SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department7@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: JUNE 27, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV399097	Yotopoulos v. Mach49, LLC, et al.	See Line 1 for Tentative Ruling.
LINE 2	20CV373138	Envirodigm, Inc. v. Apple, Inc.	See Line 2 for Tentative Ruling.
LINE 3	21CV380268	Calles v. Barracuda Networks, Inc. (Class Action)	On the court's own motion, this matter is continued to a future date. Counsel must contact the Complex Coordinator to arrange for a new hearing date.
LINE 4	23CV412578	Regalado, et al. v. Kellogg Company (Class Action/PAGA)	The unopposed motion to be relieved as counsel for Plaintiff Enrique Martin is GRANTED. The Court will sign the proposed order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	19CV345045	VanCleave, et al. v. Abbott Laboratories (Class Action)	See Line 5 for Tentative Ruling.
LINE 6	18CV336217	Prado v. Dart Container Corporation of California (Class Action)	OFF CALENDAR
LINE 7	20CV372622	Temujin Labs Inc. v. Abittan, et al.	See Line 7 for Tentative Ruling.
LINE 8	20CV369179	Hone Capital LLC, et al. v. Wu, et al. (Lead Case; Consolidated With 20CV369308)	See Line 8 for Tentative Ruling.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Jason Yotopoulos v. Mach49, LLC, et al.*
Case No.: 22CV399097

This is a corporate control case arising out of the acquisition of defendant Mach49, LLC ("Mach49") by defendant Next Fifteen Communications Corporation ("Next15"). Plaintiff Jason Yotopoulos, formerly employed by Mach49, alleges that other members of the company diverted substantially all of the sales proceeds to themselves and away from him through a series of impermissible self-dealing transactions.

Before the Court is Defendants Mach49, Next15 and Tim Dyson's (collectively, "Defendants") motion for protective order. The motion is unopposed. As discussed below, the motion is GRANTED.

I. BACKGROUND

A. Factual

According to the allegations of the operative First Amended Complaint ("FAC"), Mach49 is a startup company founded by Mr. Yotopoulos and defendants Linda Yates, Russell Lampert, and Brad Sharek (collectively referred to as the "Founder Defendants"). In 2014, the Founder Defendants and Plaintiff entered into the Mach49 Operating Agreement (the "Operating Agreement"). When Ms. Yates became CEO of Mach49, Plaintiff negotiated for veto rights over any proposed sale of Mach49, any proposed issuance of additional Mach49 stock, and any proposed amendment to the Operating Agreement. The Operating Agreement incorporated Plaintiff's and the Founder Defendants' ownership interests in the 10,000,000 shares of stock issued by the company. Because both Ms. Yates and Mr. Yotopoulos owned more than 25% of the shares, they could each veto actions that required a supermajority (defined as 75% of shares or more), including any proposed sale of Mach49, any proposed issuance of additional Mach49 stock, and any proposed amendment of the Operating Agreement.

In 2018, defendants Clement Wang and David Charpie became members of Mach49. (Messrs. Wang, Charpie, Lambert, Sharek and Ms. Yates will be referred to collectively as the "Member Defendants"). Also in 2018, Mach49 began talks with Next15 regarding the latter's acquisition of the former. Next15's CEO, defendant Tim Dyson, is a friend of Ms. Yates and her husband, defendant Paul Holland.

In September 2019, Ms. Yates removed Plaintiff as an officer in Mach49. On January 21, 2020, defendant Deborah Ludewig, outside counsel for Mach49, organized defendant Harker Holding, LLC ("Harker"), a wholly-owned subsidiary of Mach49, of which Mr. Lampert was the sole member on the board of directors. Around May 28, 2020, the Mach49 board of directors met without Plaintiff and issued 1,000,000 additional shares of Mach49 stock to Messrs. Wang, Charpie, Sharek and Lampert. This had the effect of diluting Plaintiff's ownership interest in the company and removing his veto power.

Thereafter, the Member Defendants restructured Mach49 such that it became a subsidiary of Harker, and then Mach49 shareholders exchanged their Mach49 shares for

Harker shares. Harker than sold all shares of Mach49 to Next15. In August 2020, the Member Defendants voted to approve the transaction.

Plaintiff alleges that the issuance of the aforementioned additional stock and the acquisition by Next15 breached the Mach49 Operating Agreement and the series of transactions executed by the Member Defendants to sell Mach49 to Next15 was purely self-interested and designed to circumvent Plaintiff's rights. Plaintiff maintains that only 2% of the price was allocated to initial payments and the remaining 98% was allocated to earnouts to be paid between 2024 and 2026 that he was excluded from. He alleges that he has received only $780,234 for his 33% stake in a company worth over $300 million.

B. Procedural

On May 27, 2022, Mr. Yotopoulos filed the initial complaint asserting nine causes of action. Subsequently, separate demurrers were filed by (1) Harker, Messrs. Lampert, Sharek, Charpie, Wang, Holland and Mses. Ludewig and Yates; and (2) Mach49, Next15 and Mr. Dyson. After the demurrers were sustained in part and overruled in part, Plaintiff filed the operative FAC on April 3, 2023, asserting the following causes of action: (1) breach of contract (against Mach49 and Member Defendants); (2) tortious interference with contractual relations (against Messrs. Holland and Dyson, Ms. Ludewig, Harker and Next15); (3) breach of fiduciary duty (against Member Defendants as members of Mach49); (5) breach of fiduciary duties (against Member Defendants as members of Harker); (5) aiding and abetting breach of fiduciary duty (against Messrs. Holland and Dyson, Ms. Ludewig and Next15); (6) breach of covenant of good faith and fair dealing (against Member Defendants); (7) unjust enrichment (against Messrs. Holland and Dyson, Ms. Ludewig, Harker and Next15); and (8) equitable accounting (against Member Defendants, Mach49 and Harker).

II. MOTION FOR PROTECTIVE ORDER

Defendants move for a protective order confirming the confidentiality designations of certain documents produced pursuant to the parties' Stipulated Confidentiality Order and designated as "Highly Confidential- Attorney's Eyes Only."

On April 18, 2023, the parties signed the Stipulated Confidentiality Order (the "Order") to protect the confidentiality of certain information obtained by the parties in connection with this case, and which set forth the process by which parties could designate material as "Confidential Information" or "Highly Confidential Information – Attorney's Eyes Only." The Order further provided that a party could challenge a confidentiality designation by providing written notice to the designating party, after which "[t]he party or non-party who designated the material shall have twenty-five (25) days from the receipt of such written notice to apply to the Court for an order designating the material as confidential or highly confidential." (Order, ¶ 8.)

In the summer of 2023, a discovery dispute arose between the parties regarding whether Defendants were required to produce documents related to a "Strategic Alliance" contract that Mach49 signed in February 2022, and Plaintiff filed a motion to compel its production. Defendants opposed the motion, insisting that the contract was irrelevant to Plaintiff's claims and contained sensitive information, the disclosure of which would be particularly harmful because Plaintiff had worked in the same industry as Mach29 for decades. Plaintiff's response

to this was that Defendants could mark the contract and related items as "Attorney's Eyes Only." The Court ultimately partially granted the motion to compel, narrowing the scope of Plaintiff's requests for production. (Order Dated September 15, 2023, at 8.) Defendants then produced responsive documents as ordered, designating some as "Highly Confidential-Attorney's Eyes Only" as permitted under the Order.

Plaintiff subsequently took issue with Defendants' designations of more than 2,000 documents. At the December 15, 2023, informal discovery conference, the Court proposed that Plaintiff provide a shorter list of challenged documents, and in response, Plaintiff narrowed his list to 349 challenged documents on January 17, 2024. Defendants now bring the instant motion to preserve the "Highly Confidential- Attorney's Eyes Only" designation of the 112 Highly Confidential Documents on the ground that these items name the Strategic Alliance client and/or discuss Mach49's work for that client.

As Defendants maintain, Courts regularly have found that documents which disclose sensitive client information are properly designated as "attorney's eyes only" because the disclosure of such information would cause competitive harm. (See, e.g., *Nutratech, Inc. v. Syntech (SSPF) Int'l, Inc.* (C.D. Cal. 2007) 242 F.R.D. 552, 555.) Here, by electing not to oppose this motion, Plaintiff has impliedly conceded that the designations made by Defendants are proper, and in fact, by previously responding to Defendants' objection to producing the subject documents that they could mark them as "Attorney's Eyes Only," Plaintiff already conceded as much. Aside from this, the Court finds that Defendants have demonstrated their good faith belief that disclosure of these documents would create a substantial risk of serious financial or competitive injury that cannot be prevented by less restrictive means. Consequently, the Court GRANTS their motion.

III. CONCLUSION

Defendants' motion for a protective order is GRANTED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 2

Case Name: *Envirodigm, Inc. v. Apple, Inc.*
Case No.: 20CV373138

This is an action for breach of contract and trade secret misappropriation, among other things, based on Defendant Apple, Inc.'s ("Apple") alleged unauthorized use of an anodizing process developed by Plaintiff Envirodigm, Inc. ("Envirodigm") for its iPhones that was disclosed to Apple pursuant to a non-disclosure agreement ("NDA").

Currently before the Court is Plaintiff's motion to seal various materials in Apple's ex parte application to continue trial and extend and advance case deadlines. Apple does not oppose the motion. As discussed below, the Court GRANTS the motion to seal.

I. BACKGROUND

A. Factual

According to the allegations of the first amended complaint ("FAC"), on September 12, 2012, Apple introduced the iPhone 5 as its latest iteration of the product. (See FAC, ¶ 10.) However, consumers indicated that they were unhappy with scratches and marks on their products. (*Id.*, ¶¶ 11-12.) On November 29, 2012, Greg Gentile of Apple arranged a meeting with Shawn Sahbari, a recognized leader in the area of semiconductor and electronic surface preparation and cleaning, to develop a better cleaning process for the iPhone's aluminum body. (*Id*., ¶¶ 13-15.) On November 30, 2012, Mr. Gentile emailed Mr. Sahbari to execute Apple's NDA, and requested that Mr. Sahbari create a chemical solution to clean certain aluminum samples for a December 5, 2012 meeting. (*Id.*, ¶¶ 16-17.) On December 13, 2012, Mr. Sahbari issued a report detailing his findings and recommendations to Apple. (*Id*., ¶ 17.) On January 25, 2013, Apple asked Mr. Sahbari to run the same lab tests on some aluminum samples from its production facilities in China, and sought help with the plating process for its products. (*Id.*, ¶ 18.) Mr. Sahbari developed an anodizing, polish and micro-etch surface preparation process that addressed Apple's scratching and marking problem, and Mr. Sahbari met with Apple on April 24, 2013 to discuss and describe the process and how it could be scaled for manufacturing purposes. (*Id.*, ¶¶ 18-19.) Mr. Sahbari and Mr. Gentile continued to discuss the progress made on the process, and on August 5, 2013, Mr. Gentile indicated that Apple had an interest in discussing microtech and other technologies with Envirodigm, including the color anodization process developed by Mr. Sahbari, and that as Mr. Sahbari's company name had changed to Envirodigm, a new NDA needed to be signed. (*Id.*, ¶¶ 20-23.)

On August 14, 2013, Mr. Sahbari met with Mr. Gentile, Apple engineer Rebecca Gilden and several other members of the Apple industrial design team, and Envirodigm showed Apple the chemical means of a superior coating and graphic anodizing, and Mr. Sahbari discussed Envirodigm's color anodization process and provided a power point presentation giving an overview of the process to the Apple team. (See FAC, ¶ 24.) After the August 14, 2013 meeting, Mr. Sahbari and Mr. Gentile exchanged emails indicating that the Envirodigm color anodization process provided a solution for Apple where a more robust finish is possible not prone to chipping or scratching off, and they agreed that it would make sense for Envirodigm to demonstrate the process on Apple's parts. (*Id.*, ¶¶ 25-27.) However, shortly thereafter, Apple went quiet on further discussions with Mr. Sahbari regarding the

matter until July 17, 2014, when Mr. Sahbari received an unsolicited email from a recruiter for Apple seeking his aid in the creation of newly highly cosmetic surface finishes by serving as the company's recognized technical leader to define surface chemistry and process requirements needed to deliver world class surface finishes, to which Mr. Sahbari declined. (*Id.*, ¶¶ 27-28.)

