman for Plaintiffs and Appellants.

Safarian Choi and Bolstad, David C. Bolstad and Jerome M. Jauffret for Defendants and Respondents James H. Ahn and Robert Ahn.

Park and Lim, Heesok Park, Jessie Y. Kim and James E. Adler for Defendant and Respondent Wilshire Bank.

Green Mutual Property Investment (GM Property), Green Mutual Equity, Inc. (GM Equity), and Ock Kun Ro appeal from a judgment of dismissal entered after the court sustained demurrers to their third amended complaint without leave to amend in favor of Wilshire Bank (Wilshire), James Hyojin Ahn, and Robert Ahn.[1]

Reviewing the demurrers de novo, we conclude that GM Equity and Ock Kun have failed to state a cause of action against any defendant. GM Property, however, has pleaded valid causes of action against the defendants and, therefore, the court erred in sustaining the demurrers against it. Accordingly, we affirm the judgment against GM Equity and Ock Kun and reverse the judgment as to GM Property.

FACTUAL AND PROCEDURAL BACKGROUND

In accordance with our standard of review, our factual summary is drawn from the well-pleaded facts (but not conclusions of fact or law) alleged in the operative, third amended complaint, as well as judicially noticeable facts. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In 2007, Trimax Melrose Inc. (Trimax) borrowed $3.6 million from Saehan Bank (Saehan), Wilshire's predecessor, and executed a promissory note in that principal amount (the Trimax Note). The Trimax Note was secured by a deed of trust

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[1] Plaintiff Ock Kun Ro is the father of Chahn Ro, who is the president of plaintiff GM Equity and figures prominently in the factual background. Defendant James Hyojin Ahn is the father of defendant Robert Ahn. To avoid confusion and enhance readability, and intending no disrespect, we will refer to each of these individuals by their first names.

(the Trimax deed of trust) on certain real property (the real property). At that time, the real property had been appraised at $5.5 million.

Over the next three years, Trimax frequently missed payments and Saehan repeatedly downgraded the loan. Trimax defaulted on the property taxes assessed against the real property in 2008 and, by June 2009, the appraised value of the real property had declined to $2.2 million.

Saehan recruited James to find a buyer for the Trimax Note. James approached Ock Kun, the President of GM Property. James told Ock Kun that the Trimax Note was "a very good and safe promissory note," that there were "no problems" with the note, and the only reason Saehan was selling it was to raise capital. James also told Ock Kun that the real property was appraised at $5.5 million and that the car wash business operating on the real property had profits of $20,000 a month. These representations were false and James knew they were false when he made them. In addition, James concealed other material facts from Ock Kun, including the recent $2.2 million appraisal and the fact that the car wash business was generating low revenues.

Ock Kun lived in South Korea and had never engaged in a real estate transaction in the United States. He therefore introduced James to his son, Chahn, a Los Angeles resident, so that Chahn could "facilitate the deal on behalf of Ock [Kun] and [GM Property]." Pursuant to James's recommendation, Chahn formed GM Equity.

In late 2009, Chahn met with James and Saehan's chief credit officer, Jin Soo Kim. James and Kim were aware that Chahn was representing GM Equity, GM Property, and Ock Kun.

During the meeting, Kim told Chahn that a $3.6 million return on the Trimax Note was "practically guaranteed," and assured him that the investment was safe and would be paid as reliably as a certificate of deposit. Kim also told Chahn that the real property had been appraised at $5.5 million, and that the only reason the bank was selling the note was to raise capital to improve its cash flow. Kim knew these representations were false, and he made them with the intent to induce the plaintiffs to purchase the Trimax Note. Kim also concealed from Chahn the most recent $2.2 million appraisal, Saehan's repeated downgrades of the note, Trimax's property tax default, and Trimax's history of delinquent payments, tax liens, and judgment liens.

Chahn relayed Kim's representations to Ock Kun. In reliance on these representations and James's prior representations to Ock Kun, "[p]laintiffs decided to purchase the Trimax Note" for $2.4 million. Pursuant to agreements among the plaintiffs as to how they would fund the purchase, Ock Kun transferred $1.2 million to GM Property, and GM Property transferred $1.2 million to GM Equity. GM Equity then agreed to pay Saehan $1.2 million and give Saehan a promissory note (the GM Equity Note) for the balance. Although Saehan agreed to assign the Trimax Note to GM Equity, Saehan and James understood that GM Equity would receive the assignment "on behalf of [GM Property] and Ock [Kun]."

The transaction was consummated in January 2010 in a loan assignment and assumption agreement entered into between Saehan and GM Equity. The agreement, which is attached to the third amended complaint, does not indicate that

GM Equity was purchasing the Trimax Note as an agent for another, and does not exclude that possibility.

The agreement includes provisions in which GM Equity acknowledged and represented that Saehan had made no warranty or representations with respect to the Trimax Note and that GM Equity had not relied on any information provided by Saehan or its agents in making the decision to purchase the Trimax Note.

Under the agreement, GM Equity was required to open a reserve account with Saehan into which payments on the GM Equity Note would be deposited. GM Property provided the initial deposit into the reserve account in the amount of $114,000.

In connection with the transaction, GM Equity executed a collateral assignment agreement to secure the obligations under the GM Equity Note. Under the agreement, GM Equity granted Saehan a security interest in the Trimax Note and the Trimax deed of trust. GM Equity also agreed that if it acquired the real property at a foreclosure sale under the Trimax deed of trust, it would secure the GM Equity Note obligations with a first deed of trust against the real property.

In July 2010, GM Equity assigned to GM Property its rights under the Trimax Note and GM Property assumed the obligations under the GM Equity Note.

Shortly after GM Property received the assignment, it and Robert entered into a "Management Agreement" (capitalization omitted), in which GM Property appointed Robert "the exclusive servicing agent for the [Trimax] Note." Robert's duties under the agreement included opening bank accounts and maintaining records for GM Property, and collecting the payments due under the Trimax Note. Robert was also required to deliver to Saehan

the monthly payments due on the GM Equity Note. In the event that GM Property acquired the real property, Robert would "manage and oversee all aspects" of the real property.

In early 2012, Trimax defaulted on the Trimax Note. On July 19, 2012, GM Property, as the beneficiary under the Trimax deed of trust, purchased the real property at a foreclosure sale for $2.5 million. Pursuant to the collateral assignment agreement between GM Equity and Saehan, Saehan acquired a security interest in the real property to secure the obligations under the GM Equity Note.

In October 2012, Ock Kun learned that the real property was the subject of a scheduled public auction for nonpayment of taxes that had been unpaid since 2008. James and Saehan eventually paid the taxes and penalties and the auction was cancelled.

After GM Property acquired the real property, the tenant in possession of the real property paid monthly rent payments to Robert, GM Property's property manager. Robert, however, failed to forward to Saehan the payments due under the GM Equity Note for the months of March, April, and May 2013. As a result, the GM Equity Note went into default.

In September 2013, Saehan sold the GM Equity Note to Marden Chen and Chia Yang, who had a business relationship with James. After Chen and Yang threatened to commence foreclosure proceedings against the real property, GM Property retained James as its real estate broker to sell the real property.

In November 2013, GM Property entered into an agreement to sell the real property for $2.55 million dollars. Soon afterward, James told Ock Kun that Ock Kun needed to transfer $100,000 to Chen and Yang to prevent them from initiating foreclosure

proceedings. In reliance on James's representations, Ock Kun "caused [GM Property] to wire transfer $100,000.00 to" Chen and Yang. The payment, however, was not used as James had promised, but rather paid to James in "an 'under-the-table' transaction to wrongfully enrich" James.

In addition to the misappropriated $100,000, the plaintiffs allege that they were deprived of the $1.2 million profit they had been promised on the Trimax Note and recovered only $835,134.79 of their $1.2 million investment in the Trimax Note.

STANDARD OF REVIEW

In reviewing an order sustaining a demurrer, we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230.) " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) When a cause of action is based on a written instrument and that writing is attached to and incorporated into the pleading, we may rely on the attached writing and treat as surplusage the plaintiffs' allegations regarding its legal effect. (*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 785-786; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.)

DISCUSSION

Initially, we observe that the third amended complaint fails to identify which plaintiffs are asserting each cause of action, as required by rule 2.112(3) of the California Rules of Court.[2] The defect subjects the pleading to a demurrer for uncertainty (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 6.113, p. 6-35). In a letter brief addressing this defect, plaintiffs acknowledge that they "could have been more specific," and state that each plaintiff is asserting each cause of action, except that the seventh cause of action for elder financial abuse is asserted by Ock Kun only. We will accept, for purposes of analysis, that representation.

