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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KAMAL BILAL,

Plaintiff and Appellant,

v.

JEFFREY SIEGEL, as Successor in
Interest, etc.,

Defendant and Respondent.

B280457

(Los Angeles County
Super. Ct. No. BC522207)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Reversed.

Robert M. Ungar for Plaintiff and Appellant.

Jacob N. Segura; Law Offices of Terry M. Magady and
Terry M. Magady for Defendant and Respondent.

Plaintiff Kamal Bilal (plaintiff) held a minority interest in Westco Petroleum Distributors, Inc. (WPD), a gasoline distribution company. Plaintiff sued the majority shareholders, defendants Antone Nino (Antone) and Nasrin Shakeri Nino (Nasrin), initially alleging they wrongly excluded him from participating in WPD's management and executed unauthorized transactions that injured both plaintiff and WPD. A later amended complaint filed by plaintiff, however, alleged injury only to himself and omitted any allegations that defendant injured WPD. The trial court sustained a demurrer to the amended complaint without leave to amend, concluding plaintiff's prior pleadings revealed the gist of the action sought redress for injury to WPD, making it a shareholder derivative action, but plaintiff had not complied with statutory requirements to bring such an action. We consider whether the trial court properly applied the sham pleading doctrine to disregard plaintiff's allegations of individual injury.

I. BACKGROUND

A. *The Original Complaint's Allegations*

Plaintiff invested \$400,000 to acquire interests in three companies: AAA Gas, Inc. (AAA), Westco Petroleum, Inc. (Westco), and WPD. Plaintiff's investment gave him a 50 percent share of AAA and Westco, and a 24 percent share of WPD. The remaining interest in each of these companies was owned by Antone "and/or [his] wife," Nasrin.

Antone was responsible for the day-to-day management of the companies and had sole possession, custody, and control of their books and records. Each company's bylaws, however,

provided that “the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board of directors.” Plaintiff and Antone were the sole directors of the three companies at all relevant times.

Antone breached his fiduciary duties to plaintiff by, among other things, causing WPD to make various unauthorized payments to Antone and his family, excluding plaintiff from access to WPD’s books and records, misrepresenting to plaintiff the “status of the financial affairs and business of WPD,” withholding “distributions and dividends payable to Plaintiff as a shareholder of WPD,” and “seizing control of the business, assets and records of WPD.”¹ Antone further breached his fiduciary duties when he transferred certain WPD assets to a third party, McWhirter Distributing Company, Inc. (McWhirter), without authorization. Specifically, Antone was alleged to have transferred “without authorization or consent of the WPD Board of Directors . . . valuable branded gasoline reseller rights” in September 2012, and, almost a year later in August 2013, “all of the remaining WPD assets”

The specified “injuries and damages” from these alleged breaches of fiduciary duty were “(a) the full amount of monies payable to and illegally withheld from Plaintiff in the form of dividends and distributions, together with interest thereon; (b) damages resulting from the illegal taking of Plaintiff’s rights, interests, entitlements and benefits due to Plaintiff as a shareholder of [Westco], WPD, and AAA; and (c) damages resulting from the diminution in value of Plaintiff’s shareholding

¹ Plaintiff made similar allegations regarding Antone’s conduct with respect to AAA and Westco.

interests in [Westco], WPD, and AAA.” The initial complaint also invoked Corporations Code sections 1601 and 1602² to request Antone’s removal as a director of WPD, appointment of a provisional director, and involuntary dissolution of the company.

B. Motion for Approval of a Provisional Director

Soon after filing his complaint, plaintiff filed a motion asking the court to appoint a provisional director of WPD. In a declaration filed in support of the motion, plaintiff again emphasized Antone had done unauthorized business with McWhirter: “Around June 2013, I discovered that [Antone] had earlier sold certain WPD assets, namely retail gasoline distribution contracts, to [McWhirter] . . . , a gasoline distribution company and competitor of WPD, without my knowledge, consent or approval as a WPD director.” Plaintiff additionally asserted Antone subsequently arranged for McWhirter to take over servicing of WPD’s remaining contracts despite plaintiff’s objection.

C. The First Amended Complaint

Plaintiff’s first amended complaint (FAC) alleged additional causes of action and added Nasrin as a defendant. Of the 22 causes of action asserted, three are pertinent here.

First, plaintiff alleged Antone breached a stock buy-sell agreement and a shareholders agreement because: “(a) [Antone] expressly denied Plaintiff’s rights as a shareholder of WPD; [¶]

² Undesignated statutory references that follow are to the Corporations Code. Sections 1601 and 1602 provide for shareholders’ and directors’ inspection of corporate records and other items.