In September 2016, Apple released the iPhone 7, introducing an aluminum body created through what Apple promoted as an innovative nine-step process of anodization and polish for a uniform, glossy finish, beginning with an anodization phase to make the surface of the body a porous aluminum oxide, and then using a machine to sweep the body of the product through a powered compound, absorbed by aluminum oxide, and concluded with an ultrafine particle bath for additional finishing the profess that Envirodigm disclosed to Apple pursuant to the NDA in 2013. (See FAC, ¶ 29.) Mr. Sahbari had no reason to suspect Apple had used the process he disclosed pursuant to the NDA; however, in July 2017, Mr. Sahbari conducted a Google search related to other matters when he came upon an image of a red special edition of the iPhone 7, which was released on March 21, 2017, prompting him to visit a local Apple retail store to physically examine the special edition iPhone 7 product. (*Id.*, ¶¶ 30-31.) Only upon seeing the product did Mr. Sahbari for the first time suspect that this product likely utilized the anodizing process that Mr. Sahbari had confidentially discussed with Apple and which was the subject of the parties NDA. (*Id*.) The initially released iPhone 7 also utilized the anodizing process that Mr. Sahbari had confidentially shown Apple pursuant to the parties NDA; however, because of its lack of color, it was not apparent to Mr. Sahbari and Mr. Sahbari did not reasonably suspect, that the initially released iPhone 7 may have also utilized the anodizing process that Mr. Sahbari had confidentially discussed with Apple. (*Id.*, ¶ 33.)

B. Procedural

Based on the foregoing allegations, Apple initiated this action with the filing of the Complaint on November 5, 2020, asserting the following causes of action: (1) breach of contract; (2) unjust enrichment; (3) unfair business practice; (4) violation of the California Uniform Trace Secrets Act ("CUTSA"); (5) fraud; and (6) breach of implied covenant or good faith and fair dealing. After Apple demurred, Envirodigm filed the operative FAC asserting the same claims. Apple again demurred, and in May 2021, the motion was sustained with leave to amend as to the third and fifth cause of action and overruled with respect to the first, second, fourth and sixth causes of action. Envirodigm did not file an amended pleading, accordingly, four causes of action remain in the FAC for breach of contract, unjust enrichment, violation of the CUTSA and breach of the implied covenant of good faith and fair dealing.

II. MOTION TO SEAL

Plaintiff moves to seal the following:

- Portions of Apple's Ex Parte Application: redacted portions at page 8, lines 3-6, lines 16-18, and line 23 (providing details as to the Trade Secret Disclosure ("TSD") and Plaintiff's alleged proprietary anodization process and chemical additives (the "Confidential Formula");
- Portions of Apple's Exhibit F: specifically Exhibit A (Plaintiff's TSD) and Exhibit B (further details provided regarding Plaintiff's Confidential Formula provided in

response to Special Interrogator No. 16) to Plaintiff's Responses to Special Interrogatories Set Four;

- Portions of Apple's Exhibit G: specifically Plaintiff's TSD which was appended to the parties' October 15, 2021 joint IDC letter;
- Portions of Apple's Exhibit H: Redacted portions of the deposition of Plaintiff's President and C.E.O. Shawn Sahbari, taken in this case on January 17, 2023, at 128-133, 278-280, which discuss the process and formulas that are part of Plaintiff's TSD.
- Portions of Apple's Exhibit I: Plaintiff's December 4, 2023 Corrected Responses to Special Interrogatories, Set 6, where redacted at 2:24-25, 3:11-12, 4:1-2, 4:13-14, 5:4-5.

A. Legal Standard

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) Confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285–1286.)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian, supra*, 96 Cal.App.4th at p. 309.)

B. Discussion

As Plaintiff explains in its motion, the Court has already ruled that the TSD is sealed from public view, determining that:

> Plaintiff has established that: (1) There exists an overriding interest that overcomes the right of access to the records; (2) The overriding interest supports sealing the records; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest.

(November 8, 2022 Minute Order re: Motion to Seal.)

Given this fact, and that the materials that are the subject of this motion either consist of the TSD itself or refer to specific details contained therein, the Court finds that the requirements of California Rules of Court, rule 2.550(d) have been met. Accordingly, the motion to seal is GRANTED.

III. CONCLUSION

Envirodigm's motion to seal is GRANTED.

The Court will prepare the order.

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Calendar Line 3

Case Name:
Case No.:

- oo0oo -

Calendar Line 4

Case Name:
Case No.:

- oo0oo -

Calendar Line 5

Case Name: *VanCleave, et al. v. Abbott Laboratories, Inc.*
Case No.: 19CV345045

Plaintiffs Elizabeth J. VanCleave and Katharine Hassan bring this class action against Defendant Abbott Laboratories, Inc. ("Abbott" or "Defendant") for alleged deceptive and misleading business practices with respect to the labeling and advertising of its PediaSure products in California. Before the Court is Plaintiffs' motion regarding the trial deadline (Code of Civil Procedure section 583.340), which is opposed by Abbott. As discussed below, Plaintiffs' motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

A. Factual

According to the allegations of the operative First Amended Complaint ("FAC"), filed on October 9, 2020, Defendant is a health care company that manufactures, markets, and distributes pediatric nutrition shakes for consumption by children ages one to thirteen under its PediaSure brand. (*Id*. at ¶ 3.) By placing statements such as "Complete, Balanced Nutrition," "Balanced Nutrition to Help Fill Gaps," "Nutrition to Help Kids Grow," "Use as part of a healthy diet," and "Clinically Proven to Help Kids Grow" on the PediaSure labeling, Defendant represents to consumers that PediaSure is a healthy option that provides balanced nutrition. (*Id*. at ¶ 5.) Defendant's representations are false and misleading because the pediatric nutrition shakes are neither healthy nor balanced- they are highly processed, sugar sweetened beverages. (*Id*. at ¶ 8.)

B. Procedural

On March 22, 2019, Plaintiffs initiated this action with the filing of the Complaint, asserting seven causes of action. After Defendant's demurrer to the Complaint was sustained in part and substantially overruled, Plaintiffs filed the FAC on October 30, 2020, asserting the following causes of action: (1) Violation of Commercial Code, § 2313, Breach of Express Warranty; (2) Violation of Commercial Code, § 2314, Breach of Implied Warranty of Merchantability; (3) Violations of the Consumers Legal Remedies Act, Civil Code § 1750, et seq.; (4) Violations of Business & Professions Code, § 17500, et seq.; (5) Violations of Business & Professions Code, § 17200, et seq., Unlawful, Unfair and Fraudulent Business Acts and Practices; and (6) Unjust Enrichment. Abbott again demurred and also moved to strike portions of the FAC. On May 17, 2021, the Court overruled the demurrer in its entirety and granted the motion to strike in part.

In December 2023, Plaintiffs moved for an order finding that the following time periods were excluded from the computation of time within which their action had to be brought to trial under Code of Civil Procedure sections 583.310 and 583.340 and the COVID-19 emergency tolling provisions:

- 22 days between the date the parties agree the case must be brought to trial (September 22, 2024) and the October 14, 2024 trial date;

- 122 days during which the Court stayed all responsive pleadings and discovery and the additional 150 days the Court extended the discovery stay, for a total of 272 days; and
- 135 days during which Defendant's discovery conduct impeded Plaintiffs efforts to move the case to trial.

In the same motion, Plaintiffs additionally requested that the Court issue an order finding that the October 14, 2024 date was timely, and that a total of 429 days was excluded from the computation of time in which the case must be brought to trial.

On December 15, 2023, the Court issued an order granting in part and denying in part Plaintiffs' motion. The Court held that the new trial date of October 14, 2024 is timely under Code of Civil Procedure section 583.310 based on the exclusion of the 22-day continuance of the original trial date made sua sponte due to "court congestion." However, it determined that the five-year period to bring this action to trial was not tolled by the remaining periods of time listed by Plaintiffs in their motion because they failed to establish that the conduct which occurred during those periods made it "impossible, impracticable, or futile" to bring their claims to trial.

II. MOTION REGARDING TRIAL DEADLINE

With this motion, Plaintiffs seek an order finding that the following time periods are excluded from the computation of time within which this action must be brought to trial under Code of Civil Procedure sections 583.310 and 583.340, and COVID-10 emergency tolling provisions:

- 291 days during which Plaintiffs attempted to have the stay on merits discovery lifted combined with Defendant's purported refusal to timely produce discovery once the stay was lifted;
- 189 days of the foregoing 291 days, during which the Court denied Plaintiffs' request to lift the stay on merits discovery, and also declined to rule on the propriety of certifying an injunctive relief class as requested in Plaintiffs' original motion for class certification, which caused the stay on merits discovery to remain in place; and
- 70 days of the aforementioned 291 days, due to court reassignment, between the date the Court originally set the hearing on the motion for class certification and the reset hearing date.

A. Legal Standard

Code of Civil Procedure section 583.310 provides that "[a]n action shall be brought to trial within five years after the action is commenced against the defendant." The five-year period beings to run when the initial complaint is filed in the action. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 723.) "Cases not brought to trial within the five-year period are subject to dismissal; any such dismissal first requires a noticed motion either by a defendant or the court on its own motion." (*State ex rel. Sills v. Gharib-Danesh* (2023) 88 Cal.App.5th 824, citing Code Civ. Proc., § 583.360, subd. (a).)

The five-year rule is "mandatory" and is "not subject to extension, excuse, or exception except as expressly provided by statute." (Code Civ. Proc., § 583.360, subd. (b).) As relevant here, Code of Civil Procedure section 583.340 ("Section 583.340") provides that certain periods of time "shall be excluded" from the five-year periods, thereby tolling the running of the five-year periods, including that "[i]n computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which … [¶] … [p]rosecution or trial of the action was stayed or enjoined" …. [or] …[¶] … [b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile." (Code Civ. Proc., § 583.340, subds. (b) and (c).)

B. Discussion

1. *Chronology of Proceedings*

As articulated above, this action was initiated on March 22, 2019, and was marked "complex" by Plaintiffs. On March 26, 2019, the Court entered an order deeming the case "Complex," staying discovery "pending further order of [the] Court," prohibiting the parties from filing any responsive pleadings until a date for such filings was set at the first case management conference ("CMC"), and setting the initial CMC for July 26, 2019.

During the initial CMC, the Court approved of the parties' jointly proposed briefing schedule for Abbot's demurrer and alternative motion to strike. A joint case management statement submitted to the Court on November 27, 2019, reflected the parties having negotiated a schedule and procedures for discovery as well as a stipulated protective order and expert discovery order, both of which were submitted to the Court and entered on December 19, 2019. A hearing on Abbott's demurrer was held the following day and the resulting order was issued on December 25, 2019.

Plaintiffs served their first set of discovery requests on January 17, 2020. Abbott objected to the scope of the requests and the parties subsequently engaged in meet and confer discussions to resolve the issue. Abbott made its first document production in March 2020 and continued making rolling productions thereafter. Discovery continued into early 2020, and Plaintiffs requested an informal discovery conference ("IDC") in June 2021 regarding numerous discovery disputes. During the June 3, 2021 IDC, the Court directed Defendant to complete its document production by July 1, 2021. Abbott's discovery responses covered the four-year period from March 23, 2015 to March 22, 2019. Shortly after the foregoing deadline, Plaintiffs raised for the first time their view that Defendant's discovery responses should have instead covered March 23, 2015 to July 1, 2021. Following another IDC in September 2021, the parties agreed to further meet and confer and ultimately reached an agreement as to the scope of discovery in November 2021. Pursuant to that agreement, Abbott produced additional documents by March 5, 2022.

In May 2022, Plaintiffs deposed various Abbott employees and took its Person Most Knowledgeable depositions relating to class certification. Abbott deposed the named plaintiffs in June 2022. The parties served class certification expert reports in the months that followed and depositions of these experts took place from December 2022 to February 2023. Class certification motion practice spanned March 13, 2023 to July 26, 2023. In March 2023, Plaintiffs sent Abbott a proposed Second Amended Complaint ("SAC"); one of their alternative classes proposed in their motion for class certification was based on the proposed

amendment. Abbott proposed to stay the remaining dates pertaining to the class certification motion pending resolution of whether Plaintiffs obtained leave to file the proposed SAC. Plaintiffs rejected the proposal because it would delay getting the case to trial within the five-year period. At the parties' March 30, 2023 CMC, they agreed to go forward with the briefing schedule currently set, and Plaintiffs withdrew their SAC.