I. First Cause of Action for Fraud

Under the heading alleging the first cause of action for fraud, plaintiffs assert two distinct causes of action under separate subheadings. The first fraud cause of action, which we refer to as the Trimax Note fraud, arises from James's and Kim's misrepresentations and concealments in 2009 concerning the purchase of the Trimax Note. The second fraud cause of action, which we call the foreclosure forbearance fraud, arises from James's misrepresentation to GM Property and Ock Kun in November 2013 that Chen and Yang, the then-holders of the GM Equity Note, needed to receive $100,000 to prevent a foreclosure sale of the real property.

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[2] This rule provides: "Each separately stated cause of action, count, or defense must specifically state: [¶] . . . [¶] . . . The party asserting it if more than one party is represented on the pleading (e.g., 'by plaintiff Jones')."

A. *The Trimax Note Fraud*

The Trimax Note fraud cause of action is asserted against James and Wilshire. As we explain below, GM Equity's claim fails because the statute of limitations ran while its corporate powers were suspended; GM Property has stated a cause of action; and Ock Kun, who never acquired the Trimax Note, does not have standing to pursue the claim.

1. *GM Equity's Trimax Note fraud claim is time-barred*

In support of James's demurrer, James established through judicial notice the fact that the Franchise Tax Board had suspended GM Equity's powers, rights, and privileges as of March 1, 2013. GM Equity did not dispute this fact, but responded with documents showing that it had revived its corporate status in January 2016. James argued, however, that GM Equity's revival came too late because the statute of limitations for fraud had already run. We agree with James.

The statute of limitations for an action based on fraud is three years after the plaintiff discovers "the facts constituting the fraud or mistake." (Code Civ. Proc., § 338, subd. (d); see *Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 920.) A plaintiff discovers such facts when it suspects or should suspect that "someone has done something wrong" to it. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110.) Although the date of such discovery is ordinarily a question of fact (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320), it can be the basis for sustaining a demurrer when it is affirmatively shown by the complaint. (*Id.* at pp. 1315-1316; *Czajkowski v. Haskell & White, LLP* (2012)

208 Cal.App.4th 166, 174; *Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 300.)

The third amended complaint alleges that Trimax defaulted on the Trimax Note in February 2012, and, on July 19, 2012, the real property was sold at a foreclosure sale for less than half of what James and Saehan had said it was worth. Under these circumstances, a reasonable person would have questioned the veracity of James's and Kim's representations about Trimax's creditworthiness, the value of the real property, and the safety of their investment in the Trimax Note. The statute of limitations therefore commenced no later than July 19, 2012, and expired no later than July 19, 2015. (Code Civ. Proc., § 338, subd. (d).) GM Equity did not revive its corporate powers until January 2016.

Although a corporation's revival will ordinarily validate "otherwise invalid prior proceedings," this rule does not apply to the running of the statute of limitations. (*Center for Self-Improvement & Community Development v. Lennar Corp.* (2009) 173 Cal.App.4th 1543, 1554; *City of San Diego v. San Diegans for Open Government* (2016) 3 Cal.App.5th 568, 579.) Therefore, because the statute ran before GM Equity revived its status, its Trimax Note fraud cause of action is time-barred.

GM Equity contends that it did not suffer damages until GM Property sold the real property in 2014, and, because the statute of limitations runs from " 'the occurrence of the last element essential to the cause of action,' " the statute did not commence until that time. (See *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.) We disagree. Damages for a fraud-induced purchase of property are ordinarily

" 'assessed as of the date of the fraudulent transaction.' " (*McCue v. Bruce Enterprises, Inc.* (1964) 228 Cal.App.2d 21, 31; see 12 Miller & Starr, Cal. Real Estate (4th ed. 2018) § 40:87, p. 40-344.) Here, GM Equity and Saehan completed the Trimax Note transaction in early 2010 and GM Equity's damages—measured, generally, by the difference between what it paid for the Trimax Note and the note's fair market value—could be ascertained as of that time. (See Civ. Code, § 3343, subd. (a); see *Stout v. Turney* (1978) 22 Cal.3d 718, 725 [damages for fraud in the sale of property is equal to "the difference in actual value at the time of the transaction between what the plaintiff gave and what he received"].) Even if GM Equity subsequently incurred additional, consequential damages and the full amount of its injury could not be made certain until later, it is "the *fact* of damage rather than the *amount*" that matters for statute of limitations purposes. (*Adams v. Paul* (1995) 11 Cal.4th 583, 589; accord, *Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 323.) Even if GM Equity suffered harm when GM Property sold the real property in 2014, GM Equity was initially damaged, if at all, at the time of the 2010 transaction when it received actual value less than what it paid.

2. *GM Property has sufficiently pleaded the Trimax Note fraud cause of action*

James argued that GM Property's fraud claim is barred because the third amended complaint is a "sham pleading." The sham pleading doctrine is an exception to the general rule that " 'an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884.) Under this

exception, if a party amends a pleading to omit or alter facts that rendered the pleading vulnerable to attack, the court may disregard the omission or alteration unless the plaintiff has a valid explanation for the change. (*Hardy v. Admiral Oil Co.* (1961) 56 Cal.2d 836, 840; *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1043, fn. 25.) The doctrine is intended "to enable the courts to prevent an abuse of process," not "to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751; accord, *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 344.) Its application is reserved "for the extreme case, . . . 'when it is apparent that no cause of action can be stated truthfully.' " (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 144.)

In support of his sham pleading argument, James contends that GM Property's allegations in the third amended complaint are inconsistent with allegations made in certain prior pleadings: a complaint filed in an earlier action by GM Equity against James and Robert and in the original and first amended complaints in the underlying action, which Chahn had filed on behalf of himself and GM Equity.[3]

The sham pleading doctrine does not apply in this situation. The doctrine is directed at a plaintiff who asserts a fact in one complaint that is harmful to the plaintiff's cause of

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[3] The earlier action was filed in Los Angeles Superior Court case No. BC483569. That action did not include allegations of fraud with respect to Saehan's sale of the Trimax Note to GM Equity.

action and then, without a valid explanation, omits the harmful fact or alleges an inconsistent fact to circumvent the harmful admission. (*Womack v. Lovell* (2015) 237 Cal.App.4th 772, 787; *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151-152.) GM Property, however, never asserted any of the facts alleged in the prior pleadings because it was not a plaintiff when those pleadings were filed nor ever adopted them. It cannot, therefore, be accused of omitting a fact or alleging a fact inconsistent with a fact it had previously alleged in those pleadings. We therefore reject James's sham pleading argument as to GM Property.

Wilshire did not expressly rely on the sham pleading doctrine in support of its demurrer, but alluded to it when it "noted" that the court could consider that GM Property's allegations in the third amended complaint that GM Equity acted as its agent when GM Equity purchased the Trimax Note, but had not alleged any such agency in the second amended complaint. Instead, the plaintiffs alleged that GM Equity agreed "to purchase the Trimax Note from Saehan." The second amended complaint, however, also alleged facts suggesting that GM Equity was acting on behalf of GM Property or Ock Kun. Ock Kun, for example, introduced James to Chahn "to facilitate the deal on behalf of Ock [Kun]," and GM Equity's purchase of the Trimax Note "was funded by Ock [Kun] and [GM Property]." Thus, when the allegation in the second amended complaint that GM Equity agreed to purchase the Trimax Note from Saehan is read in its context, the allegation in the third amended complaint that GM Equity purchased the Trimax Note as an agent for GM Property does not appear to be an attempt to circumvent a prior admission with an untruthful pleading, but rather an

attempt to add clarity to ambiguous facts. (Cf. *Avalon Painting Co. v. Alert Lbr. Co.* (1965) 234 Cal.App.2d 178, 184 [sham pleading rule did not apply to pleader who amended to omit harmful allegation that defendants were agents of each other].)

The focus of Wilshire's demurrer as to the Trimax Note fraud is its argument that the Trimax Note transaction documents show that GM Equity purchased the Trimax Note for itself, not as an agent for GM Property or Ock Kun. We reject this argument for two reasons.

First, the fact that GM Equity executed the Trimax Note transaction documents in its own name is not inconsistent with the allegation that it acted as GM Property's agent. Generally, when a party enters into a contract with another's agent, the agent's principal is a party to the contract and may sue to enforce the contract in its own name, even if the contract is signed only by the agent and the principal is not identified in the contract. (See *Purviance v. Shostak* (1949) 90 Cal.App.2d 295, 296-297; *American Builder's Assn. v. Au-Yang* (1990) 226 Cal.App.3d 170, 176; Rest.3d Agency (2006) § 6.01, com. (c), pp. 7-8 & *id.*, at § 6.03, pp. 39-40.)[4] This rule applies even when the agent conceals the fact that he or she is acting as an agent (*Buckley v. Shell Chemical Co.* (1939) 32 Cal.App.2d 209, 214-215), where the contract prohibits an assignment (*Sumner v. Flowers* (1955)

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[4] The rule is subject to exceptions (see 3 Witkin, Summary of Cal. Law (11th ed. 2018) Agency and Employment, § 171, pp. 224-225; 12 Williston on Contracts (4th ed. 2012) § 35:46, pp. 572-578; Annot., Exceptions to Rule Which Permits Suit by or Against Undisclosed Principal (1941) 130 A.L.R. 664), but none appear on the face of the third amended complaint.