(b) [Antone] expressly denied Plaintiff his rights as a director of WPD and refused to participate in board of director meetings with Plaintiff; [¶] (c) [Antone] refused to allow Plaintiff to participate in the management of WPD; [¶] (d) [Antone] refused to give Plaintiff access to the corporate books and records of WPD; [¶] (e) [Antone] caused WPD to transfer valuable contract rights to resell branded gasoline to [McWhirter] without obtaining Plaintiff's prior written consent; [¶] [and] (f) [Antone] and his family members made loans to WPD and received loans from WPD without obtaining Plaintiff's prior written consent."

Second, plaintiff asserted a breach of fiduciary duty claim based largely on the same facts alleged in the original complaint but adding an allegation that Antone and Nasrin "den[ie]d the existence of Plaintiff's rights as a shareholder and director of WPD, . . . thereby diminishing the value of Plaintiff's shares and resulting in an unequal distribution of profits" He also alleged the August 2013 McWhirter transaction left WPD "without assets."

Third, the FAC alleged Nasrin aided and abetted the alleged torts in which Antone engaged.

D. The McWhirter Litigation

Concurrent with this action, McWhirter sued Westco, WPD, plaintiff, and—because Antone died shortly after the FAC was filed—the personal representative of Antone's estate, Jeffrey Siegel (Siegel).³ Our record includes only selected pleadings from

³ In the discussion that follows, for simplicity's sake, we refer to Antone as if he were the party filing the demurrer, as well as the respondent on appeal, even though Siegel is the actual respondent as administrator of Antone's estate.

the McWhirter litigation, namely, first and second amended cross-complaints filed by plaintiff against McWhirter, WPD's second amended cross-complaint, and a joint status conference report.

Plaintiff's second-amended cross-complaint against McWhirter stated he was involved in WPD's agreement in 2012 to sell several gasoline reseller contracts to McWhirter in two phases.⁴ (His original and first amended complaints filed against defendants had not made such a specific allegation.) It asserted plaintiff—an attorney—facilitated McWhirter's attorneys' due diligence and received the first payment for \$1,000,000 in his client trust account. It further alleged these funds were deposited in WPD's account and defendants then began diverting "customer deposits and payments from WPD customers . . . to their own personal use, thereby allowing the \$1,000,000 on deposit in WPD's account to be depleted by . . . payments . . . for fuel deliveries." In addition, it alleged Antone and McWhirter subsequently executed an amended agreement without plaintiff's knowledge in August 2012 and, as a result, "three of WPD's nine remaining [gasoline reseller contracts] were transferred to [McWhirter] by [Antone] (without shareholder/director authority or consent), and . . . [McWhirter] paid \$300,000 by wire transfer to the account of WPD; whereupon [Antone] and Nasrin immediately diverted all of said monies from WPD's account for their personal use, leaving WPD to default on payments to creditors, including sums owed to [plaintiff]."

⁴ With minor exceptions not relevant here, the "Common Facts For All Causes of Action" in both plaintiff's and WPD's second amended cross-complaints were identical, but the causes of action differed.

The joint status conference report filed in the McWhirter litigation, signed by plaintiff in propria persona and by counsel for WPD and Westco, described the litigation in this case as “involv[ing] the alleged misappropriation of corporate funds of [WPD and Westco] by Antone Nino and Nasrin Nino”

E. Second Amended Complaint

Plaintiff filed his second amended complaint (SAC), which is the operative complaint in this action, shortly after his second amended cross-complaint in the McWhirter litigation. The SAC names Siegel as personal representative of Antone’s estate and omits those causes of action previously alleged that concerned AAA and Westco. Instead, the operative complaint alleges only three causes of action: breach of written contract against Antone, breach of fiduciary duty against Antone and Nasrin, and aiding and abetting a tort against Nasrin.

The SAC’s allegations relevant to the breach of written contract claim are similar to those in the FAC. Notably, however, the SAC emphasizes plaintiff’s damages from the alleged breach were attributable to Antone’s diversion of “\$1.3 Million . . . of sale proceeds without payment to Plaintiff of his 24% share in the amount of at least \$312,000.”