On August 3, 2023, the Court held the hearing on the motion for class certification, during which Plaintiffs expressed concerns that a second round of certification briefing would further delay the merits discovery needed to prepare for trial. The Court advised that the issue seemed premature but might be revisited at the next CMC; the August 31, 2023 CMC was rescheduled by the Court to October 12, 2023. On September 28, 2023, the Court issued an order denying Plaintiffs' motion for class certification based on their original proposed class, but allowed them to file another motion.

At the October 12, 2023 CMC, Plaintiffs requested that the Court open merits discovery; the Court was reluctant to do so and instructed the parties to meet and confer on the case schedule assuming class certification was granted. Plaintiffs also requested the Court set a date for trial to commence prior to the statutory deadline, and on October 18, 2023, the Court set a trial date of September 16, 2024.

Abbott stated its belief to Plaintiffs that there were no impediments standing in the way of the parties being ready for trial by the September 22, 2024 deadline, based on its contention that merits discovery would only take a few months given the factual overlap between class and merits discovery. Consequently, the parties did not reach an agreement under Code of Civil Procedure section 583.330 to extend the time within which to bring the case to trial.

On November 1, 2023, the Court issued an order continuing the trial to October 14, 2024 "[d]ue to court congestion," and apologizing for the "inconvenience these changes may cause for counsel and the parties." Abbott declined to stipulate that the new trial date would be timely under the rules. On November 2, 2023, Plaintiffs filed their renewed motion for class certification, which requested that the Court lift the stay on merits discovery as of the date of class certification and set a hearing regarding class notice at the earliest available date. This motion (along with motions to exclude various experts) was originally set to be heard on January 25, 2024, but ultimately rescheduled by the Court for April 4, 2024.

On March 15, 2024, the parties attended an IDC regarding merits discovery. The Court declined Plaintiffs' request to lift the merits stay as to Abbott in its entirety, but directed the parties to meet and confer about: (1) any preexisting discovery requests under which Plaintiffs would seek merits discovery; and (2) any new merits request from Plaintiffs, which they were directed to provide to Abbott to begin reviewing in order to facilitate potential future merits discovery after the hearing and ruling on Plaintiffs' renewed class certification motion. The Court also gave Plaintiffs leave to serve third-party subpoenas to certain retailers.

On March 29, 2024, the parties met and conferred as directed by the Court. The parties met and conferred over old requests that Plaintiffs had identified, and Plaintiffs stated that they would provide their "new" merits discovery requests for production "early" the following week (April 1-2, 2024). Abbott requested that Plaintiffs propose search terms and custodians for the merits phase, which Plaintiffs agreed to do. "New" merits requests were not provided by

Plaintiffs until April 12, 2024, and Plaintiffs did not propose any custodians or search terms at that time.

Following oral argument, the Court issued an order on April 5, 2024, granting in part and denying in part Plaintiffs' renewed motion for class certification, and directing the parties to meet and confer regarding Plaintiffs' request to commence merits discovery and to file a stipulation and proposed order lifting the stay as of April 12, 2024. After the parties engaged in the requisite meet and confer, they stipulated and the Court entered an order lifting the discovery stay and opening merits discovery as of April 12th.

On April 18, 2024, Plaintiffs sent Defendant a letter demanding that it supplement its production and responses to all preexisting discovery. The following day, Plaintiffs provided Defendant with proposed search terms and custodians, and requested that the prior agreed-to set of search terms and custodians be used to search for discovery related to market research and surveys of consumer perception and interest in the challenged statements that post-date the original complaint.

Approximately a month later, on May 13, 2024, the parties stipulated, and the Court entered an order setting a briefing schedule for the instant motion, which was then filed on May 21st.

On May 17, 2023, Ms. VanCleave served (1) special interrogatories requesting Abbott to provide support for its contentions and to identify its health and consumer related studies; (2) declaration of necessity (out of an abundance of caution) that covers only 4 interrogatories that are arguably beyond the 35 per party limit; and (3) requests to admit the genuineness of the documents it produced in light of the imminently approaching trial; and (4) fact witness deposition notices.

2. *291 Days During Which Plaintiffs Attempted to Have the Stay on Merits Discovery Lifted Combined with Defendant's Conduct Once the Stay was Lifted*

It is still the case, as it was in Plaintiffs' motion regarding the trial deadline, that they cannot rely on subdivision (b) of Section 583.340 to obtain a finding that the five-year period is tolled for 291 days based on discovery stays issued by the Court. (See *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 721-722, 726, 730 [explaining that subdivision (b) of Section 583.340 "contemplates a bright-line, nondiscretionary rule that excludes from the time in which a plaintiff must bring a case to trial only that time during which *all* the proceedings in an action are stayed" and therefore partial stays imposed by the trial court, which halt "specific proceedings, such as a stay of discovery," are *not* to be excluded from the five-year period under Section 583.340, subdivision (b)]; *Warner Bros. Entertainment Inc. v. Superior Court* (2018) 29 Cal.App.5th 243, 258 [finding that an order that stays discovery and responsive pleadings does not operate to toll the five-year period under subdivision (b) of Section 583.340].) Thus, Plaintiffs can only obtain such a finding if the stay on merits discovery, and Defendants' alleged conduct once the stay was lifted, are shown to have made it "impossible, impracticable, or futile" to bring this action to trial under subdivision (c) of Section 583.340.

Under Section 583.340, subdivision (c), a court must determine what is impossible, impracticable, or futile "in light of all circumstances in the individual case, including the acts

and conduct of the parties and the nature of the proceedings themselves." (*Moran v. Superior Court* (1983) 35 Cal.3d 229, 238.) "The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case." (*Ibid*.) However, "[a] plaintiff's reasonable diligence alone does not preclude involuntary dismissal; it is simply one factor for assessing the existing exceptions of impossibility, impracticability, or futility." (*Bruns, supra*, 51 Cal.4th at 731, citing *Baccus v. Superior Court* (1989) 207 Cal.App.3d 1526, 1532-1533.) Further, "every period of time during which the plaintiff does not have it within his power to bring the case to trial is *not* to be excluded in making the computation. [Citation.]" (*Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court* (1990) 217 Cal.App.3d 464, 472, emphasis added.) Critically, "[t]ime consumed by the delay caused by ordinary incidents of proceedings, like disposition of a demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar are *not* within the contemplation of these exceptions." (*Baccus, supra*, at 1532.) "[I]mpracticability and futility involve a determination of *excessive* and *unreasonable* difficulty or expense, in light of circumstances of the particular case." (*Brunzell Constr. Co. v. Wagner* (1970) 2 Cal.3d 545, 554.)

The plaintiff bears the burden of proving that the circumstances warrant application of the Section 583.340, subdivision (c), exception (see *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 590) and must set forth (1) the obstacles he or she faced due to causes beyond his or her control and (2) his or her exercise of reasonable diligence in overcoming them (see *Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 438; *Wilshire Bundy Corp. v. Auerbach* (1991) 228 Cal.App.3d 1280, 1287-1288.)

The Court previously rejected Plaintiffs' contention that the stay on merits discovery (along with a stay of responsive pleadings) qualified as the type of circumstances contemplated by subdivision (c) of Section 583.340 because it found that the record established that even with such a stay, the parties "made substantial progress in moving the case to trial by meeting and conferring several times and: negotiating a responsive pleading schedule; stipulating to a protective order; negotiating an order relating to expert discovery; discussing scheduling of fact discovery and class certification briefing; collaborating on two case management statements; and fully briefing and arguing Abbott's demurrer and alternative motion to strike." (12/15/24 Order at 7:22-27, citing *Warner Bros., supra,* 29 Cal.App.5th at 257.)

Plaintiffs maintain that the statutory period should be tolled from August 3, 2023 based on the stay on merits discovery *combined with* Abbott's opposition to lift that stay and its "failure to produce any discovery." It has been Defendant's strategy, Plaintiffs suggest, to "run out the clock" in this case, and they have made diligent efforts to prevent it from doing so by making regular efforts to lift the stay at the following times: the August 3, 2023 class certification hearing; the October 12, 2023 CMC; and the March 15, 2024 ex parte hearing. They continue that to date, Abbott has not produced any documents since the stay was lifted and since its last production on February 3, 2023. Consequently, Plaintiffs urge, the statutory periods should be tolled from August 3, 2023, to the present.

Considering their showing, the Court does not find that Plaintiffs have met their burden to show that such open-ended tolling is warranted. Since August 3, 2023, the parties have continued to engage in activities that substantially advanced this case towards trial, including: briefing and related motion practice on Plaintiffs' renewed motion for class certification and motions regarding the trial deadline; engaging in meet and confer efforts over the future lifting

of the merits discovery stay, which included Plaintiffs' entitlement to provide anticipated merits discovery requests; and, since the stay was lifted, exchanging discovery and participating in numerous meet and confer efforts relating to that discovery. While the stay on merits discovery may have been frustrating to Plaintiffs, the foregoing events are typical of and, indeed, expected in complex litigation, and to hold that they operate to effectuate a tolling of the statutory period of nearly 10 months would arguably render the five-year statute meaningless and capable of being regularly circumvented. Further, if the Court did not have access to the chronology of events in this case, Plaintiffs' characterization of these proceedings would give it the impression that Plaintiffs have not been able to significantly develop the substance of their claims; this does not actually appear to be the case. Abbott suggests, and the Court agrees, that much of the factual record necessary to resolve this action has been developed during the certification-based discovery. (See, e.g., *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023 ["[I]ssues affecting the merits of a case may be enmeshed with class action requirements."] (quotations omitted).) It is also hard to square Plaintiffs' assertions that Abbott's conduct is making it "impossible, impracticable, or futile" to bring this action to trial when they have not always demonstrated the reasonable diligence they proclaim to have performed. For example, despite the Court granting Plaintiffs permission on March 15, 2024 to send merits discovery requests to Abbott so that it could begin its review in advance of responding to the requests after the stay was lifted, they inexplicably waited a *full month* before doing so.

In its order on Plaintiffs' prior motion concerning the trial deadline, the Court rejected their argument that Abbotts' conduct in connection with the discovery propounded by Plaintiffs during the period of October 21, 2021 to March 5, 2022, merited tolling the statutory deadline, finding that "[n]one of the events and conduct described by Plaintiffs qualif[ied] as anything other than ordinary discovery disputes that are common to complex cases involving broad discovery, the scope of which is likely to be the subject of routine negotiation and debate." (12/15/24 Order at 8:24-26.) This is still the case with respect to Abbott's conduct subsequent to when the stay on merits discovery was lifted, and there is nothing presently before the Court which indicates that the current discovery disputes between the parties are not in good-faith including, for example, a pending IDC.

In sum, the Court finds that the five-year period was not tolled during the time within which Plaintiffs attempted to have the stay on merits discovery lifted.

3. *189 Days of the 291 Days, During which Time the Court Denied Plaintiffs' Request to Lift the Stay on Merits Discovery, and Also Declined to Rule on Propriety of Certifying an Injunctive Relief Class*

Plaintiffs next insist that the statutory period should be tolled 189 days from August 3, 2023 to April 4, 2023 for the additional reason that the Court declined to rule on the propriety of Plaintiffs' injunctive relief claims or open merits discovery. Such actions, they insist, made it impossible for them, through no fault of their own, to complete merits discovery.

Plaintiffs explain that when the Court denied their initial motion for class certification, it found that "typicality and adequacy were satisfied, but the class was not ascertainable and common issues did not predominant[e] because class membership could not be readily determined, and class members were exposed to different products and alleged misrepresentations." (See 4/5/24 Order on Renewed Motion for Class Certification at 3.)