130 Cal.App.2d 672, 676), and where the contract includes an integration clause (*Ford v. Williams* (1858) 62 U.S. 287, 289). The rule applies not only to a principal's action to recover on the contract, but also to a principal's action for damages caused by fraud committed against the agent. (See Rest.2d Agency (1958) § 315 & com. b, p. 56; *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 210; *Roberts v. Salot* (1958) 166 Cal.App.2d 294, 300.) Although the rule can be avoided through "a simple device" in the contract excluding any interest in persons other than the signatory, Saehan did not do so. (See Rest.3d Agency, *supra*, § 6.03, com. (d), p. 43; see 3 Witkin, Summary of Cal. Law, *supra*, Agency and Employment, § 171, p. 224 [undisclosed principal may sue in its own name unless excluded by the terms of agreement between defendant and agent].) The fact that GM Equity executed the transaction documents in its own name, therefore, does not belie the allegation that GM Equity purchased the Trimax Note as an agent for GM Property.

Second, even if we disregard the allegation that GM Equity acted as an agent for GM Property and we assume that GM Equity purchased the Trimax Note for itself and later sold it to GM Property, the defendants can be liable to GM Property if they had a reason to expect that their misrepresentations about the Trimax Note would be communicated to and relied upon by GM Property in acquiring the Trimax Note. (See *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605; *Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171, 192-193; *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095; 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 924, pp. 1257-1258; Rest.2d Torts (1977) § 533, pp. 72-73.) This rule "cover[s] cases in which the perpetrator of the fraud actually intends" that

his misrepresentation will be transmitted to the subsequent purchaser "as well as those in which it may be inferred from the circumstances that the defendant *knew* the injured party would rely thereon." (*Geernaert v. Mitchell*, *supra*, 31 Cal.App.4th at p. 608.)

Here, James made his initial misrepresentations directly to Ock Kun, the president of GM Property with the intent to induce GM Property to purchase the Trimax Note. Ock Kun then introduced his son Chahn to James to "facilitate the deal on behalf of . . . [GM Property]." Chahn, however, "was merely acting as the local contact for . . . GM Property," and James was aware of Chahn's role at all relevant times. During the meeting among Chahn, James, and Kim, where Kim (as Saehan's chief credit officer) made further misrepresentations about the Trimax Note, James and Kim "knew that [Chahn] was representing [GM Property] and was facilitating the deal on behalf of . . . [GM Property]." James and Kim made their representations to Chahn with the intent to induce each of the plaintiffs "to rely on their representations and purchase the Trimax Note." These facts, if true, establish that James and Kim either intended GM Property to rely on their misrepresentations or they knew that GM Property would do so. Therefore, James and Wilshire (the successor to Kim's employer) may be liable to GM Property for damages caused by the misrepresentations.

Wilshire further contends that GM Property cannot establish justifiable reliance on the misrepresentations because of the provisions in the loan documents expressly disclaiming any representations or warranties concerning the Trimax Note. Under California law, however, such exculpatory provisions do not preclude a cause of action for fraud in the inducement.

(See *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1499; 1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 305, pp. 323-324.)

Lastly, we reject Wilshire's contention that GM Property had failed to allege damage caused by the misrepresentations. Damages for a fraudulent transaction are ordinarily "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." (Civ. Code, § 3343, subd. (a).) Here, it appears that GM Property paid $1.2 million cash and assumed the obligation to pay the $1.2 million GM Equity Note—a total consideration of $2.4 million. In exchange, it received the Trimax Note, which "was likely to go into default" and was secured by real property appraised at only $2.2 million. In addition to this $200,000 difference, post-transaction consequential damages may increase the amount of GM Property's damages. (See *Garrett v. Perry* (1959) 53 Cal.2d 178, 184-187.) The facts alleged are thus sufficient to establish that GM Property was damaged as a result of James's and Kim's misrepresentations.

3. *Ock Kun lacks standing to assert the Trimax Note fraud claim*

The demurrer as to Ock Kun's Trimax Note fraud claim was correctly sustained, but on a ground not expressed by the trial court: Ock Kun does not have standing to assert fraud concerning the Trimax Note because he never acquired the Trimax Note. Although he transferred money to his corporation, GM Property, which acquired the note, he is merely the shareholder of a corporation (GM Property) that was injured by the defendants' fraud. A corporate shareholder "may not

maintain an action in his [or her] own behalf for a wrong done by a third person to the corporation." (*Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530; accord, *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1253.) Ock Kun therefore lacks standing to assert the Trimax Note fraud claim.

B. *The Foreclosure Forbearance Fraud Cause of Action Against James*

James did not directly address the foreclosure forbearance fraud cause of action in his demurrer. The trial court, however, sustained the demurrer to this cause of action based upon the sham pleading doctrine.

We reject the court's application of the sham pleading doctrine as to GM Property for the reasons discussed above, and conclude that GM Property has adequately stated a cause of action. According to the third amended complaint, James told Ock Kun (the president of GM Property) that he or GM Property must pay $100,000 to prevent a foreclosure of the real property; this was false, and James knew that it was false; James made the statement to induce them to transfer $100,000 to the GM Equity noteholders, Chen and Yang; GM Property and Ock Kun reasonably relied on James's statement because of his expertise as a real estate broker; and Ock Kun then "caused [GM Property] to wire transfer $100,000.00 to" Chen and Yang. The payment, however, was not used to prevent foreclosure proceedings, but rather was paid to James in "an 'under-the-table' transaction to wrongfully enrich" James, causing GM Property to be damaged by the loss of the $100,000 payment. These allegations adequately state a cause of action for fraud against GM Property.

Ock Kun has no standing to assert the forbearance fraud claim for the same reason he has no standing to assert the

Trimax Note fraud claim: he is merely a shareholder of the victim of the fraud.

GM Equity does not have standing to assert the forbearance fraud claim because the misrepresentations upon which the claim is based were not made to it and, even if they were, GM Equity suffered no damages as a result because it did not pay the $100,000.

II. Third Cause of Action for Fiduciary Duty Against James and Robert

The third cause of action for breach of fiduciary duty arises out of Robert's duties as GM Property's property manager and James's duties as its real estate broker in 2013.

" ' "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." ' " (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1114.) GM Property adequately alleged each element here.

"An agent is a fiduciary as a matter of law" (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 960), and an " 'agent "is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and on account of the latter, and to render an account of such transactions." ' " (*Violette v. Shoup* (1993) 16 Cal.App.4th 611, 620; see *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386 [a fiduciary is one who knowingly undertakes to act on behalf and for the benefit of another].)

Here, GM Property hired Robert to open bank accounts for GM Property and to handle, for GM Property's benefit, the Trimax Note debt payments and the payments due on the

GM Equity note. This is sufficient to allege that Robert acted as GM Property's agent and fiduciary for the specified purposes. (See *Vai v. Bank of America* (1961) 56 Cal.2d 329, 338; *Kennard v. Glick* (1960) 183 Cal.App.2d 246, 250.)

The elements of breach and damages are also sufficiently pleaded by allegations that Robert, despite receiving rent payments from the tenant in possession of the real property, breached his duty to pay to Saehan the sums due on the GM Equity Note. As a result of this breach, the GM Equity Note went into default.

GM Property also sufficiently alleged breach of fiduciary duty against James. According to the third amended complaint, GM Property retained James as its real estate agent in November 2013 in connection with a sale of the real property. As its real estate agent, James owed to GM Property a "fiduciary duty . . . requiring 'the highest good faith and undivided service and loyalty.' " (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1311.) James breached his duty by failing to disclose that he was also an agent for "[p]laintiffs' lender" in connection with the sale of the property and by fraudulently inducing a $100,000 payment "by falsely creating a foreclosure threat during the sale of the [real] property."

There is nothing in the third amended complaint, however, to support a fiduciary relationship between Robert or James and either GM Equity or Ock Kun. GM Equity had sold the Trimax Note to GM Property before Robert was engaged to act as a servicing agent or property manager and before James was hired as a real estate broker to sell the real property. Ock Kun was merely a shareholder of GM Property.