The pared-down breach of fiduciary duty cause of action in the SAC alleges Antone and Nasrin “seiz[ed] control of the business, assets and records of WPD,” denied plaintiff’s rights as a shareholder and director, and excluded him from participating in WPD’s business and affairs. Plaintiff also alleges Antone and Nasrin transferred WPD assets to McWhirter without authorization and failed to pay plaintiff his 24% share of the proceeds. The fiduciary duty claim no longer alleges the breach

“le[ft] WPD without assets” or caused injury in the form of “diminution in value of Plaintiff’s shareholding interest[] in . . . WPD”

The allegations relevant to aiding and abetting a tort are identical to those in the FAC.

F. Antone’s Demurrer

In his demurrer to the SAC, Antone for the first time argued plaintiff lacked “standing” to assert causes of action belonging to WPD because he did not comply with threshold requirements for bringing a shareholder derivative action as described in section 800.⁵

⁵ “As a general rule, [m]anagement of a corporation, including decisions concerning the prosecution of actions, is vested in its board of directors. When the board refuses to enforce corporate claims, however, the shareholder derivative suit provides a limited exception to the rule that the corporation is the proper party plaintiff. In deference to the managerial role of directors and in order to curb potential abuse, the shareholder asserting a derivative claim must make a threshold showing that he or she made a presuit demand on the board to take the desired action. This demand requirement was recognized over 120 years ago by the Supreme Court . . . and is codified [in section 800].” (*Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222, 231-232.)

Section 800 requires, among other things, a plaintiff to allege “with particularity plaintiff’s efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and . . . further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file.” (§ 800, subd. (b)(2).)

According to Antone, “[t]he gravamen of the claimed injuries and damages as alleged by [plaintiff] in his SAC arise out of the alleged wrongful mismanagement of WPD by its Board of Directors, and the resulting dissipation and misappropriation of *the corporate assets of WPD*.” Conceding, however, that “[the] SAC is not pleaded as a derivative action seeking to remedy corporate injury,” Antone accused plaintiff of “seek[ing] to transmute the nature and origin of the corporate claims and damages which he had previously alleged in his Complaint and FAC[] into his own personal and individual claims and damages.”⁶

Antone requested, and the trial court took, judicial notice of plaintiff’s pleadings in this action, his motion for appointment of a provisional director, his motion for leave to file the SAC and the court’s order granting the motion, plaintiff’s and WPD’s pleadings in the McWhirter litigation, and the joint status conference report filed in the McWhirter litigation. Antone argued these documents showed how “[plaintiff] previously alleged and admitted on many occasions that WPD, and not [plaintiff], is the owner and holder of each of the claims for alleged dissipation and misappropriation of WPD corporate assets which underlie [the] SAC.” Antone stressed plaintiff “no longer assert[ed] that the sale of WPD’s assets to [McWhirter was an] unauthorized and therefore wrongful disposition of WPD’s corporate assets.

⁶ Antone pursues a similar approach in this appeal. He argues, for example, “Bilal deleted from his SAC all facts and allegations which establish and confirm the corporate nature of WPD’s several claims” and “made it appear in his SAC that the claims alleged are [his] individual claims, and not the corporate claims of WPD, [Westco] and AAA.”

Rather, in the SAC, [plaintiff's] only concern [was] that he did not receive his piece of the pie from this particular corporate transaction” Antone urged the court to treat the SAC as a sham pleading.

Plaintiff opposed the demurrer, maintaining the SAC was not a “sham” contradiction of documents filed in this action or in the McWhirter litigation. Specifically, he contended neither the SAC nor any prior pleading “allege[d] the 2012 agreement to sell the gasoline distributions contracts was unauthorized. [Rather, plaintiff] allege[d] that as a result of being ‘frozen’ out of the business, transfers were secretly made to the buyer and 100% of the sale profits were distributed to Antone and Nasrin without disclosure or authorization to do so.”

The trial court sustained Antone’s demurrer without leave to amend. The court’s judgment of dismissal adopts “the grounds set forth” in Antone’s demurrer as its reasons for the ruling.⁷

II. DISCUSSION

Plaintiff contends the trial court should not have disregarded allegations of individual injury in the SAC because the SAC did not meaningfully contradict his prior pleadings nor his filings in the McWhirter litigation. In our independent

⁷ As already summarized, those grounds were that the individual causes of action alleged in the SAC contradicted allegations of corporate injury in documents previously filed in this and the McWhirter litigation, the sham pleading doctrine required allegations of corporate injury to be read into the SAC, and plaintiff lacked standing sue for injury to WPD because he did not comply with the statutory requirements to bring a derivative action.

judgment, he is correct. Antone did not identify (and we do not see) any contradictions in plaintiff's allegations relating to attempts to "freeze [him] out [of]" WPD's management. These alone are sufficient to support the viability of causes of action for individual (rather than corporate) injury. In addition, the record belies Antone's claim that plaintiff contradicted himself on the issue of whether the McWhirter transactions were authorized; plaintiff never alleged *all* of the transactions with McWhirter were unauthorized. Because Antone correctly concedes the SAC "is not pleaded as a derivative action," the absence of contradictions justifying the trial court's application of the sham pleading doctrine means reversal is required.