However, they insist, they should have been able to conduct merits discovery after the September 28, 2023 order on class certification because the issues of ascertainability and exposure are not required to certify an injunctive relief class. Thus, they continue, had the Court ruled on injunctive relief, it should have certified the class and granted their request to lift the stay. As it did not, Plaintiffs urge that they were prejudiced by their inability to obtain merits discovery such that the statutory period should be tolled.

The Court does not agree. As Abbott explains in its opposition, Plaintiffs never specifically asked for certification of an injunctive-relief-only class in their initial class certification briefing, instead vaguely asking for certification of a class as to "all claims asserted in the operative complaint." They also did not move for reconsideration of the Court's order, instead negotiating a briefing schedule on a renewed motion for certification. Though Plaintiffs would likely not describe their argument in such a way, they are essentially taking the position that delays caused by a judicial decision they disagree with somehow operate to extend the trial deadline. This is not the law, nor could it be as it would obliterate the five-year statute. Plaintiffs made the tactical decisions that they made in response to the Court's orders, and those decisions do not meet the requirements of subdivision (c) of Section 583.340.

Therefore, the Court finds that the five year period was not tolled during the time the Court declined to rule on the propriety of certifying an injunctive relief class.

4. *70 Days of the 291 Days, Due to Court Reassignment, Between the Date the Court Originally Set the Hearing on Class Certification and the Reset Hearing Date*

Finally, contrary to the time periods discussed above, the Court agrees with Plaintiffs that the 70-day continuance on their renewed motion for class certification qualifies as the type of impossibility, impracticability and futility contemplated by subdivision (c) of Section 583.340. The motion was continued *sua sponte* due to the reassignment and unavailability of judicial officers, a circumstance entirely out of Plaintiffs' control. As Plaintiffs note, our state Supreme Court has held that delay due to a court's reassignment *should* be excluded under subdivision (c) of Section 583.340. (See *Gaines v. Fidelity National Ins. Co.* (2016) 62 Cal.4th 1081, 1104.) The renewed motion for class certification was fully briefed when it was originally set to be heard on January 25, 2024, and there was nothing that Plaintiffs could have done to force it to be heard prior to when it eventually was on April 4, 2024. As a result, this case was effectively halted during this time, and therefore the Court concludes that the statutory period was tolled and excludes 70 days from the five-year period.

III. CONCLUSION

Plaintiffs' motion is GRANTED IN PART and DENIED IN PART. The Court holds that the five (and a half)-year period within which to bring this action to trial was tolled during the time Plaintiffs' renewed motion for class certification was continued from January 25, 2024 to April 4, 2024 due to the reassignment and unavailability of judicial officers. Consequently, 70 days is excluded from the foregoing period of time. No other time is excluded.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 6

Case Name:
Case No.:

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Calendar Line 7

Case Name: *Temujin Labs, Inc., et al. v. Abittan, et al.*
Case No.: 20CV372622

This action arises out of a business dispute between Plaintiffs/Cross-Defendants Temujin Labs Inc., a Delaware corporation ("Temujin Delaware") and a related Cayman Islands Corporation, Temujin Labs Inc. ("Temujin Cayman") (collectively, "Temujin" or "Plaintiffs") and various parties- Defendants Ariel Abittan, Benjamin Fisch and Charles Lu- who purportedly conspired together to obstruct Plaintiffs' progress while preparing to launch competing ventures. In the related cross-action, Mr. Abittan alleged that Temujin and numerous other parties engaged in a multi-year conspiracy in an effort to swindle him out of his rights in intellectual property known as Findora.

Currently before the Court are the following motions: (1) Mr. Abittan's demurrer to Temujin's First Amended Complaint[1] ("FAC") and (2) Temujin Delaware's demurrer to the Cross-Complaint[2] filed by Defendant/Cross-Complainant Ariel Abittan. Both motions are opposed. As discussed below, the Court SUSTAINS Mr. Abittan's demurrer and OVERRULES Temujin Delaware's.

I. BACKGROUND

A. Temujin's FAC

According to the allegations of the FAC, Temujin design, develop, offer and implement cryptographical secured managed data and transaction services and related products. (FAC, ¶ 10.) Because Plaintiffs' products and services, which rely on blockchain-based technology, are auditable but do not sacrifice user privacy, they represent a "significant advancement in the digital transaction processing space." (*Id*.) Plaintiffs plead that in this context, "Blockchain" means that transactions "are verified in a decentralized manner by market participants who run software that confirms and records the transactions" and that "blocks of verified transactions are periodically added to a ledger, and hence the term blockchain developed to describe the ledger." (*Id*. at ¶ 11.)

In August 2019, Temujin Cayman acquired the intellectual property underpinning the ledger from Eian Labs, Inc. ("Eian"), a now-defunct corporation that is jointly owned by several shareholders including, among others, Juniper Venture Partners LLC ("JVP") and Lakeside Garden Heritage LLC ("Lakeside"). (FAC, ¶¶ 2, 12-13.) Pursuant to the Intellectual Property Sale Agreement (the "IP Sale Agreement"), Eian sold all of its intellectual property to Temujin Cayman. (*Id*., ¶¶ 14-21, Exhibit A.)

In late 2020, Mr. Abittan, a JVP shareholder, represented to co-founders and current and former employees of Temujin Delaware, without any basis for doing so, that he was the rightful owner of "Temujin" and/or its intellectual property, "ostensibly by virtue of his stake

[1] Messrs. Fisch and Lu move to join Mr. Abittan's demurrer to the FAC, which the Court GRANTS.

[2] Cross-Defendant Discreet Labs Ltd. moves to join Temujin Delaware's demurrer to Mr. Abittan's Cross-Complaint, which is GRANTED.

in JVP and/or Eian." (FAC, ¶ 22.) Such representations were also made to Defendants Messrs. Fisch and Lu. Per the allegations of the FAC, Mr. Fisch is a former consultant to Temujin Delaware and Mr. Lu is the former Chief Executive Officer of Temujin Delaware. (*Id*., ¶¶ 3-4.)

On October 21, 2020, several founders, employees and consultants of Temujin Delaware, including Messrs. Lu and Fisch, resigned from the company, allegedly due to Mr. Abittan's false representations of ownership of "Temujin." (FAC, ¶¶ 25-26.) Plaintiffs allege that since this "mass resignation," Messrs. Abittan, Lu and Fisch have acted in concert to obstruct the continued operation of their business in several ways, including but not limited to:

- Obstructing Temujin Delaware's access to its social media accounts by improperly withholding from it the credentials to those accounts;
- Attempting to open source (i.e., making available to the public through a permissive open source license) and/or benefit from open-sourcing Plaintiffs' proprietary source code;
- Interfering with Plaintiffs' relationships with their advisors, business partners, and investors; and
- Soliciting Temujin Delaware employees to resign from the company.

(FAC, ¶¶ 27, 29, 34, 36, 40, 43.)

Based on the foregoing, Plaintiffs initiated this action on November 6, 2020 and filed the operative FAC on January 21, 2022, asserting the following causes of action: (1) declaratory relief (against all defendants); (2) civil conspiracy (against all defendants); (3) tortious interference with contract (against all defendants); (4) breach of contract (against Mr. Lu); (5) breach of contract (against Mr. Lu); (6) breach of contract (against Mr. Fisch); (7) breach of contract (against Mr. Fisch); (8) trade secret misappropriation (against all defendants); (9) violation of Penal Code § 502(c) (against Mr. Lu); (10) conversion (against Mr. Lu); and (11) breach of fiduciary duty (against Mr. Lu).

B. Mr. Abittan's Cross-Complaint

Beginning in May of 2016 and extending through 2019, Mr. Abittan began regularly transacting in luxury watches with Cross-Defendants Yuting Chen (a/k/a Tiffany Chen, a/k/a Lily Chao) ("Ms. Chen") and her husband Tao Ding (a/k/a Damien Ding, a/k/a Damien Leung) ("Mr. Ding"). (Cross-Complaint, ¶¶ 39-40.) The parties entered into a partnership pursuant to an oral agreement which provided, among things, that Mr. Abittan and Ms. Chen/Mr. Ding would operate as 50/50 partners. (*Id*., ¶ 43.) To purchase the watches, Mr. Abittan would wire money from his business entity to Wells Fargo accounts in the names of Ms. Chen and Mr. Ding. (*Id*., ¶ 43.) On some occasions, Ms. Chen and Mr. Ding would pay for their portion of the watches as agreed, however, on other occasions, they would misuse Mr. Abittan's credits cards to pay for their share. (*Id*.)

Through the watch business, Mr. Abittan developed a realtionship of trust with Ms. Chen and Mr. Ding; he alleges that this was an "integral part" of their scheme to defraud him. In the course of this relationship, Ms. Chen and Mr. Ding made various representations to Mr. Abittan that they had access to significant familial wealth and maintained connections with the Chinese business elite. (Cross-Complaint, ¶¶ 45-52.) In December 2017, the parties were in

daily communication with one another and began to discuss the potential use of blockchain for secure and anonymous watch transactions, as well as fraud prevention. (*Id*., ¶ 53.)

By January 2018, the discussions between the parties had expanded and were aimed at creating a reliable blockchain financial infrastructure with privacy protecting transparency for use in numerous industries; an oral and/or implied partnership to create blockchain technology was created from these conversations. (Cross-Complaint, ¶ 54.) On January 22, 2018, the partnership formed Juniper Ventures Incorporated ("JVI"); however, Ms. Chen and Ms. Ding refused to identify themselves on incorporation documents and instead presented Mr. Abittan with an agreement naming him and Guanghua Liang- a strawman to hide their involvement- as "founders" of JVI. (*Id*., ¶ 55.) Despite this, Ms. Chen and Mr. Ding represented to Mr. Abittan at all times that they were, with him, equal partners in JVI. (*Id*., ¶ 56.)

The blockchain project created by Mr. Abittan, Ms. Chen and Mr. Ding became known as "Findora." When Mr. Abittan began to hire employees for the project, Ms. Chen and Mr. Ding convinced him that, to limit potential liability, they needed to keep the business from the tech. (Cross-Complaint, ¶ 64.) This resulted in the creation of two public-facing entities: Project Revolution (the "fund" that paid salaries and entered into contracts) and Eian (the "coin," i.e., tech, side). (*Id*., ¶¶ 64-67.) Ms. Chen confirmed that this structure would allow them to retain 100% of the Findora tech, while giving employees equity in the business. (*Id*., ¶ 68.) However, Ms. Chen and Mr. Ding later used this structure to facilitate their fraud, by attempting to structure one entity as effectively insolvent, with the other owning Findora's valuable intellectual property. (*Id*., ¶ 72.)

While Mr. Abittan devoted significant time to attracting investors for Findora, Ms. Chen and Mr. Ding represented that they were making, with success, similar efforts to major Chinese businessmen and women. (Cross-Complaint, ¶ 76.)

Beginning in early 2018, Ms. Chen directed Mr. Abittan to open multiple credit card accounts, with multiple cards issued to her and other individuals, to be used for Findora. (Cross-Complaint, ¶ 85.) She also represented that the cards would be used for business purposes only, and therefore all expenses would be reimbursed by the Partnership. (Cross-Complaint, ¶¶ 85-86.) Unbeknownst to Mr. Abittan, Ms. Chen later used his personal information to obtain individual credit cards in the names of numerous employees and linked them to his personal credit. (*Id*., ¶¶ 87-88.) Ms. Chen ultimately began using the cards for her and Mr. Ding's personal expenses and benefit. (*Id*., ¶¶ 89-91.)

In April 2019, Mr. Abittan demanded that Ms. Chen and Mr. Ding return money to Findora's investors. Despite initially agreeing, Ms. Chen never returned the funds and stopped paying the bills for the credits cards that she had obtained in Mr. Abittan's name. (Cross-Complaint, ¶¶ 93-95.) In the summer of 2019, in a ruse to coopt Findora's intellectual property, Ms. Chen and Mr. Ding advised Mr. Abittan that they needed to transfer Eian's assets to a Cayman entity in order to protect investors. Based on representations made to him by Ms. Chen that such an arrangement would not change his equity interest as a founder and owner of Findora, Mr. Abittan executed related documents presented to him by Ms. Chen. (*Id*., ¶¶ 98-105.)