James and Robert do not challenge the sufficiency of the allegations supporting the fiduciary duty cause of action per se. Instead, they assert that their demurrer to the breach of fiduciary duty cause of action should be sustained because the third amended complaint is a sham pleading. The sham pleading argument fails as to GM Property for the reasons set forth above in connection with James's fraud causes of action.

Because GM Property, but not GM Equity or Ock Kun, has adequately pleaded breach of fiduciary duty causes of action against Robert and James, the demurrer should have been overruled as to it and was properly sustained as to GM Equity and Ock Kun.

III. Fourth Cause of Action for Negligence Against James and Robert

Plaintiffs allege their negligence cause of action by incorporating the preceding allegations and asserting that James and Robert owed to plaintiffs a duty of reasonable care, that they breached that duty "by, amongst other ways, providing information that was misleading or untrue, and by failing to disclose material information," and the breach was a legal cause of damages. To plead negligence, "it is sufficient to allege that an act was negligently done by defendant, and that it caused damage to plaintiff." (*Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 154.)

James and Robert do not assert a substantive argument as to GM Property's assertion of the claim, and it is adequately pleaded based on the allegations of James's misrepresentations (which may have been made negligently as well as intentionally) and Robert's failure to make payments on the GM Equity Note (which may have breached an ordinary duty of care as well

as a fiduciary duty). (See *William L. Lyon & Associates, Inc. v. Superior Court*, *supra*, 204 Cal.App.4th at p. 1312 [breach of fiduciary duty may also constitute negligence or fraud].)

GM Equity, however, has failed to state a claim for negligence based upon any breach of duty James or Robert owed to it in connection with the Trimax Note transaction because, as discussed in part I.A.(1), its corporate powers were suspended when the statute of limitations ran on any such claim. (Code Civ. Proc., § 339, par. 1 [cause of action for negligence is two years].) It has also failed to state a claim arising from any breach of duty that Robert or James owed as a property manager or real estate agent because such duties were owed to GM Property, not GM Equity.

Ock Kun has failed to state a cause of action because the duties James and Robert allegedly breached were duties owed to GM Property and, as discussed above, he has no standing to assert claims that belong to GM Property.

IV. Fifth Cause of Action for Breach of Good Faith and Fair Dealing Against James and Robert

The fifth cause of action for breach of the implied covenant of good faith and fair dealing claim is allegedly based upon contracts plaintiffs entered into with James and Robert. Under California law, parties to a contract have an implied duty of good faith and fair dealing in the performance and enforcement of the contract. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393.) This duty " 'imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose' " and to avoid doing anything that " ' "will injure the right of the other to receive the benefits of the agreement." ' " (*Ibid.*; see

Thrifty Payless, Inc. v. The Americana at Brand, LLC (2013) 218 Cal.App.4th 1230, 1244.)

The pertinent contracts appear to be the management agreement Robert entered into with GM Property, and James's agreement to act as GM Property's real estate agent in the November 2013 property sale transaction. Robert breached the implied covenant by failing to service the Trimax Note and make the payments on the GM Equity Note, thereby depriving GM Property of the benefits of the contract. James breached the implied covenant when, in his capacity as GM Property's real estate agent, he fraudulently induced GM Property to make a $100,000 payment it was not required to make. These allegations are sufficient to allege a breach of the covenant of good faith and fair dealing.

Neither James nor Robert put forth any argument against GM Property's assertion of this claim, and the trial court's reliance on the sham pleading doctrine is misplaced for the reasons discussed above. As to GM Property, therefore, the court erred in sustaining the demurrer to this cause of action.

GM Equity and Ock Kun lack standing to assert this claim because there is no allegation that James or Robert had a contract with either of them. The demurrer as to them, therefore, was properly sustained.

V. Sixth Cause of Action for Unfair Competition

The sixth cause of action for violation of the unfair competition law (UCL) is asserted by each plaintiff against James and Wilshire. It incorporates the allegations that preceded it and adds that the defendants' conduct constituted "unlawful, unfair, and fraudulent acts against [p]laintiffs."

The UCL provides remedies for "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.) Although the three prongs of the UCL—unlawful, unfair, and fraudulent—are governed by different tests (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 906-907), when, as here, a plaintiff has adequately stated a cause of action for fraud, the same fraudulent conduct will support a cause of action under the UCL under one or more of the UCL prongs. (See, e.g., *id.* at pp. 907–908 [fraud allegations sufficient to support UCL cause of action based on unfair act and fraudulent act prongs]; *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 253-254 [fraud allegations support UCL claim under unlawful, unfair, and fraudulent act prongs]; *Tietsworth v. Sears* (N.D.Cal. 2010) 720 F.Supp.2d 1123, 1136 [fraud allegations support UCL claim under unlawful act prong].)

One has standing to bring an action under the UCL if he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.) The requirement has two parts: The UCL plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury,* and (2) show that that economic injury was the result of, i.e., *caused by,* the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.) An injury in fact is one that affects " 'the plaintiff in a personal and individual way.' " (*Id.* at p. 323.)

The allegations regarding GM Property's damages resulting from James's and Saehan's fraud, which we discussed

in part I.A.(2) above, satisfy the injury in fact and loss of money requirements for standing under the UCL.

Ock Kun does not have standing to pursue a UCL claim because he is merely a shareholder of a corporation that has been harmed; he has not suffered an injury " 'in a personal and individual way.' " (*Kwikset Corp. v. Superior Court*, *supra*, 51 Cal.4th at p. 323.)

Whether GM Equity has stated a claim under the UCL is more complicated. As discussed in part I.A.(1), GM Equity is barred from asserting a claim for fraud because it had not revived its corporate powers before the three-year statute of limitations had run. The statute of limitations for asserting a UCL claim, however, is four years. (Bus. & Prof. Code, § 17208.) The four-year statute applies even if the cause of action the plaintiff "borrows" to support the UCL cause of action has a shorter statute of limitations. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179; *Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 364.) The discovery rule of accrual also applies. (*Aryeh v. Canon Business Solutions, Inc.*, *supra*, 55 Cal.4th at p. 1195.) Thus, if, as discussed above, GM Equity's cause of action accrued when the Trimax Note foreclosure sale occurred in July 2012, its corporate revival three and one-half years later occurred in time to prevent the running of the UCL statute of limitations.

The misrepresentations that James and Kim made to Chahn (GM Equity's president) constitute fraudulent acts and support a UCL cause of action for the same reason that they support GM Property's UCL claim.

The remaining issue is whether GM Equity suffered an "injury in fact and has lost money" as a result of the fraud.

(Bus. & Prof. Code, § 17204.) Wilshire asserted, and the trial court agreed, that GM Equity suffered no damages because it sold the Trimax Note to GM Property. Neither Wilshire nor the court cited any authority for this point, and it is not the law. Although a subsequent sale close in time to a fraudulent transaction may be relevant to establish the property's value at the time of the transaction and aid in determining the amount of damages, the sale, whenever it occurs, does not negate the purchaser's damages. (See *Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876; *Clar v. Board of Trade of* (1958) 164 Cal.App.2d 636, 647; *Nielsen v. Farrington* (1990) 223 Cal.App.3d 1582, 1587; *Burkett v. J. A. Thompson & Son* (1957) 150 Cal.App.2d 523, 527.)

Although GM Equity's assignment of the Trimax note to GM Property did not, ipso facto, negate the possibility of damages, we conclude that GM Equity has failed to allege economic harm. According to the third amended complaint, GM Equity acted as GM Property's agent in the transaction and contributed no cash of its own; GM Property supplied the $1.2 million in cash and funded the $114,000 reserve account. Although GM Equity was the nominal obligor on the GM Equity Note, GM Property apparently assumed that note when it took the assignment of the Trimax Note from GM Equity. Even if GM Equity remained obligated on the note, there is no allegation that GM Equity ever made any payments on that note. Lastly, even if the failure to realize the "promised return" on the Trimax Note constitutes "lost money" under the UCL, GM Equity gave up any right it had to that promised return once it "assigned all of its rights . . . under the Trimax Note" to GM Property. In short, regardless of whether GM Equity was an agent of

GM Property or an intermediary facilitating the transaction for GM Property, it appears that it had not lost any money of its own. Aside from conclusory allegations of damages, which we are not required to accept, GM Equity has failed to allege an economic injury sufficient to provide it with standing to assert a UCL claim.

VI. Seventh Cause of Action for Elder Abuse Against James

The cause of action for elder financial abuse is asserted against James based upon his fraudulent "demand" that Ock Kun pay $100,000 to prevent a foreclosure of the car wash property. In response to that demand, Ock Kun, who was 65 years old at the time, paid or caused GM Property to pay, that amount, thus "causing [Ock Kun] harm."