A. *Standard of Review*

We review an order sustaining a demurrer de novo. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 537.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. [Citation.]" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. omitted.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the [trial] court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; accord, *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504 & fn. 2

[validity of the trial court’s action, not the reason for its action, is what is reviewable].)⁸

B. The Appellate Record is Adequate

Plaintiff, as the appellant, has the burden to present an adequate record to affirmatively demonstrate error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Rhule v. WaveFront Technology, Inc.* (2017) 8 Cal.App.5th 1223, 1227.) The record on appeal includes, among other things, the SAC, Antone’s demurrer, all documents of which the trial court took judicial notice, and the judgment of dismissal adopting the grounds set forth in Antone’s demurrer as the basis for the court’s ruling.

⁸ Antone asserts we should forego applying the established de novo standard of review for an order sustaining a demurrer without leave to amend. Without citation to pertinent authority, he invites us to review the trial court’s order sustaining his demurrer using a combination of the substantial evidence and abuse of discretion standards of review. We reject the invitation. Our task in this appeal requires us to compare the various pleadings and judicially noticed materials to determine whether and to what extent they are mutually inconsistent—nothing more. We are in no worse a position than the trial court to perform such a task, and there is accordingly no reason to depart from the accepted de novo standard in favor of a review posture that would require us to defer to the trial court’s view of the same pleadings we are able to examine. (See *Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1415 [rejecting argument for more deferential abuse of discretion review because “[t]he trial court had no more information than is now before us and was in no better position than we are to evaluate that information”].)

Antone contends plaintiff's failure to supply a reporter's transcript of the hearing on his demurrer or a settled or agreed statement of the proceedings is fatal to plaintiff's appeal. Because our review is de novo and the trial court's error is apparent from the documents in the record, however, nothing more than what we have is necessary. (See, e.g., *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 ["A reporter's transcript may not be necessary if the appeal involves legal issues requiring de novo review"]; *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699 (*Chodos*) ["None of the parties relies upon the oral argument before the trial court, and we decide a purely legal issue based on the filings before the trial court—as did the trial court. And, as noted, we review that trial court decision de novo"]; *People ex rel. Harris v. Shine* (2017) 16 Cal.App.5th 524, 533 [reporter's transcript not necessary where "arguments on appeal do not require consideration of colloquy during hearing on the motion"]; see also *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 933 ["While a record of the hearing would have been helpful to understand the trial court's reasoning, it is not necessary here where our review is de novo and the appellate record includes the trial court's written orders and all the evidentiary materials germane to Appellants' motion"].)⁹

⁹ Our ruling is consistent with the Supreme Court's recent decision in *Jameson v. Desta* (2018) 5 Cal.5th 594 (*Jameson*). Although *Jameson* makes certain observations concerning the importance of a reporter's transcript—noting, for example, that lack of a reporter's transcript "will frequently be fatal to a litigant's ability to have his or her claims of trial court error resolved on the merits by an appellate court" (*id.* at p. 608)—*Jameson*'s holding does not turn on a question of record adequacy. (*Id.* at p. 624 [holding invalid the San Diego Superior

C. *The Sham Pleading Doctrine*

“Under the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment. [Citation.]” (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425.) “The purpose of the doctrine is to enable the courts to prevent an abuse of process. [Citation.] The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts. [Citation.]” (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751.)

Application of the sham pleading doctrine is not an all-or-nothing proposition. When an amended complaint includes unexplained, inconsistent allegations, courts disregard those specific allegations—they do not disregard the amended complaint in its entirety. (See *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 [“[A]ny inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent allegations”].)

Court policy of refusing to provide court reporters in civil matters to litigants who qualify for a fee waiver].) Here, the record includes all of the materials upon which the trial court based its ruling (see *Chodos, supra*, 210 Cal.App.5th at p. 699) and the record is therefore adequate to rebut the “fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct.” (*Jameson, supra*, at pp. 608-609.)