Subsequent to inducing Mr. Abittan to sign the aforementioned paperwork, Mr. Ding and Ms. Chen performed various actions that effectively shut Mr. Abittan out of Findora, and

continued to represent that they would address the various credit card debt accumulating in his name. (Cross-Complaint, ¶¶ 106-114.) Ms. Chen and Mr. Ding also made false representations to Findora's executives and employees about Mr. Abittan's absence, including that he was not a major owner and was lying when he claimed to be a founder. (*Id*., ¶ 118.) Ms. Chen and Mr. Ding also admonished Mr. Abittan not to share information with anyone at Findora, particularly Messrs. Lu and Fisch. (*Id*., ¶ 119.) Because different misrepresentations had been made to Messrs. Lu and Fisch, Ms. Chen and Mr. Ding knew that if those parties communicated with one another, their fraud and misconduct would be revealed. (*Ibid*.) Mr. Abittan subsequently discovered the extent of Ms. Chen and Mr. Ding's fraudulent conduct.

Based on the foregoing, Mr. Abittan filed the Cross-Complaint on November 3, 2021, asserting the following causes of action: (1) declaratory judgment (against all cross-defendants); (2) breach of partnership agreement (against all cross-defendants); (3) conversion (against all cross-defendants); (4) breach of fiduciary duty (against Ms. Chen and Mr. Ding); (5) aiding and abetting breach of fiduciary duty (against the "Common Enterprise Agents"[3] and "Common Enterprise Entities"[4]); (6) fraudulent inducement (against all cross-defendants); (7) unjust enrichment (against all cross-defendants); (8) accounting (against all cross-defendants); (9) civil violations of the Racketeer Influenced and Corrupt Organization Act ("RICO") (18 U.S.C. § 1962(c)) (against all cross-defendants); (10) conspiracy to commit violations of RICO (18 U.S.C. § 1962(d)) (against all cross-defendants); (11) fraud (against all cross-defendants); (12) breach of contract (against Ms. Chen and Mr. Ding); and (13) defamation (against Ms. Chen and Mr. Ding).

II. MR. ABITTAN'S DEMURRER TO TEMUJIN'S FAC

A. Legal Standard

In ruling on a demurrer, a court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff" s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

Mr. Abittan (and Messrs. Fisch and Lu) demurs to the FAC and the claims asserts against him, i.e., the first, second, third and eighth on the grounds of failure to state facts

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[3] This refers to: Guanghua Liang, Yang Yang, Jiangrong Wang, Xilei Wang, Selena Chen, Yi Chung Yang and Alex Wang.

[4] This includes: JVI, Project Revolution, Eian, JV Holdings, JV Partners, Lakeside Garden, Fourhair, Temujin Delaware, Temujin Cayman, Smart Investment Fund, Powerscale Capital Fund; Black Cobble Rideshare Funding and Nessco.

sufficient to constitute a cause of action and uncertainty.[5] Mr. Abittan demurs to the third cause of action on the additional ground that it cannot be ascertained whether the agreement this claim is predicated on it written, oral or implied by conduct.[6] (Code Civ. Proc., § 430.10, subds. (e), (f) and (g).)[7]

1. *Non-Compliant Opposing Brief*

As an initial procedural matter, Mr. Abittan argues that the Court should disregard Plaintiffs' opposition because it does not comply with the California Rules of Court. California Rules of Court 3.1113(d) provides that "[e]xcept in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages." Here, Plaintiffs' opposition is 25 pages, a full 10 pages over the limit, and Plaintiffs filed the excessive brief without the Court's permission or notice to Mr. Abittan. (See Cal. Rules of Court, rule 3.1113(e) [stating that a party "may apply to the court ex parte but with written notice of the application to other parties, at least 24 hours before the memorandum is due, for permission to file a longer memorandum. The application must state reasons why the argument cannot be made within the stated limit."].)

Mr. Abittan insists that Plaintiffs' unexplained overage is "particularly egregious" given their conduct in connection with the briefing schedule for the opposing and reply papers. According to the email communications attached to the declaration of Mr. Abittan's counsel filed in support of his reply, the parties reached an agreement wherein the opposition was to be filed on May 17 and the reply on June 7. (See Declaration of Brianna Pierce in Support of Reply ("Pierce Decl."), Exhibit B.) A stipulation was to be filed reflecting the agreed-upon schedule, but Plaintiffs suggested that the stipulation did not comply with a prior court order due to the inclusion of certain wording that was unrelated to the actual scheduling.[8] (*Id.*) Plaintiffs' counsel than, seemingly unilaterally, proposed an entirely different briefing schedule to the Court, representing that the parties "had not been able to agree to a stipulation … [regarding] a demurrer briefing schedule," which extended Plaintiffs' time to draft an opposition by three weeks (to June 7) and reduced Mr. Abittan's time to file a reply from three weeks to four business days (to June 13). The Court agrees with Mr. Abittan that he was

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[5] Mr. Abittan's demurrer on the ground of uncertainty is OVERRULED. The allegations of the FAC are relatively straightforward and thus Mr. Abittan can reasonably respond to them. (See *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616 [explaining that a demurrer for uncertainty will be sustained only the complaint is so bad that the defendant cannot reasonably respond- i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against them].)

[6] Mr. Abittan's request for judicial notice of various documents filed in *Ariel Abittan v. Lily Chao, et al.*, Case No. 5:20-cv-0930, U.S. District Court for the Northern District of California (the "Federal Action") is GRANTED. (Evid. Code, § 452, subd. (d).)

[7] The demurrer was filed on April 5, 2022.

[8] Plaintiffs' counsel explained that the proposed stipulation circulated between the parties was "inconsistent" with the Court's order because that order applied to both the instant action and the related action involving Mr. Fu, and the Temujin Parties had not filed a demurrer on March 18, 2022. Mr. Abittan's counsel acknowledged this and stated "the deletion of that sentence [refereeing to the other action] is fine. But the actual [demurrer briefing schedule] should be [the version setting forth an opposition deadline of May 17 and a reply deadline of June 13]."

prejudiced by this reduction of time to prepare a reply and the significantly oversized opposition brief. Consequently, the Court exercises its discretion and will not consider any pages of the opposition in excess of 15 pages.[9] (See Cal. Rules of Court, rule 3.1113(g) [stating that an oversized memorandum may be "considered in the same manner as a late-filed paper"] and rule 3.1300(d) [stating that the court has discretion to refuse to consider a late-filed paper].)

2. *Temujin Delaware's Standing*

Mr. Abittan first contends that the collective term "Plaintiffs" renders the entire FAC uncertain as to Temujin Delaware's standing, with no specific allegations establishing that entities' ownership in Findora's source code, trade secrets, or social media accounts, or that it is a party to any of the agreements at issue. The Court believes it is most prudent to address the validity of this argument in the context of the specific claims at issue.

3. *Temujin Cayman's Capacity to Sue*

Next, Mr. Abittan asserts that a demurrer lies with respect to Temujin Cayman because it is foreign corporation that has not pleaded it is qualified to transact intrastate business pursuant to Corporations Code section 2105 and thus it lacks capacity to maintain this action.

Corporations Code section 2105 ("Section 2105") provides, in pertinent part, that "[a] foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification." (Corp. Code, § 2105, subd. (a).) While it is true, as Mr. Abittan maintains, that foreign corporations that transact intrastate business but have not obtained qualification under Section 2105 "shall not maintain any action or proceeding upon any intrastate business … that was commenced prior to compliance with Section 2105" (Corp. Code, § 2203, subd. (c)), he cites no authority which provides that a foreign corporation must *affirmatively plead* its compliance with Section 2105 in order to establish its capacity to maintain a lawsuit. Although an unqualified corporation may commence an action without qualifying, its failure to qualify is a matter of abatement: i.e., the defendant may raise as a defense that the foreign corporation lacks the capacity to maintain the action. (*United Med. Mgmt. Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732, 1740.) Where the defendant raises this defense, he has the burden to establish that (1) the action arises out of a transaction of intrastate business by a foreign corporation and (2) the action was commenced by the foreign corporation prior to qualifying to transact business here. (*United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001, 1007.) Because Mr. Abittan has not established either of the foregoing, the Court will not sustain his demurrer as to Temujin Cayman based on a lack of capacity to maintain this action.

4. *The Federal Action and the Doctrine of Judicial Estoppel*

Mr. Abittan next argues that his demurrer to Temujin Delaware's first (declaratory relief), second (civil conspiracy), third (tortious interference with contract) and eighth (trade secret misappropriation) causes of action should be sustained because they are barred by the doctrine of judicial estoppel. The doctrine has been explained thusly:

[9] Thus, the Court only considers pages six through twenty.

> The doctrine of judicial estoppel, sometimes called the doctrine of "preclusion of inconsistent positions" [citation]), "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary." (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735.) The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." [Citations and quotations omitted.]
>
> Judicial estoppel is an equitable doctrine to protect against fraud on the courts. [Citation.] It has been said that "[b]ecause of its harsh consequences, the doctrine should be applied with caution and limited to egregious circumstances." (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 132.) But unlike equitable estoppel that "focuses on the relationship between the parties ...", judicial estoppel focuses on "the relationship between the litigant and the judicial system' and is designed "to protect the integrity of the judicial process." (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at 182.) Judicial estoppel may be based on a position taken by a party or party's legal counsel. (*AFN, Inc. v. Schlott, Inc.* (D.N.J. 1992) 798 F.Supp. 219, 224.)

(*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 47-48.)

According to Mr. Abittan, the doctrine operates to bar Temujin Delaware from making the aforementioned claims based on the positions that it took in the Federal Action, specifically that it did not acquire any assets of Findora pursuant to the IP Sale Agreement. In the FAC, Plaintiffs seek a declaration that the subject Findora source code is the "exclusive property of *Plaintiffs* and that neither Defendants nor any third parties are entitled to use those codes." (FAC, ¶ 48.) However, as Mr. Abittan notes, in the Federal Action, in its motion to dismiss Mr. Abittan's complaint (see Mr. Abittan's Request for Judicial Notice ("RJN"), Exhibit A), Temujin Delaware took the completely contrary position by denying that it had acquired any assets pursuant to the IP Sale Agreement, stating:

- "Temujin Delaware was not a party to the [IP Sale Agreement] transaction, only Temujin Cayman" (RJN, Exhibit A at 5);
- "Temujin Delaware was a not a party to the [Eian asset sale], and, if anything, appears to have been excluded from the negotiations" (*id*. at 12);
- "Temujin Delaware was not a party to the [Eian asset sale] agreement, and the Complaint lacks particularized facts indicating that Temujin Cayman, which paid $300,000 for the assets, acted for any reason other than its own interests" (*id*. at 13).

Mr. Abittan asserts that Temujin Delaware was successful in asserting the foregoing position because its motion to dismiss was granted[10] and the federal court, in rendering its decision, cited the facts of the IP Sale Agreement-specifically noting the transfer of assets pursuant to the agreement to Temujin Cayman *only*- thereby adopting and accepting such facts as true. However, the Court does not believe that in granting the motion to dismiss, the federal court adopted Temujin Delaware's position regarding its interest or lack of interest in the Findora assets or accepted it as true because, as that court explained in its dismissal order, for the purposes of the motion before it, it was required to "accept as true all factual allegations in the complaint" (RJN, Exhibit B at 5), and there is no indication that the court adopted the representations made by Temujin Delaware in its motion because the motion was decided on the ground that Mr. Abittan's claims against the Temujin Parties were compulsory counterclaims under California Code of Civil Procedure section 426.10 such that they had to be filed in the instant action, and this determination was not dependent on the position that Temujin Delaware took with regard to ownership of the Findora assets. Consequently, the Court will not sustain the demurrer on the ground that the subject claims are barred by the doctrine of judicial estoppel.

5. *Preemption Under the California Trade Secret Misappropriation Act ("CUTSA")*

Next, Mr. Abittan insists that the first (declaratory relief), second (civil conspiracy) and third (tortious interference with contract) causes of action are preempted by the CUTSA and therefore his demurrer to these claims should be sustained.