Under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (the Act), an "elder," as defined in the Act, may recover damages against one who "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder . . . for a wrongful use or with intent to defraud." (Welf. & Inst. Code, § 15610.30.)[5]

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[5] An "elder" for purposes of the Elder Abuse and Dependent Adult Civil Protection Act is "any person residing in this state, 65 years of age or older." (Welf. & Inst. Code, § 15610.27.) There is no allegation that Ock Kun is a resident of California. Indeed, according to the third amended complaint, Ock Kun "lived in South Korea" and was "at all relevant times . . . a resident of the Republic of South Korea"; It thus appears that Ock Kun is not a resident of "this state" and, therefore, not an "elder" under the Act. (*Ibid.*) James, however,

The court sustained James's demurrer to this claim because Ock Kun "is a sham plaintiff." If this phrase is a reference to the sham pleading doctrine, neither defendants nor the court identified any allegation that Ock Kun made in a prior pleading that would implicate the sham pleading doctrine. Our prior discussion of the court's misapplication of the sham pleading doctrine applies here as well.

Ock Kun's allegations regarding the elder abuse cause of action are, however, inconsistent. In allegations that are incorporated into each cause of action, Ock Kun stated that, in response to James's representation that he needed to transfer $100,000 to Chen and Yang to prevent foreclosure, Ock Kun "caused [GM Property] to wire transfer $100,000.00 to" Chen and Yang. Based on this allegation, James obtained the property of *GM Property*, not the property of Ock Kun and, therefore, Ock Kun does not have standing to assert the claim.

Ock Kun also alleges that, as a result of James's misrepresentation, Ock Kun "paid $100,000.00" to Chen and Yang. To the extent this alleges that Ock Kun paid his money, not GM Property's money, to Chen and Yang, it is inconsistent with the more specific allegation that Ock Kun caused GM Property to transfer funds to Chen and Yang. Moreover, even if Ock Kun actually paid the funds himself, that payment does not necessarily give him standing to assert a claim for the alleged injury. The fraud that James allegedly committed was based upon his misrepresentation that Chen and Yang would commence foreclosure proceedings against

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did not make this argument and our decision does not depend on it.

the real property, which GM Property, not Ock Kun, owned; and GM Property suffered the resulting damage when, upon the completion of the sale of the real property, the escrow accounting failed to reflect the $100,000 payment as a credit to GM Property. Stated differently, Ock Kun made a $100,000 payment on behalf of GM Property that should have been credited to GM Property upon close of escrow, and GM Property was harmed when it did not receive that credit. In substance, therefore, GM Property was the entity harmed by the alleged fraud; Ock Kun was harmed, if at all, only because of his interest as a shareholder in GM Property, which does not provide him with standing to sue. (See *Hilliard v. Harbour* (2017) 12 Cal.App.5th 1006, 1012 [elder owner of corporation does not have standing to sue for elder financial abuse based upon harm to the corporation].) Ock Kun has therefore failed to state a cause of action for elder financial abuse.

DISPOSITION

The judgment is reversed as to GM Property and affirmed as to GM Equity and Ock Kun. The court shall vacate its order sustaining the demurrers as to the claims asserted by GM property and enter a new order overruling the demurrers as to GM Property's causes of action for fraud (the Trimax Note fraud and the foreclosure forbearance fraud), the third cause of action for breach of fiduciary duty, the fourth cause of action for negligence, the fifth cause of action for breach of the covenant of good faith and fair dealing, and the sixth cause of action for violation of the UCL.

Appellants shall recover their costs on appeal from respondents.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

I concur:

CHANEY, J.

JOHNSON, J., Dissenting.

While I agree with the majority opinion that Green Mutual Equity, Inc. (GME) and Ock Kun Ro failed to state a cause of action in the third amended complaint against any of the defendants (Wilshire Bank, James Hyojin Ahn, and Robert Ahn), I do not agree that Green Mutual Property & Investment Co. (GMPI) pleaded valid causes of action against the defendants. As the trial court correctly determined, the third amended complaint was a sham pleading and it was properly disregarded by the court. Consequently, I would affirm the trial court's decision sustaining the defendants' demurrer to the third amended complaint.[1] In explaining this particular conclusion, a thorough recitation of the lawsuit's procedural history is required.

PROCEDURAL HISTORY

I. The Initial Complaints

On April 30, 2012, GME sued James and Robert Ahn for fraud, breach of contract, and breach of fiduciary duty.[2] This

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[1] Although the trial court also dismissed the third amended complaint on several other meritorious grounds, for relative brevity's sake, this dissent will focus only on the trial court's sham pleading analysis.

[2] The April 30, 2012 complaint was assigned case No. BC483659, while the instant case was assigned case No. BC515574. The same trial judge presided over both cases and ordered them related. GME was represented by counsel when filing the initial complaint in BC483659. However, GME, now joined by Chahn Ro as a plaintiff, proceeded in pro. per.

complaint focused on GME's transfer of the Trimax Melrose, Inc. (Trimax) promissory note (Trimax Note) to GMPI and alleged that the Ahns, who had acted as escrow agents during the transaction, caused the transfer to occur even though GMPI never paid the agreed-upon $2.4 million purchase price. GME voluntarily dismissed this complaint in September 2014.

On July 18, 2013, GME and Chahn Ro sued Saehan Bank (Saehan), James Ahn, GMPI, and others, for fraud, breach of contract, breach of fiduciary duty, and breach of covenant of good faith and fair dealing, among other claims.[3] The defendants filed a demurrer to this complaint. On December 26, 2013, GME and Chahn Ro filed a first amended complaint, alleging largely the same claims. The defendants again demurred. Both the first amended complaint and the resulting demurrer were ultimately withdrawn.

II. The Second Amended Complaint

On July 30, 2014, a second amended complaint was filed. This time, however, the plaintiffs were listed as GMPI, Ock Kun Ro and GME. The plaintiffs sought $1.7 million in damages from Wilshire Bank (Wilshire), as successor in interest to Saehan, as well as James and Robert Ahn, alleging fraud, breach of fiduciary

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when filing the initial complaint and first amended complaint in BC515574. When filing the second and third amended complaints in BC515574, the plaintiffs—now comprised of GME, Ock Kun Ro and GMPI—were again represented by counsel.

[3] The parties call the July 18, 2013, complaint "the original complaint."

duty, negligence, breach of covenant of good faith and fair dealing, unfair competition and elder financial abuse.

The defendants filed a demurrer to the second amended complaint, which the trial court granted on April 29, 2015.[4] The trial court sustained Wilshire's demurrer to the fraud claim for failure to allege actual reliance. The plaintiffs adequately alleged that Trimax's payment history was poor, and that although the real property appraised for $2.2 million at the time, James Ahn claimed the property was worth $5.5 million and said that Saehan was selling the note only because it needed to raise capital, not because there were any problems with loan repayment or the security. (*Chahn Ro* Order [2015 WL 13660461 at p. 1].) The plaintiffs alleged that Chahn Ro and GME agreed to purchase the Trimax Note based on these misrepresentations. But the plaintiffs did not allege that Ock Kun Ro or GMPI actually relied on any statements by James Ahn because neither Ock Kun Ro nor GMPI purchased the Trimax Note in reliance on the representations—only GME did. Thus, the trial court sustained, without leave to amend, Wilshire's demurrer to the fraud claim alleged by plaintiffs Ock Kun Ro and GMPI. (*Ibid.*)

As for plaintiff GME, the trial court sustained Wilshire's demurrer with respect to damages. GME invested $1.2 million of GMPI's money and another $114,000 for the interest payments (for a total of $1,314,000) and " 'ended up with $835,134.79' " for a net loss of $478,865.21, along with the lost $1.2 million profit expected on the Trimax Note, and another $100,000 paid to the

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[4] See *Chahn Ro et al. v. Stewart Default Services et al.* (Super. Ct., L.A. County, 2015, No. BC515574) [2015 WL 13660461] (*Chahn Ro* Order).

new GME Note holders that was not reflected in the final accounting. The trial court determined that although this was an adequate allegation of damages incurred by GMPI, it was not an adequate allegation of GME's damages. The trial court allowed GME to amend the second amended complaint in order to factually allege the damages incurred by GME—the only plaintiff that actually relied, to its detriment, on the defendants' alleged misrepresentations by purchasing the Trimax Note. (*Chahn Ro* Order [2015 WL 13660461 at p. 1].)