D. The SAC Alleges Individual Injury Unrelated to the Character of the McWhirter Transactions

“A shareholder’s derivative suit seeks to recover for the benefit of the corporation and its whole body of shareholders when injury is caused to the corporation that may not otherwise be redressed because of failure of the corporation to act. . . . The stockholder’s individual suit, on the other hand, is a suit to enforce a right against the corporation which the stockholder possesses as an individual.’ [Citation.]” (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107.) In other words, “an individual cause of action exists only if the damages were not *incidental* to an injury to the corporation. . . . The cause of action is individual, not derivative, only “where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff’s status as a shareholder.”” (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124 (*Nelson*)). “[I]n some cases, the same facts regarding injury to the corporation may underlie a personal cause of action, such as intentional infliction of emotional distress, breach of contract, fraud, or defamation” (*Id.* at pp. 124-125.)

Antone contends “[t]he gravamen of all the causes of action alleged by [plaintiff] in his original Complaint and verified FAC was what [plaintiff] alleged and admitted was the unauthorized sale of the corporate assets of WPD” Because a cause of action “to rescind the transaction and seek possession of . . . misappropriated assets” would belong to WPD rather than plaintiff, Antone argues, purported inconsistencies regarding the character of these transactions are dispositive of plaintiff’s standing.

Antone ignores allegations of individual injury unrelated to the character of the McWhirter transactions in both of plaintiff's prior pleadings in this case. The allegations supporting the cause of action for breach of fiduciary duty in the original complaint and the FAC state Antone and/or Nasrin excluded plaintiff from access to WPD's books and records, misrepresented the state of WPD's financial affairs, withheld distributions and dividends payable to plaintiff, and seized control of the business, assets, and records of WPD. Although plaintiff's earlier pleadings alleged damages including "diminution in value" of his shares in WPD, he also alleged illegally withheld dividends and distributions along with damages "resulting from the illegal taking of Plaintiff's rights, interests, entitlements and benefits due to Plaintiff as a shareholder of [WPD]" The derivative nature of the former does not contradict or undermine the individual nature of the latter. (See *Nelson, supra*, 72 Cal.App.4th at pp. 124-125; see also *id.* at p. 127 ["Whether there is one minority shareholder or many, an action is individual only if the stock of the individual plaintiff or plaintiffs is the only stock affected adversely"].)

Similarly in the SAC, plaintiff alleges Antone and Nasrin "seiz[ed] control of the business, assets and records of WPD," denied plaintiff's rights as a shareholder and director, and excluded him from participating in WPD's business and affairs. The pleadings are consistent on these points, and regardless of whether the McWhirter transactions were authorized, these are individual injuries for which plaintiff need not satisfy the prerequisites for a derivative action.

E. The Sham Pleading Doctrine Does Not Apply to Plaintiff's Allegations Regarding the McWhirter Transactions

Even putting aside the allegations just described that suffice to state a claim for relief that is not dependent on the derivative lawsuit mechanism, we further conclude the sham pleading doctrine does not apply to plaintiff's allegations concerning the McWhirter transactions.

In his original complaint, plaintiff alleged that, “without authorization or consent of the WPD Board of Directors, in or about September 2012, [Antone] transferred WPD assets to McWhirter[,] namely valuable branded gasoline reseller rights, and diverted the sales proceeds for [his] own use and benefit,” along with a parallel allegation regarding the August 2013 transfer. In the FAC, plaintiff alleged “[Antone] caused WPD to transfer valuable rights to resell branded gasoline to [McWhirter] without obtaining Plaintiff's prior written consent” and repeated the allegations regarding the September 2012 and August 2013 transfers. Neither pleading suggests the only transactions between WPD and McWhirter took place in September 2012 and August 2013 or that all transactions between WPD and McWhirter were unauthorized. Plaintiff's declaration in support of the motion for appointment of a provisional director is similarly opaque in its reference to plaintiff's discovery “[a]round June 2013 . . . that [Antone] had earlier sold certain WPD assets . . . to [McWhirter] . . . without my knowledge, consent or approval”

Plaintiff's second amended cross-complaint in the McWhirter litigation undermines Antone's suggestion that there was a single, monolithic “WPD-McWhirter transaction” that was

either authorized or unauthorized. It expressly distinguishes between WPD's authorized business with McWhirter (e.g., the June 2012 transfer of seven contracts to McWhirter in exchange for \$1,000,000 deposited in plaintiff's client trust account) and unauthorized business with McWhirter (e.g., the unauthorized August 2012 amended agreement).