The CUTSA, which is codified in sections 3426 through 3426.11 of the Civil Code, reflects "a legislative intent to occupy the field of trade secret liability to the exclusion of other civil remedies" and thus common law claims that are "based on the same nucleus of facts as the misappropriation of trade secrets claim" are preempted. (*K.C. Multimedia, Inc. v. Bank of America Tech. & Operations, Inc.* (2009) 171 Cal.App.4th 939, 957-958 (*K.C. Multimedia*).) The Act does not supersede "(1) contractual remedies, whether or not based upon misappropriation of a trade secret, [and] (2) other civil remedies that are not based on misappropriation of a trade secret." (Civ. Code, § 3426.7, subd. (b).) A plaintiff cannot simply plead a different theory of liability to get around the suppressive effect of CUTSA. (*Id*.) Instead, they must "allege wrongdoing that is materially distinct from the wrongdoing alleged in [the] CUTSA claim." (*Prostar Wireless Group, LLC v. Domino's Pizza, Inc.* (N.D Cal. 2018) 360 F.Supp.3d 994, 1106, internal citations and quotations omitted.) Critically, CUTSA is broadly applied. (See *K.C. Multimedia, supra*, 171 Cal.App.4th at 957.)

Accordingly, the Court must determine the scope of CUTSA preemption in order to ascertain whether the first three causes of action survive demurrer. Given the foregoing, the determinative question is whether these three claims are "based on the same nucleus of facts" as Plaintiffs' trade secret misappropriation claim (*K.C. Multimedia, Inc., supra,* 171 Cal.App.4th at 957-958) or allege "wrongdoing that is materially distinct from the wrongdoing" alleged in that claim (*Prostat Wireless Group, LLC, supra,* 360 F.Supp.3d at 1106). Upon review of the FAC, the Court finds that the latter is the case. Although these claims are predicated, at least in part, on the alleged misappropriation of the source code (see, e.g., FAC, ¶¶ 22, 31-35, 42, 46, 47, 52, 57), they are *also* based on other, distinct actions, including, but

[10] The motion to dismiss was granted on the ground that Mr. Abittan's claims against Temujin Delaware had to be brought as compulsory counterclaims in the instant action.

not limited to, making misrepresentations in order to interfere with Plaintiffs' contractual relationships with other entities and refusing to hand over access to Temujin Delaware's social media accounts. As a demurrer does not lie to part of a cause of action (see *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682), the Court will not sustain the demurrer to the first three causes of action on the ground that they are preempted by the CUTSA.

6. *Trade Secret Misappropriation (Eighth Cause of Action)*

Mr. Abittan next argues that his demurrer to Plaintiffs' trade secret misappropriation claim should be sustained because (1) Temujin Delaware fails to allege any cognizable legal interest in Findora's trade secrets, (2) Plaintiffs fail to plead the existence of a "trade secret" with sufficient particularity, (3) Plaintiffs fail to allege sufficient facts to show that Mr. Abittan disclosed a trade secret without consent, (4) Plaintiffs fail to allege sufficient facts to show that Mr. Abittan used a trade secret without authorization and (5) even if Mr. Abittan used the source code, Plaintiff fails to plead facts sufficient to show that he did so while knowing that the trade secret was acquired or disclosed by improper means.

A claim for trade secret misappropriation under the CUTSA consists of the following elements: (1) possession by the plaintiff of a trade secret; (2) the defendant's misappropriation of the trade secret, meaning its wrongful acquisition, disclosure, or use; and (3) resulting or threatened injury to the plaintiff. (Civil Code, §§ 3426.1, 3426.2 and 3426.3.) CUTSA defines "trade secret" to mean "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d).) A plaintiff who endeavors to state a claim under the CUTSA "should describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies." (*Diodes, Inc. v. Franzen* (1968) 260 Cal.App.3d 244, 252-253.)

The Court agrees with Mr. Abittan that Plaintiffs' claim suffers from several deficiencies. First, the "trade secrets" alleged to have been misappropriated are pleaded only in the most general of terms, devoid of the specificity necessary to "separate [them] matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies." (*Diodes, Inc., supra,* 260 Cal.App.3d at 252-253.) Plaintiffs simply plead that their "source codes and other technical, confidential and proprietary information related to [their] business are [their] 'trade secrets' within the meaning of the [CUTSA] …." (FAC, ¶ 95.) This falls far short of the minimum requirements for stating a claim based on the misuse or misappropriation of trade secrets. Further, references to a "ledger" or "cryptography library" do not provide sufficient particularity; they are merely general descriptors of mechanisms commonly used by many blockchain companies.

Second, the trade secrets at issue are alleged to have originated as Eian's intellectual property ("IP"), and only Temujin Cayman is specifically identified as having obtained this IP from Eian by virtue of the IP Sale Agreement. (FAC, ¶ 14.) There are no facts pleaded which demonstrate that Temujin Delaware acquired or has any ownership interest in this IP and thus,

the subject "trade secrets." Consequently, it has not stated an essential element of this claim such that no cause of action for trade secret misappropriation has been stated by Temujin Delaware against Messrs. Abittan, Lu and Fisch.

Finally, there are no specific facts pleaded which establish that Mr. Abittan, in particular, misused and/or misappropriated the alleged trade secrets. There are specific allegations pertaining to Mr. Fisch in this regard, but none as to Messrs. Abittan and Lu. In the absence of such facts, an essential element of this claim has not been stated.

Given the foregoing, the demurrer to this cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

7. *Declaratory Relief (First Cause of Action)*

Mr. Abittan additionally argues that his demurrer to the first cause of action should be sustained because it is superfluous given the eighth cause of action for trade secret misappropriation.

Claims for declaratory relief are governed by Code of Civil Procedure section 1060, which provides:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another … may, in cases of actual controversy relating to legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premise, including a declaration of any questions or construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at this time.

The fundamental basis of declaratory relief is the existence of an actual and present controversy over a proper subject. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "A general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged; the pleader need not establish it is entitled to a favorable judgment." (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action, because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.)

As Mr. Abittan contends, "[t]he declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues." (*General of America Ins. Co. v. Lilly* (1968) 258 Cal.App.2d 465, 470.) Here, the issue of ownership of the

Findora assets is subsumed within the trade secret misappropriation claim. Consequently, the declaratory relief claim is superfluous and therefore the demurrer to the first cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

8. *Tortious Interference with Contract (Third Cause of Action)*

Mr. Abittan asserts that his demurrer to the third cause of action should be sustained because (1) Plaintiffs fail to plead facts which establish the existence of valid contracts between themselves and third parties, (2) Plaintiffs fail to specifically identify tortious actions taken by Mr. Abittan or how any of these actions were independently unlawful[11], (3) Plaintiffs fail to allege specific breaches of any contract by contractual parties, (4) Plaintiffs fail to sufficiently plead damages as a result of Mr. Abittan's actions and (5) Plaintiffs fail to specify whether the agreements sued upon are written, oral or implied by conduct.

The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239; see also CACI, No. 2201.)

Here, the Court finds persuasive Mr. Abittan's contention that this claim has not been adequately pleaded.[12] Plaintiffs do not specifically identify any of the agreements with third parties that the defendants purportedly interfered with, merely generally pleading the existence of "valid contracts with third parties." This is wholly insufficient; Plaintiffs must identify the *specific* agreements at issue in order to state a claim against the defendants for tortuously interfering with them. Plaintiffs also have not pleaded with any specificity *how* Mr. Abittan's (or the other defendants') alleged actions actually breached or disrupted these unspecified contracts with unidentified third parties. Consequently, the defendants' demurrer to the third cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

9. *Civil Conspiracy (Second Cause of Action)*

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[11] A claim for tortious independence with contract generally does not require conduct that is independently wrongful (unlike a claim for tortious interference with prospective economic advantage/contract) *unless* the agreement at issue is at-will. (See *Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1148.) There are no facts pleaded which indicate that this is the nature of the agreements that are the subject of this cause of action. As such, independently wrongful conduct need not be pleaded to state this cause of action.

[12] The Court, however, OVERRULES Mr. Abittan's demurrer to this claim on the ground that, "[i]n an action founded upon a contract, it cannot be ascertained whether the contract is written, oral, or is implied by conduct." (Code Civ. Proc., § 430.10, subd. (g).) This is because a claim for tortious interference with a contract is not "upon a contract" within the meaning of the statute; in order qualify as such, the right to recover for the asserted cause of action must be based on the contract in question.

Finally, Mr. Abittan contends that his demurrer to the second cause of action should be sustained because Plaintiffs have failed to plead the facts necessary to state such a cause of action, including that there was an agreement between him and the other defendants to engage in wrongful conduct towards Plaintiffs. He asserts that it should additionally be sustained because Plaintiffs have failed to plead the underlying tort necessary to support conspiracy-based liability. The Court agrees.

As a threshold matter, "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [citation omitted]. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors. Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) In other words, a plaintiff alleging conspiracy must sufficiently plead an underlying predicate tort in order to state such a basis for liability. "Liability for civil conspiracy generally requires three elements: (1) formation of the conspiracy (an agreement to commit wrongful acts); (2) operation of the conspiracy (commission of the wrongful acts); and (3) damage resulting from operation of the conspiracy." (*People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal. App. 4th 102, 136.)

Here, Plaintiffs have not pleaded an underlying predicate tort (e.g., trade secret misappropriation or tortious interference with contract), nor have they pleaded *facts* establishing the formation of a conspiracy between the defendants and Mr. Abittan's commission of wrongful actions to further that conspiracy. Plaintiffs' allegation that the defendants "acted in concert to obstruct the continued operation of [their] business in several ways …" (FAC, ¶ 27) and "acting in concert through knowing and mutual agreement, formed a conspiracy" (FAC, ¶ 51), fall far short of what is necessary to plead a basis to impose conspiracy liability. Therefore, the defendants' demurrer to the second cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

III. TEMUJIN DELAWARE'S DEMURRER TO MR. ABITTAN'S CROSS-COMPLAINT

Temujin Delaware demurs to the Cross-Complaint in its entirety, as well as each of the claims asserted against it, i.e., the first, second, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action, on the ground of failure to state facts sufficient to constitute a cause of action.[13] (Code Civ. Proc., § 430.10, subd. (e).)

A. Demurrer to Cross-Complaint in its Entirety

Temujin Delaware first contends that its demurrer to the Cross-Complaint should be sustained because Mr. Abittan fails to articulate what it specifically did, instead "lumping" it in with multiple other entities and individuals for "guilt by association" with Ms. Chen and Mr.

[13] The demurrer was filed on December 7, 2021. Temujin Delaware has changed its representation since then.

Ding. In the absence of such allegations, Temujin Delaware maintains, no claims have been stated against it. The Court disagrees.

As Mr. Abittan responds in his opposition, he alleges that Temujin Delaware is one of numerous alter egos (the "Common Enterprise Entities") of Ms. Chen and Mr. Ding, and it is this theory of liability upon which his claims against Temujin Delaware are based. Under this theory, "when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners." (*Sonora Diamond Corp. v. Super. Ct.* (2000) 83 Cal.App.4th 523, 538.) When pleading alter ego liability, particularity is not required; instead, it is sufficient for a plaintiff to plead (1) such a unity of interest and ownership that the separate personalities of the corporation and the individuals do not exist, and (2) an inequity will result if the corporate entity is treated as the sole actor. (See *Stodd v. Goldberger* (1977) 73 Cal.App.3d 827, 832.) Therefore, a party is only required to allege ultimate rather than evidentiary facts in support of an alter ego theory. (*Rutherford Holdings, LLC, supra*, 223 Cal.App.4th at p. 236.)

Here, Mr. Abittan has more than sufficiently alleged facts supporting alter ego liability against Temujin Delaware, to wit: the Common Enterprise Entities were created by Ms. Chen and Mr. Ding to perpetuate their fraud and scheme to convert Mr. Abittan's money and interests in Findora; there exists a unity of interest and ownership between Ms. Chen/Mr. Ding and Temujin Delaware such that any separation between the former and the latter has ceased to exist and adhering the fiction that they are separate would result in an injustice; funds between these parties were commingled; the Common Enterprise Entities were inadequately capitalized; there was a failure to keep corporate records; personal and entity assets were not kept separate; and representations were made by Ms. Chen and Mr. Ding that the Common Enterprise Entities and the alleged partnership were one and the same and all backed by them as partners with Mr. Abittan. (Cross-Complaint, ¶¶ 132, 162-170.) Consequently, the Court will not sustain the demurrer to the Cross-Complaint on this basis.