The trial court also sustained Wilshire's demurrer to the second cause of action for breach of fiduciary duty. With respect to plaintiffs Ock Kun Ro and GMPI, the plaintiffs had alleged no direct relationship whatsoever between Ock Kun Ro or GMPI and Saehan. Rather, Ock Kun Ro and GMPI had allegedly provided the funds to GME, which purchased the Trimax Note from Saehan. Although there was a relationship between GME and Saehan, it was not a fiduciary relationship. The relationship was merely that of buyer and seller of the Trimax Note. There was no allegation that Saehan took control of any property belonging to GME under conditions where Saehan had a duty to act with the utmost good faith for the benefit of GME. Rather, GME simply purchased the Trimax Note from Saehan. The relationship of seller to buyer is not one ordinarily vested with fiduciary obligation. Nor did the plaintiffs allege any facts suggesting that Saehan participated in Trimax's financed enterprise (i.e. the car wash). The plaintiffs cited no authority that a buyer-seller relationship is a fiduciary one, where seller is not required to act for the benefit of the buyer. Moreover, the plaintiffs had failed to articulate a sound basis upon which any plaintiff could amend the complaint to allege a fiduciary relationship with Saehan.

Thus, the trial court sustained Wilshire's demurrer to the second claim without leave to amend. (*Chahn Ro* Order [2015 WL 13660461 at p. 2].)

The trial court similarly sustained Wilshire's demurrer on the third cause of action for negligence. Once again, the plaintiffs had not alleged that Saehan was actively participating in Trimax's financed enterprise. The plaintiffs also cited no authority holding that selling a debt is outside a lender's conventional role. The plaintiffs thus failed to state the essential element that Saehan owed GME, GMPI, or Ock Kun Ro a duty in selling the Trimax Note to GME. The plaintiffs further failed to explain how any plaintiff could amend the complaint to allege that Saehan owed and breached a duty of care to GME. Thus, the trial court sustained Wilshire's demurrer to the third claim without leave to amend. (*Chahn Ro* Order [2015 WL 13660461 at p. 2].)

The trial court sustained Wilshire's demurrer to the fourth cause of action for breach of the implied covenant of good faith and fair dealing as to GMPI and Ock Kun Ro. Neither GMPI nor Ock Kun Ro were parties to the assignment contract between Saehan and GME. The only parties to that contract were Saehan and GME, and the prerequisite for any action based on a breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties. (*Chahn Ro* Order [2015 WL 13660461 at p. 2].) As for the remaining plaintiff GME, the allegation was that the defendants interfered with GME's right to receive the benefits of the contract, that is, the promised repayment by Trimax of the Trimax Note, alleging damages of $1.7 million, which consisted of the $1.2 million expected return on the Trimax Note, plus

roughly $500,000 in net losses on the investment, mitigated by the amount GMPI collected when it sold the property. Critically, Saehan had not promised to repay the Trimax Note and had not guaranteed the value of the security. Saehan merely agreed that it would assign the $3.6 million Trimax Note to GME for $2.4 million, of which $1.2 million would be financed by Saehan. The implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract. As Saehan never promised to repay the Trimax Note, the implied covenant could not create that obligation. (*Ibid*.)

To the extent that the breach of the implied covenant cause of action was based on the alleged fraud, Saehan and GME expressly agreed that GME accepted the Trimax loan "as is," without any express or implied representations and without recourse of any nature to assignor Saehan. GME also agreed that Saehan did not warrant the status of the property in question, or the financial condition of the borrower. (*Chahn Ro* Order [2015 WL 13660461 at p. 2].)

The final cause of action for unfair competition was based on all the prior paragraphs in the second amended complaint. Under such conditions, this derivative cause of action stands or falls depending on the fate of the antecedent substantive causes of action. Because the demurrer was sustained as to every cause of action with respect to defendant Wilshire, the derivative cause of action also failed. However, the trial court allowed the plaintiffs to amend this claim. (*Chahn Ro* Order [2015 WL 13660461 at p. 3].)

With respect to defendants James and Robert Ahn, the trial court sustained James Ahn's demurrer to the first cause of action

for fraud as to plaintiffs Ock Kun Ro and GMPI. Again, the plaintiffs could not show actual reliance since only GME relied on the representations by buying the Trimax Note. Further, this demurrer was sustained without leave to amend, as this defect was not curable by amendment. However, the trial court overruled James Ahn's demurrer to the first cause of action as to plaintiff GME. The trial court also overruled James and Robert Ahn's demurrer to the remaining causes of action. (*Chahn Ro* Order [2015 WL 13660461 at p. 3].)

III. The Third Amended Complaint

On May 19, 2015, GMPI, Ock Kun Ro and GME filed a third amended complaint naming Wilshire, James Ahn and Robert Ahn as defendants.[5] The third amended complaint alleged: (1) three causes of action against Wilshire for fraud, negligent misrepresentation, and unfair competition in violation of Business and Professions Code section 17200; (2) seven causes

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[5] Chahn Ro, the first named plaintiff in the original complaint, was no longer a party at all. GMPI, named as a defendant in the original complaint and first amended complaint, became a plaintiff in the second and third amended complaints. Ock Kun Ro did not appear as a plaintiff until the second amended complaint. After reviewing the third amended complaint, the trial court found that "over the course of multiple demurrers and amended pleadings, plaintiffs have improperly changed the case caption by moving defendants into the plaintiffs' caption, without leave of court, and then using a new case name in subsequent motions, despite being admonished by the court that the case name had to remain the same as on the initial filing." Thus, the proper name of the case was *Chahn Ro et al v. Stewart Default Services et al.*

of action against James Ahn for fraud, negligent misrepresentation, breach of fiduciary duty, negligence, breach of covenant of good faith and fair dealing, unfair competition in violation of Business and Professions Code section 17200, and elder financial abuse; and (3) three causes of action against Robert Ahn for breach of fiduciary duty, negligence, and breach of the covenant of good faith and fair dealing.

The defendants filed demurrers as to every cause of action in the third amended complaint. On April 27, 2016, following two lengthy hearings, the trial court sustained the defendants' demurrers without leave to amend. In so ruling, the trial court found that the third amended complaint was an attempt to circumvent its prior demurrer rulings and was "actually maybe one of the clearest cases of sham pleading that I've seen." On June 6, 2016, the trial court entered a judgment of dismissal in favor of all the defendants.

A. *The Trial Court's Ruling as to Wilshire*

The trial court sustained Wilshire's demurrer as to all the alleged causes of action. The court observed that the plaintiffs began to radically change their theories of liability in the second amended complaint, and now the third amended complaint, recasting defendant GMPI as a plaintiff, and alleging that GME was an agent for Ock Kun Ro and GMPI in purchasing the Trimax Note.[6] Yet it was undisputed that GME purchased the

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[6] For example, in the original complaint, GME claimed that GMPI had defrauded GME by wrongfully obtaining an interest in the Trimax Note as well as the deed of trust on Trimax's real property. GME also claimed that GMPI and James Ahn were

Trimax Note in its own name. The third amended complaint itself specifically alleged that GME had purchased the Trimax Note on its own behalf.[7] If GME were really the agent for Ock

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agents, employees, and alter egos of one another and had jointly conspired to wrong GME. The complaint did not allege that GME was an agent of GMPI and Ock Kun Ro or that GME had purchased the Trimax Note as an agent for GMPI. Nor did the second amended complaint make such an allegation. Instead, the pleading alleged that Chahn Ro agreed on behalf of GME to purchase the Trimax Note. The second amended complaint also alleged that, months after the purchase, GME assigned its rights under the Trimax Note to GMPI—a move that would have been unnecessary had GME simply acted as GMPI's agent, thus rendering GMPI the true owner of the Trimax Note at the time of purchase. In the third amended complaint, GME now claimed it was GMPI's authorized agent and that GMPI was GME's authorized agent. GME also claimed that although the Trimax Note was to be held in GME's name, both Saehan and James Ahn understood and agreed that GME was acting on behalf of GMPI and Ock Kun Ro during the purchase and that GMPI and Ock Kun Ro were the "true beneficiaries" of the transaction.

[7] The fact that GME purchased the Trimax Note as principal, and not in its capacity as an agent of GMPI or Ock Kun Ro, was evidenced by: (1) the loan assignment and assumption agreement, which stated that GME was the purchaser of the Trimax Note; (2) the promissory note, which showed that GME, not GMPI, borrowed money from Saehan to finance the purchase of the Trimax Note; and (3) the assignment of deed of trust, which stated that GME, not GMPI, was assigned Saehan's interest in the deed of trust on Trimax's real property. Notably, if exhibits to a complaint conflict with the allegations of the complaint, we rely on and accept as true the contents of the

Kun Ro and GMPI, the trial court noted, then the Trimax Note would have been in the name of GME as agent of GMPI and Ock Kun Ro. Moreover, the original complaint and first amended complaint admitted that GMPI and Ock Kun Ro were not the principals of GME.