Antone's observation that plaintiff and WPD allege the same underlying facts in their second amended cross-complaints in the McWhirter litigation does not, as he contends, "prove[] conclusively that [plaintiff] knows and understands that the purportedly personal and individual claims alleged . . . in his SAC[] are in actuality the corporate claims of WPD" Although WPD's second amended cross-complaint includes all of the causes of action alleged in plaintiff's individual second amended cross-complaint (plus several more), the theories supporting these causes of action are distinct.¹⁰ The fact that many of the same facts underlie these different theories of

¹⁰ For example, WPD alleges breach of fiduciary duty based on Antone and/or Nasrin diverting customer deposits and payments for their personal use, agreeing in August 2012 to amend the June 2012 WPD-McWhirter agreement without authorization, and agreeing in August 2013 to allow McWhirter to service five of WPD's contracts without authorization. Plaintiff alleges breach of fiduciary duty by Antone and/or Nasrin based on, among other things, their "mismanaging WPD and [Westco] and failing to comply with [their] . . . governing corporate documents and applicable corporate law" and "diverting corporate monies and corporate property to their personal use; not meeting corporate financial obligations; [and] not discharging their duties in good faith and in the best interests of the company"

recovery does not mean plaintiff's SAC in this case is a sham pleading. (See *Nelson*, *supra*, 72 Cal.App.4th at p. 124.)

Antone's contention that the joint status conference report and plaintiff's pleadings in the McWhirter litigation contradict the SAC is also unpersuasive. The joint status conference report's high-level summary of this case as involving "the alleged misappropriation of corporate funds of [WPD] and [Westco]" cannot plausibly be read as an exhaustive description of the then-operative FAC.¹¹

At bottom, Antone's contention is that "the *core of the contradiction*" between the SAC and plaintiff's prior pleadings is that the SAC characterizes "the WPD-[McWhirter] transaction [as] validly authorized by WPD's Board of Directors" despite plaintiff's previous allegations that "the WPD-[McWhirter] asset sale transaction was never validly authorized by WPD's Board of Directors." The purported contradiction arises from Antone's suggestion that there was a single "WPD-McWhirter transaction" that must have been either authorized or unauthorized. Plaintiff, on the other hand, maintains there were several transactions—some authorized, some not. His prior pleadings and other court submissions are not expressly to the contrary.¹² Indeed, quite the

¹¹ Antone also directs us to a line in the joint status conference report stating "[plaintiff] sued [Antone] for breach of fiduciary duties and for stealing corporate assets and money. Among the stolen assets were five [WPD] exclusive fuel supply contracts." Again, this refers to only one of the transactions between WPD and McWhirter.

¹² The only allegation in the SAC that arguably might be read to suggest plaintiff asserts a claim belonging to WPD is the allegation in paragraph 23(e) that "[Antone] caused WPD to

opposite. Although the SAC does not set forth a detailed chronology of WPD's dealings with McWhirter,¹³ the judicially noticed pleadings in the McWhirter litigation are consistent with the assertion of an individual, rather than a derivative, claim based solely on certain aspects of the McWhirter transactions.

transfer valuable contract rights to resell branded gasoline to [McWhirter] without obtaining Plaintiff's prior written consent and diverted \$1.3 Million . . . of sale proceeds without payment to Plaintiff of his 24% share in the amount of at least \$312,000.00." Though it could be stated more clearly, we agree with plaintiff's representation—which he will be bound by in the ensuing proceedings—that the “gravamen” of this allegation (see, e.g., *Nelson, supra*, 72 Cal.App.4th at p. 124) supports an individual action based on defendants' excluding plaintiff from his share of distributions; the relevant authorization language functions descriptively rather than providing a basis for recovery. (See, e.g., *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1258 [complaint alleging plaintiff was “deprived of a fair share of the corporation's profits as a result of defendants' generous payment of executive compensation to themselves” asserted individual action]; *Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 429 [limited partner that alleged general partner “used its management and control of the [partnership] to structure a merger transaction which afforded benefits and opportunities for itself from which the limited partners were excluded” asserted individual action].)

¹³ The SAC alleges, for instance, that, “[f]rom September 2012 [forward], Plaintiff is informed and believes and thereupon alleges that WPD transferred certain valuable contract rights to resell branded gasoline to [McWhirter].”

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion. Plaintiff is awarded his costs on appeal.

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BAKER, Acting P. J.

We concur:

MOOR, J.

SEIGLE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.