B. Declaratory Relief (First Cause of Action)

In the first cause of action, Mr. Abittan pleads that an actual controversy exists between himself and Ms. Chen and Mr. Ding as to their respective rights to Findora. He contends that "each and every contract relating to Findora from January 2018 through present is the result of fraud, that all such contracts are void, and that Findora- both the business and the technology- is the property of a general partnership between" himself and Ms. Chen and Mr. Ding in which he has a fifty percent interest. (Cross-Complaint, ¶ 173.) Temujin Delaware argues that Mr. Abittan is not entitled to declaratory relief against it because (1) it did not exist until mid-2019 and (2) Mr. Abittan alleges that Temujin never had any interest in Findora.

Claims for declaratory relief are governed by Code of Civil Procedure section 1060, which provides:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another … may, in cases of actual controversy relating to legal rights and duties of the respective parties, bring an original action or cross-complaint in

> the superior court for a declaration of his or her rights and duties in the premise, including a declaration of any questions or construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at this time.

The fundamental basis of declaratory relief is the existence of an actual and present controversy over a proper subject. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "A general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged; the pleader need not establish it is entitled to a favorable judgment." (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action, because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.)

Here, given that the Court has concluded that Mr. Abittan has sufficiently pleaded that Temujin Delaware were Ms. Chen and Mr. Ding's alter egos or were part of a single, common enterprise controlled by them, and alter ego is the basis of any liability asserted by Mr. Abittan against Temujin Delaware, and Temujin Delaware otherwise has not demonstrated that the declaratory relief claim is deficient, the Court finds no basis to sustain the demurrer to this claim.

C. Breach of Partnership Agreement (Second Cause of Action)

In the second cause of action, Mr. Abittan alleges that he, Ms. Chen and Mr. Ding "entered into an oral partnership for the purpose of creating … Findora" (Cross-Complaint, ¶ 178) and Ms. Chen Mr. Ding breached the partnership agreement by "repudiating the existence of the partnership, denying Abittan's interest in the partnership, using the assets acquired by the partnership for their own use, and funneling the technology and business of Findora away from the partnership and into the Common Enterprise Entities using the Common Enterprise Agents" (Cross-Complaint, ¶ 181).

Temujin Delaware argues that its demurrer to this cause of action should be sustained because (1) it was not in existence at the time the purported agreement was entered into and (2) nowhere does Mr. Abittan plead that he and Temujin Delaware were in an oral and/or implied partnership or entered into a partnership agreement.

As with the preceding claim, because Temujin Delaware is alleged to be Ms. Chen and Mr. Ding's alter ego, and the claim otherwise appears to be adequately pleaded against them, the Court will not sustain the demurrer to this cause of action.

D. Conversion (Third Cause of Action)

The third cause of action is predicated on allegations that the cross-defendants converted Mr. Abittan's interest in: Findora**;** twenty-four luxury watches; $637,000; and $50,000 invested by Mr. Abittan in JVI. (Cross-Complaint, ¶¶ 187-190.) Temujin insists that

no claim for conversion has been stated against it because it is inconsistent with Mr. Abittan's allegation that Temujin Delaware never had any interest in Findora.

As recently described by our state Supreme Court, "[c]onversion is an 'ancient theory of recovery' with roots in the common law action of trover" (a remedy against a finder of lost goods who refused to return them to the owner). (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1150, citations omitted.) Today, the tort "is understood more generally as 'the wrongful exercise of dominion over personal property of another.' " (*Ibid.*) "As it has developed in California, the tort comprises three elements: '(a) plaintiff's ownership or right to possession of personal property, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting damages.' " (*Ibid.*)

As with the preceding claims, Temujin Delaware's assertion that no claim has been stated against it is unavailing because the basis of liability against the entity is that it is the alter ego of Ms. Chen and Mr. Ding. As such, if a claim for conversion has adequately been stated against Ms. Chen and Mr. Ding- and Temujin Delaware has not demonstrated that this is *not* the case- a claim for conversion has been stated against it and the Court will not sustain the demurrer.

E. Aiding and Abetting Breach of Fiduciary Duty (Fifth Cause of Action)

Mr. Abittan's fifth cause of action is predicated on allegations that the Common Enterprise Agents and Common Enterprise Entities knew that Ms. Chen and Mr. Ding were fiduciaries of Mr. Abittan who owed him attendant duties, and aided and abetted them in breaching those duties by "conspiring and actively working with Ding and Chen to obtain Abittan's rights and interests in Findora in exchange for no or inadequate consideration." (Cross-Complaint, ¶¶ 201-202.) Temujin Delaware maintains that this claim fails because there are no facts pleaded which establish that it "knowingly gave substantial assistance" to Ms. Chen and Mr. Ding and, as the entity was not created until July 2019, it would have been impossible for Temujin Delaware to provide such aid.

"'Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.' [Citation]." (*Das v. Bank of America* (2010) 186 Cal.App.4th 727, 744.) Generally, to plead a cause of action premised on aiding and abetting, a plaintiff need only plead ultimate facts. (See *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95.)

> [a] defendant is liable for aiding and abetting another in the commission of an intentional tort, including a breach of fiduciary duty, if the defendant " ' "knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act." ' " (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144 …(*Casey*).) The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a

> substantial factor in causing harm to plaintiff. (Judicial Council of Cal., Civ. Jury Instns. (CACI) (2014) No. 3610; *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1478 … [(*American Master Lease*)].) Some cases suggest a complaint must allege a fifth element—that the aider and abettor had the specific intent to facilitate the wrongful conduct. (Directions for Use for CACI No. 3610, p. 633, citing *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95 ….)

(*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343; see also *George v. eBay, Inc.* (2021) 71 Cal.App.5th 620, 641 (*George*) [citing *Nasrawi* for these elements].)

In California, aiding and abetting a breach of fiduciary duty must be alleged with some specificity, as discussed at length in *Casey*. (See *Casey, supra*, 127 Cal.App.4th at pp. 1144–1149; see also *George, supra*, 71 Cal.App.5th at p. 642 [elements of this claim must be alleged with "the requisite specificity"].) Critically, "[t]he defendant must have 'actual knowledge of the specific primary wrong the defendant substantially assisted.' " (*Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal.App.5th 323, 351, quoting *Casey, supra,* 127 Cal.App.4th at p. 1145.) A "conclusory allegation that [the defendant] was 'aware' of [general wrongdoing] is manifestly insufficient. (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1154 … [dismissing aiding and abetting claim where plaintiff alleged that defendant generally knew of 'wrongful or illegal conduct' but did not plead knowledge of specific alleged fraud]….)" (*George, supra*, 71 Cal.App.5th at p. 641.)

Again, the Court has found that Mr. Abittan has pleaded sufficient facts to support an alter ego theory of liability as to Temujin Delaware. Because of this, Temujin Delaware would have actual knowledge of Ms. Chen and Mr. Ding's conduct. Consequently, the Court will not sustain the demurrer to this cause of action.

F. Fraudulent Inducement and Fraud (Sixth and Eleventh Causes of Action)

Temujin Delaware next asserts that its demurrer to Mr. Abittan's fraud-based claims should be sustained because they are not pleaded with the requisite specificity. It additionally argues that: there are no facts pleaded linking it to any alleged misrepresentation by Ms. Chen and Mr. Ding; because Temujin Delaware never had any interest in Findora, as alleged by Mr. Abittan, it lacked the requisite knowledge and intent to induce his reliance; Mr. Abittan's alleged "justifiable" reliance is unreasonable as a matter of law because he reviewed the document at issue and thus had knowledge of any inconsistencies; and any alleged misstatements about the impact of the Eian asset sale on Mr. Abittan's interest are not actionable fraud because he had express written notice of its effects.

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Fraud in the inducement is a subset of the tort of fraud … [which] occurs when the promisor knows that he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable." (*Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828, 829, internal citations and quotations omitted.) Fraud must be pleaded with particularity and the doctrine of liberal construction of pleadings does not apply. (*Lazar v.*

Superior Court, supra, 12 Cal.4th at 638.).) This particularity requirement necessitates pleading facts that show how, when, where, to whom and by what means the alleged misrepresentations were tendered. (*Id.* at 645.)

Here, the Court finds that the fraud-based claims are pleaded with the requisite specificity. Again, the basis for liability against Temujin Delaware is that it is the alter ego of Ms. Chen and Mr. Ding. As such, is it not necessary for Mr. Abittan to plead specific actions by Temujin Delaware in order to state these claims against it, and the level of specificity in the Cross-Complaint as to the actions of Ms. Chen and Mr. Ding is relatively high, with a plethora of facts pleaded concerning their actions to propagate a fraudulent scheme on Mr. Abittan to divest him of not only his interest in Findora, but also other assets. As for the issue of justifiable reliance, the Court does not believe it can determine as a matter of law, based *solely* on what is pleaded in the Cross-Complaint, that Mr. Abittan's reliance was not reasonable or justifiable. (See *Amiodarone Cases* (2022) 84 Cal.App.5th 1091, 1111 [explaining that justifiable reliance is ordinarily a question of fact that is not properly determined on demurrer, but can be decided as a matter of law if "reasonable minds can come to only one conclusion based on the facts."].) Therefore, the Court will not sustain Temujin Delaware's demurrer to the sixth and eleventh causes of action.

G. Unjust Enrichment (Seventh Cause of Action)

In the seventh cause of action, Mr. Abittan pleads that as a result of the cross-defendants' wrongful conduct, they were unjustly enriched at his expense (particularly the items that are the subject of the conversion claim). (FAC, ¶¶ 214-216.) Temujin Delaware argues that there is no basis for such a claim, i.e., facts establishing an entitlement to restitution.

"Unjust enrichment is not a cause of action, however, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution. Unjust enrichment has also been characterized as describing the result of a failure to make restitution. [¶] In reviewing a judgment of dismissal following the sustaining of a general demurrer, we ignore erroneous or confusing labels if the complaint pleads facts which would entitle the plaintiff to relief. Thus, we must look to the actual gravamen of [plaintiff's] complaint to determine what cause of action, if any, he stated, or could have stated if given leave to amend." (*McBride v. Houghton* (2004) 123 Cal.App.4th 379, 387.) Under California law, restitution "may be awarded where the defendant obtained a benefit form the plaintiff by *fraud*, duress, *conversion*, or similar conduct." (*Id*. at 388, emphasis added.)

As the Court has concluded that claims for fraud and conversion has been stated against Temujin Delaware under the alter ego doctrine, it must also conclude that a basis for restitution, and thus a "claim" for unjust enrichment has been stated against the entity. Consequently, the Court will not sustain the demurrer to this claim.

H. Accounting (Eighth Cause of Action)

Temujin Delaware next argues that no claim for an accounting has been stated against it because it owned no fiduciary duties to Mr. Abittan and as "the right to an accounting is derivative and depends on the validity" of other claims" (*Duggal v. GE. Cap. Commc'ns*

Servs., Inc., (2000) 81 Cal. App. 4th 81, 95) and the preceding claims fail for the reasons argued in its motion, the demurrer to this claim should be sustained. The Court disagrees.

"An action for an accounting has two elements: (1) that a relationship exists between the plaintiff and defendant that requires an accounting and (2) that some balance is due the plaintiff that can only be ascertained by an accounting." (*Sass v. Cohen* (2020) 10 Cal.5th 861, 869 [internal citation omitted].) An action for accounting does not require a fiduciary relationship, but may be brought where "the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 910). Thus, contrary to Temujin Delaware's assertions, Mr. Abittan need not plead the existence of a fiduciary relationship between himself and Temujin Delaware in order to state a claim for an accounting, though he alleges one between himself and Ms. Chen/Mr. Ding, and Temujin Delaware is allegedly their alter ego. Further, the preceding claims do not fail. Consequently, the Court will not sustain the demurrer to the eighth cause of action.