As the trial court observed, if a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting facts which made the previous complaint defective or by adding facts inconsistent with those of previous pleadings, the court may take judicial notice of prior pleadings and may disregard any inconsistent allegations. Because the trial court could disregard the plaintiffs' new and historically inconsistent allegations in the third amended complaint that GME was an agent of GMPI and Ock Kun Ro, it sustained Wilshire's demurrer to the first cause of action for fraud without leave to amend. As before, the plaintiffs failed to allege GMPI or Ock Kun Ro took any actions in reliance on Saehan's alleged misrepresentations. Likewise, the plaintiffs failed to allege that GME suffered any damages given that GME previously sold the Trimax Note. Thus, the plaintiffs failed to state a claim for fraud.

As to the second cause of action for negligent misrepresentation, the trial court noted it had not granted leave to file a new cause of action and therefore struck this claim. Even if such leave had been given, the second cause of action would fail for the same reasons as the first—due to the sham pleadings, the allegation in the third amended complaint that

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exhibits. (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83.)

GME was an agent of GMPI and Ock Kun Ro could not be accepted as true. Thus, the plaintiffs failed to allege that GMPI or Ock Kun Ro relied on Saehan's alleged misrepresentations and failed to allege that GME suffered any damages.

As to the unfair competition claim, the trial court noted that unfair competition is a derivative claim and requires an independent wrong. Based upon the above rulings, there was no predicate act upon which to base the unfair competition cause of action. Therefore, the demurrer was also sustained to this cause of action, without leave to amend.

Notably, the trial court observed, the allegations in the third amended complaint were "so confused, muddled, and contradicted by the multiple inconsistent and sham allegations" that they had become impossible to untangle. This was particularly true when a defendant was suddenly turned into a plaintiff in the third and fourth versions of the complaint. Thus, the court concluded that any amendment would be futile.

B. *The Trial Court's Ruling as to the Ahns*

The trial court sustained the Ahns' demurrer to the fraud cause of action without leave to amend. The court sustained the Ahns' demurrer for the same reasons it sustained Wilshire's demurrer to the fraud claims. The court also sustained the Ahns' demurrer as to the fraud claim because neither Ock Kun Ro nor GMPI were proper plaintiffs, but had been transferred from defendants to plaintiffs without leave of court and via historically contradictory allegations that rendered the third amended complaint a sham pleading and were an attempt to avoid the court's prior rulings. GME further failed to state a fraud claim because GME was a suspended corporation when it filed its

original complaint and thus it did not have legal standing to sue. Importantly, the statute of limitations had continued to run, expiring before GME was back in good standing in January 2016.[8]

As to the second cause of action for negligent misrepresentation, the trial court had not granted leave to file a new cause of action for misrepresentation in the third amended complaint and thus struck the claim. Moreover, the trial court noted that even if it had not stricken the claim, it would have sustained the demurrer. Neither Ock Kun Ro nor GPMI were proper plaintiffs and, again, GME was suspended when it filed its original complaint and thus did not have legal standing to file the lawsuit. Thus, both the fraud claim and the negligent misrepresentation claim were now time-barred. Furthermore, the second cause of action contained the same pleading defects and sham allegations as the first cause of action. Therefore, the court sustained the demurrer to the second cause of action without leave to amend.

The remaining causes of action suffered from the same infirmities. Moreover, the sham pleading allegations, including the confusion of the parties, the changing of defendant parties into plaintiff parties without leave of court, and the overbroad and contradictory agency allegations rendered the remaining claims "uncertain, ambiguous and unintelligible." The trial court

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[8] "[A] suit filed by a corporation while its powers were suspended does not toll the statute of limitations. The suit is ineffective because of the suspension, so the statute continues to run." (*American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 563.)

sustained the demurrer to the remaining causes of action without leave to amend on this ground alone.

The trial court also noted the third amended complaint's additional inconsistencies regarding the remaining claims. For example, the breach of fiduciary duty claim not only incorporated all of the previous sham allegations, it also alleged that James Ahn was the plaintiffs' agent and broker. But the original complaint and first amended complaint alleged that James Ahn was Saehan's agent and broker. Even the third amended complaint alleged this fact elsewhere in the pleading and also claimed that Saehan had paid James Ahn's commission. Furthermore, the negligence claim was worded as a misrepresentation claim and thus replicated the second cause of action for negligent misrepresentation. Therefore, this cause of action failed for the same reasons. The trial court also rejected the breach of the covenant of good faith and fair dealing claim because the third amended complaint did not allege a contract existed between either Ahn defendant and Ock Kun Ro, the agency allegations were sham pleadings, and Ock Kun Ro and GMPI were sham plaintiffs. As for the elder abuse claim, only Ock Kun Ro as an individual could have standing to bring this claim. But, the trial court concluded, Ock Kun Ro was a sham plaintiff. Moreover, the third amended complaint did not state an elder abuse claim against James Ahn. The third amended complaint alleged that James Ahn's wrongful conduct had been to tell Ock Kun Ro to forward money to the new GME note holders to prevent a pending foreclosure, which Ock Kun Ro allegedly did. But the alleged harm was not that James Ahn kept the money, which is a required element of this cause of action. Instead, the alleged harm was that a third party, the escrow

agent, did not properly reflect the payment in the closing accounting.[9]

DISCUSSION

I. The Sham Pleading Doctrine

A. *As Applied to GME*

The sham pleading doctrine prevents a plaintiff from attempting to breathe life into a complaint by omitting relevant facts from an amended complaint that made a plaintiff's previous complaint defective. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425.) Under the sham pleading doctrine, a plaintiff cannot avoid allegations that are determinative to a cause of action simply by filing an amended complaint which omits the problematic facts or pleads facts inconsistent with those alleged in the original complaint. The doctrine precludes a plaintiff from amending a complaint to omit harmful allegations without explanation, from previous complaints to avoid attacks raised in demurrers. Instead, the plaintiff must satisfactorily explain such an omission. Failure to provide such an explanation allows the court to disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint. (*Id*. at pp. 425-426.)

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[9] As for the unfair competition claim, this was a derivative cause of action which required an independent wrong. Because the trial court sustained the Ahns' demurrer to all the other causes of action, there was no independent wrong on which to base this claim.

After oral argument, we asked the parties to provide additional briefing addressing several questions raised by the panel. In our request for additional briefing, we noted that while a corporation is an artificial legal entity that cannot represent itself in pro. per. (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729-730), GME did not have counsel when it filed the original complaint and first amended complaint in BC515574, but did have counsel when it filed the third amended complaint in that case. Thus, we first asked the parties: "In determining whether, for purposes of the sham pleading doctrine, allegations made by GME in the third amended complaint in BC515574 are inconsistent with allegations made in the original and/or first amended complaints in B515574, should the trial court have treated GME as having made the allegations in the original and first amended complaints when GME was not represented by counsel when those pleadings were filed?" After reviewing the parties' supplemental briefs, I agree with the plaintiffs that because GME was not represented by counsel when it filed the original complaint or first amended complaint, these pleadings are a nullity for the purposes of the sham pleading doctrine as they would have been subject to a motion to strike by the trial court.

Several rationales support the rule that a corporation cannot represent itself in pro. per. "First, a corporation, as an artificial entity created by law, can only act in its affairs through its natural person agents and representatives. If the corporate agent who would likely appear on behalf of the corporation in court proceedings, e.g., an officer or director, is not an attorney, that person would be engaged in the unlicensed practice of law. [Citation.]" (*CLD Construction, Inc. v. City of San Ramon* (2004)

120 Cal.App.4th 1141, 1146 (*CLD Construction*).) "Second, the rule furthers the efficient administration of justice by assuring that qualified professionals, who, as officers of the court are subject to its control and to professional rules of conduct, present the corporation's case and aid the court in resolution of the issues. [Citations.] Third, the rule helps maintain the distinction between the corporation and its shareholders, directors, and officers. [Citation.]" (*Ibid.*)

State courts have been divided in their response when faced with a pleading filed by an unrepresented corporation. Some states have taken the view that all actions taken by a nonattorney on behalf of a corporation have no effect and are a " 'nullity.' " (*CLD Construction*, *supra*, 120 Cal.App.4th at p. 1148.) The pleading defect is considered incurable and raises a barrier going to the trial court's power to exercise subject matter jurisdiction. Other states have taken the approach that this defect is a correctable, permitting the corporation a reasonable time to obtain an attorney. (*Ibid.*) Although *CLD Construction* ultimately held that a corporation's failure to be represented by an attorney is a correctable defect, on such terms as are just in the sound discretion of the trial court (*id.* at p. 1149), there is no evidence that the trial court in this case was asked to either address or excuse this pleading defect.[10] Nor did the trial court strike the original complaint or first amended complaint sua

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[10] The defendants did not move to strike the original complaint or the first amended complaint under Code of Civil Procedure section 435 et seq., which is traditionally used to reach pleading defects not subject to demurrer. (*CLD Construction*, *supra*, 120 Cal.App.4th at p. 1146.)

sponte. Thus, the pleading defect in both complaints still stands. Accordingly, the original and first amended complaints, filed by Chahn Ro on behalf of GME, cannot bind GME to the allegations that Chahn Ro made on GME's behalf in those pleadings, and should not have been considered when determining whether the sham pleading doctrine barred GME's claims in the third amended complaint.

Assuming the trial court could not consider the original complaint or first amended complaint filed in BC515574 when deciding if the sham pleading doctrine barred GME's claims in the third amended complaint, we asked the parties whether the trial court could have considered the complaint GME filed in BC483659 when conducting its sham pleading analysis and if there was any evidence in the record that the trial court did in fact consider this particular complaint when conducting its analysis.

As noted above, GME first filed suit on April 30, 2012, when it sued James and Robert Ahn for fraud, breach of contract, and breach of fiduciary duty. GME was represented by counsel when it filed this complaint, which was assigned case number BC483659. This particular complaint focused on GME's transfer of the Trimax Note to GMPI, and alleged that the Ahns, who had acted as escrow agents during the transaction, caused the transfer to occur even though GMPI had never paid the agreed-upon $2.4 million purchase price. GME voluntarily dismissed this complaint in September 2014.

In their supplemental brief, the plaintiffs concede that the trial court could have properly taken into account the BC483659 complaint when reviewing the third amended complaint. The plaintiffs further concede that although the trial court did not

specifically cite the BC483659 complaint when conducting its sham pleading analysis, the trial court took judicial notice of the BC483659 complaint before conducting its analysis and the Ahns had pointed to contrary allegations made in the BC483659 complaint in their demurrer to the third amended complaint.[11] Indeed, when sustaining the Ahns' demurrer, the trial court specifically noted the "multiple contradictory allegations" between the BC483659 complaint and the third amended complaint. Nevertheless, according to the plaintiffs, a close reading of the BC483659 complaint and third amended complaint reveals no inconsistencies which would warrant application of the sham pleading doctrine.[12]

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[11] For example, in the BC483659 complaint, GME alleged that the Ahns, GMPI and Ock Kun Ro were agents and alter egos of one another and acted together to harm GME. Conversely, the third amended complaint alleged that GME, GMPI and Ock Kun Ro were agents of one another and acted together to harm the Ahns. Furthermore, in the BC483659 complaint, GME alleged that GME was the true beneficiary of the Trimax Note, while GMPI could only benefit if it paid GME $2.4 million. Conversely, the third amended complaint alleged that GMPI and Ock Kun Ro were the true beneficiaries of the Trimax Note, and that GME and Chahn Ro only acted to secure the note for GMPI and Ock Kun Ro.

[12] In addition to arguing that the BC483659 complaint and third amended complaint were not actually inconsistent, the plaintiffs *also* argue that even if the pleadings do contradict each other, the inconsistencies are excusable. According to the plaintiffs, "the dispute that arose regarding the transfer of the Trimax Note from GME to GMPI was mainly due to a misunderstanding between . . . Chahn Ro and Ock Kun Ro. Once

I disagree. For example, the BC483659 complaint alleged that on or about January 29, 2010, Saehan assigned the deed of trust on the real property to GME and thus did *not* allege that GME took the assignment in its alleged capacity as an agent of GMPI. The BC483659 complaint further alleged that on or about July 23, 2010, GME entered into an agreement with GMPI, under which GME was to assign its interest in the Trimax Note and deed of trust to GMPI. GMPI was to pay GME $2.4 million for this assignment. In other words, the complaint alleged that GME entered into an agreement with GMPI only *after* GME had purchased the note from Saehan, thus ruling out the possibility that GME had purchased the note as an agent of GMPI. Indeed, in alleging that GMPI breached its agreement with GME, the BC483659 complaint made clear that the agreement entered into between GME and GMPI was a contract of purchase and sale, not an arrangement between principal and agent. In short, the BC483659 complaint completely contradicts the third amended

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Chahn Ro and Ock Kun Ro resolved their misunderstanding regarding the Trimax Note, they were able to focus on the actual wrong[,] which was the wrong caused by Saehan and James and Robert Ahn regarding the sale of the Trimax Note and handling of the property thereafter." However, given that GME and GMPI had litigated against one another for *years* prior to the third amended complaint's filing, it beggars belief that this alleged wrong was in fact newly discovered. Furthermore, while the plaintiffs say they repeatedly explained their change in strategy when before the trial court, this explanation was not incorporated into their subsequent pleadings. Under the sham pleading doctrine, the failure to provide such an explanation allows a court to disregard the inconsistent allegations. (See *Deveny v. Entropin, Inc.*, *supra*, 139 Cal.App.4th at p. 426.)

complaint's foundational factual premise that GME was an agent of GMPI. Instead, the BC483659 complaint alleged that the relationship between GME and GMPI was adverse, that there was no agreement between the two companies as to GME's purchase of the Trimax Note, and that it was not until after the transaction that GME and GMPI entered into an agreement of purchase and sale.

In sum, the BC483659 complaint, filed by counsel on behalf of GME, can bind GME to the allegations made on GME's behalf in the pleading, and was properly considered when determining whether the sham pleading doctrine barred GME's claims in the third amended complaint. Furthermore, a close reading of the BC483659 complaint and third amended complaint reveals several inconsistencies which would warrant application of the sham pleading doctrine.

B. *As Applied to GMPI and Ock Kun Ro*

Neither GMPI nor Ock Kun Ro were named as plaintiffs in the original complaint or the first amended complaint. Thus, we next asked the parties: "In determining whether, for purposes of the sham pleading doctrine, allegations made by GMPI or Ock Kun Ro in the third amended complaint in BC515574 are inconsistent with allegations made in the original and/or first amended complaints in B515574, should the trial court have treated GMPI or Ock Kun Ro as having made the allegations in the original and first amended complaints given that they were not yet plaintiffs when those pleadings were filed?" Although the defendants argue that GMPI and Ock Kun Ro should be treated as having made the allegations in the original complaint and the first amended complaint given that they elected to join and

amend those pleadings, they cite no authority in support of this position. Thus, neither the original complaint nor the first amended complaint should have been considered when determining whether the sham pleading doctrine barred GMPI's or Ock Kun Ro's claims in the third amended complaint.

Although the trial court erred in its application of the sham pleading doctrine in this discrete respect, I note that the third amended complaint is also *internally* inconsistent. According to the third amended complaint, GME served as an agent for Ock Kun Ro and GMPI when purchasing the Trimax Note. Yet it is undisputed that GME purchased the Trimax Note in its own name. Indeed, the third amended complaint specifically alleged that GME purchased the Trimax Note on its own behalf. Furthermore, at least three exhibits attached to the third amended complaint directly contradicted the plaintiffs' claim that GME had served as Ock Kun Ro's or GMPI's agent during the transaction: (1) the loan assignment and assumption agreement, which stated that GME was the purchaser of the Trimax Note; (2) the promissory note, which showed that GME, not GMPI, borrowed money from Saehan to finance the purchase of the Trimax Note; and (3) the assignment of deed of trust, which stated that GME, not GMPI, was assigned Saehan's interest in the Trimax deed of trust. As correctly noted by the trial court, facts in exhibits attached to a complaint are given precedence over inconsistent allegations in the complaint. (See *Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.) Given that the agency allegations in the third amended complaint were inconsistent with the third amended complaint's exhibits, the trial court properly gave the facts in the exhibits precedence over the allegations in the third amended complaint.

As the trial court properly determined, the new general agency allegations in the third amended complaint were insufficient where specific allegations in the third amended complaint's exhibits demonstrated that no such relationship existed.

In sum, the trial court could, and did, consider the BC483659 complaint when determining whether the sham pleading doctrine barred GME's claims in the third amended complaint, and a close reading of the two pleadings reveals several inconsistencies which would warrant application of the doctrine. The trial court could, and did, also consider the third amended complaint's internal inconsistencies when determining whether the sham pleading doctrine barred GMPI's and Ock Kun Ro's claims in the third amended complaint, and a close reading of the pleading and its exhibits reveals several inconsistencies which would warrant application of the doctrine. Moreover, the plaintiffs cannot show a reasonable possibility that these material inconsistencies can be cured by amendment. Therefore, the trial court did not abuse its discretion when it sustained the defendants' demurrer without leave to amend as to all claims based on the sham pleading doctrine.

Accordingly, I would affirm the judgment against all the plaintiffs as to all the causes of action alleged in the third amended complaint.

JOHNSON, J.