I. RICO and Conspiracy to Violate RICO (Ninth and Tenth Causes of Action)

In the ninth cause of action, Mr. Abittan alleges that Ms. Chen, Mr. Ding and the various Common Enterprise Entities, including Temujin Delaware, and the Common Enterprise Agents "formed an association-in fact, whose joint and common purpose was to defraud investors, business partners, Findora's executives and employees, and third parties," and engaged in racketeering activity in order to accomplish such ends. (Cross-Complaint, ¶ 223.) Temujin Delaware contends that its demurrer should be sustained because Mr. Abittan fails to plead the requisite "conduct," the existence of a "RICO" enterprise, or a pattern of racketeering activity.

The RICO, which is contained in title 18 of the United States Code, sections 1961 through 1968, is aimed at "racketeering activity" and to this end, among other civil and criminal remedies, creates a private cause of action for treble damages. (*Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1228.) "Although RICO provides for a private cause of action in federal district court, the California Supreme Court has held that state courts have concurrent jurisdiction over RICO claims." (*Ibid.*) "The elements of a civil RICO cause of action have been variously stated and in fact differ according to the type of prohibited activity alleged. In general, however, the plaintiff must [plead and] prove that the defendant caused injury to the plaintiff's business or property by engaging in a pattern of racketeering activity in connection with an enterprise which affects interstate commerce." (*Gervase, supra,* 31 Cal.App.4th at p. 1232.)

18 U.S.C. section 1962, subdivision (c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"Racketeering activity" is broadly defined under title 18 of the United States Code, section 1961. "To state a claim under § 1962(c), a plaintiff must allege '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' [Citation.]" (*Odom v. Microsoft*

Corp. (9th Cir. 2007) 486 F.3d 541, 547.) Courts have applied a particularity requirement to RICO claims. (*Moore v. Kayport Package Express* (9th Cir. 1989) 885 F.2d 531, 541 (*Moore*).) This requires a pleader to allege the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation. (*Ibid.*; see *Schreiber Distrib. Co. v. Serv-Well Furniture Co.* (9th Cir. 1986) 806 F.2d 1393, 1401 [allegations of fraud under section 1962(c) "must identify the time, place, and manner of each fraud plus the role of each defendant in each scheme"].)

"Section 1962(d) proscribes a conspiracy to violate RICO. It provides: 'It shall be unlawful for any person to conspire to violate any of the [other RICO] provisions.' It is the mere agreement to violate RICO that § 1962(d) forbids; it is not necessary to prove any substantive RICO violations ever occurred as a result of the conspiracy. The illegal agreement need not be express as long as its existence can be inferred from the words, actions, or interdependence of activities and persons involved. If a RICO conspiracy is demonstrated, 'all conspirators are liable for the acts of their co-conspirators.'" (*Oki Semiconductor Co. v. Wells Fargo Bank* (9th Cir. 2002) 298 F.3d 768, 774-775, internal citations omitted (*Oki Semiconductor Co.*).) "Holding RICO conspirators jointly and severally liable for the acts of their co-conspirators reflects the notion that the damage wrought by the conspiracy 'is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'" (*Id.* at 775, internal citations omitted.)

Given the alter ego allegations against Temujin Delaware, as well as the presence of detailed facts concerning Ms. Chen and Mr. Ding's purported scheme to defraud Mr. Abittan through their use of the Common Enterprise Entities and the Common Enterprise Agents and the commission of various actions that fall within the scope of "racketeering activity" as defined by title 18 of the United States Code, section 1961, the Court will not sustain the demurrer to these causes of action. (Cross-Complaint, §§ 221-235.)

IV. CONCLUSION

Messrs. Abittan, Fisch and Lu's demurrer to the FAC on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND, as specifically explained above.

Temujin Delaware's demurrer to the Cross-Complaint is OVERRULED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely.

No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 8

Case Name: *Hone Capital LLC v. Wu, et al.*
Case Nos.: 20CV369179 (consolidated with Case No. 20CV369308)

This consolidated action arises from a series of business disputes among several parties. Plaintiff/Cross-Defendant Hone Capital LLC ("Hone Capital" or "Hone" or "Plaintiff"), a subsidiary of China Science & Merchants Investment Management Group Co, LTD ("CSC Group"), has sued several parties for fraud and breach of fiduciary duty, among other things. Hone Capital's claims arise from: (1) alleged embezzlement and double-dealings of Defendants/Cross-Complainants Veronica Wu and Purvi Gandhi, former employees of Hone Capital; and (2) supposed assistance in these wrongful actions by various outside parties hired by or doing business with Mses. Wu and Gandhi, either directly or through entities controlled by Mses. Wu and Gandhi. Mses. Wu and Gandhi have each filed cross-claims against Hone Capital for unpaid wages and profit sharing.

Before the Court is (1) Ms. Wu's motion for leave to file the fourth amended complaint and (2) Defendants NBD Group, Inc. ("NBD") and Sara Terheggen (collectively, the "NBD Defendants") motion to compel further responses and production from Hone Capital to Request for Production of Documents ("RPD"), Set One. The former motion is not opposed, while the latter motion is. As discussed below, the Court (1) GRANTS the motion for leave to amend and (2) deems the motion to compel MOOT as to RPD No. 43, DENIES the motion as to RPD Nos. 32 and 43 and GRANTS the motion as to the remaining requests at issue.

I. MS. WU'S MOTION FOR LEAVE TO AMEND

Ms. Wu seeks leave to file the Fourth Amended Complaint ("4AC"), which she maintains will not result in any "substantial change in the issues already before the Court." She explains that the subject of amendment is the alleged secret "Management Action" carried out by the defendants in 2021 that is addressed in the amendment resulting in Ms. Gandhi's Third Amended Complaint.

A. Legal Standard

Section 473, subdivision (a)(1) of the Code of Civil Procedure states in pertinent part: "[t]he court may ... , in its discretion after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars ...." (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760 (*Atkinson*).) In considering a motion for leave to amend, "courts are bound to apply a policy of great liberality in permitting amendments … at any stage of the proceedings, up to and including trial." (*Id.* at p. 761.) "[I]t is a rare case" in which a court will be justified in denying a party leave to amend his pleadings. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

However, the policy of liberality in permitting amendments should be applied only where no prejudice is shown to the adverse party. (*Atkinson, supra*, 109 Cal.App.4th at p. 761.) Where an amendment would require substantial delay in the trial date and substantial additional discovery; would change not only the specific facts and causes of action pled, but the tenor and complexity of the complaint as a whole; and where no reason for the delay in seeking leave to amend is given, refusal of leave to amend is not an abuse of

discretion. (See *Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 486–488 (*Magpali*) [affirming denial of request to amend made during trial].)

A party requesting leave to amend must include a copy of the proposed amended pleading with their noticed motion, as well as a supporting declaration which sets forth: (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier. (Cal. Rules of Court, rule 3.1324 (a) and (b).)

B. Discussion

With the 4AC, Ms. Wu seeks to add allegations concerning a purported scheme by defendants to retroactively nullify her membership in CSC Upshot Ventures Management GP, LLC ("UpShot GP"), in order to deny her vested carried interest compensation on investments managed by that entity. Specifically, in the proposed 4AC, Ms. Wu alleges that in order to effectuate this scheme, defendants obtained the cooperation UpShot Manager Huoy-Ming Yeh, who signature was necessary to effectuate a "Management Action" of the type needed to divest Ms. Wu of her rights, through extortion by making baseless threats of wrongdoing against her and threatening to sue her on that basis.

As Ms. Wu notes, in April 2023, Ms. Gandhi sought leave to file a third amended complaint adding allegations that are essentially identical to those that Ms. Wu seeks leave to add now. Ms. Wu asserts, as Ms. Gandhi did in her motion, that she has not sought leave prior to this point in time to add the subject allegations because the scheme was concealed from her by Hone Capital (and others) due to its improper designation of relevant documents as "Attorneys' Eyes Only" to prevent her from accessing them. Hone Capital opposed Ms. Gandhi's motion on the ground that it would suffer prejudice if amendment were permitted at this stage of the proceedings. The Court rejected Hone Capital's argument, concluding that the type of unwarranted delay or prejudice necessary to justify Ms. Gandhi's motion.

Here, none of the defendants oppose Ms. Wu's motion, and thus impliedly concede that they will not suffer any prejudice if leave to amend is granted. Trial is over a year away, and it is not otherwise apparent to the Court that there is any valid basis to justify denial of Ms. Wu's motion. Consequently, the motion is GRANTED.

II. THE NBD DEFENDANTS' MOTION TO COMPEL FURTHER RESPONSES AND PRODUCTION

The NBD Defendants move to compel further responses and production to RPD, Set One, Nos. 1-13, 15-20, 26-30, 32, 33, 35-38, 43 and 46-50, request that Hone Capital produce a privilege log to the extent that any responsive items are withheld on the ground of privilege, and request that the Court conclude that Hone Capital has knowingly waived the attorney-client privilege as to any documents which are responsive but have not been listed in a privilege log.[1]

A. Legal Standard

[1] The Court declines to make such an expansive ruling based solely on what is currently before it.

A party propounding a request for production may move for an order compelling a further response if it deems that a statement of compliance is incomplete, a representation of inability to comply is inadequate, or an objection is without merit. (Code Civ. Proc., § 2031.310, subd. (a).) The motion must set forth "specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Proc., § 2031.310, subd. (b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) Good cause is established simply by a fact-specific showing of relevance. (*Id.* at 98.) If good cause is shown, the burden shifts to the responding party to justify any objections. (*Ibid*.)

B. Discovery Dispute

The discovery at issue was originally propounded to Hone Capital on January 21, 2022, and Hone Capital served its initial responses on April 8, 2022. Approximately five weeks later, counsel for the NBD Defendants sent a meet and confer letter to opposing counsel that addressed a variety of issues, including Hone Capital's responses to various RPDs, which the NBD Defendants believed to be insufficient. With few exceptions, Hone Capital stood by its objections, asserted it was reviewing and compiling responsive documents, and stated its intention to serve only one document production and, depending on the parties' meet and confer efforts, one amended discovery response contemporaneously. Ultimately, the Amended Responses were not provided until over 11 months later, and Hone completed its *tenth* piecemeal document production in December 2023.

Hone's counsel wrote a further meet and confer letter on June 20, 2022 which, among other things, documented an agreement between the parties by which the NBD Defendants agreed to narrow certain requests and agreed to waive the requirement that the documents identify which request they were responsive to, in order to facilitate a consolidated response from Plaintiff. A further round of meet and confer efforts followed, with counsel for NBD attempting to further respond to Plaintiff's objections, and pointing out Plaintiff's failure to include the required statutory language mandated by Code of Civil Procedure section 2031.220 in certain responses. Hone's counsel responded that the amended responses to specified requests (Nos. 34-38) *would* include the aforementioned language, but when the Amended Responses were served, this proved not to be the case.

On May 15, 2023, Plaintiff served Amended Responses to the NBD Defendants RPD, Set One. Believing the amended responses and accompanying partial production of documents to be deficient, the NBD Defendants' counsel sent an email to opposing counsel citing the absent statutory language, explaining why certain responses were insufficient (responses that expressed Hone's belief that the communications requested in Nos. 43 and 49 should be obtained from the individuals involved in those communications, and not Hone) and asking for confirmation that the documents produced with the Amended Responses would be the extent of Hone's production. Hone indicated that no amended responses containing the statutory language would be provided, and again insisted documents responsive to Nos. 43 and 49 could be obtained by contacting the individuals' counsel.

On June 15, 2023, the NDB Defendants' counsel sent a letter attempting to clarify and understand Hone's position, including whether its production of documents had been completed. Counsel believed that when Hone referred to having made several different productions of responsive documents, it was not referring to the "small" production responsive

to RPD, Set One, but rather its production in responses to RPDs from *other* defendants. Counsel stated his client's expectation that Hone's production to it would be completed "no later than June 30, 2023." Counsel for Hone responded, identifying new objections and confirming that the NBD Defendants would have 30 days to move to compel "after service of Hone Capital's amended responses and completed document production."

The NBD Defendants continued to push Hone to complete its production, but claim they met with little success. The parties engaged in an informal discovery conference ("IDC") on November 9, 2023, in order to reach an agreement as to Hone finalizing its production of documents. Based on agreement of the parties, it was ordered during the IDC that Hone complete its production by December 8, 2023. Additional documents were produced by the deadline, and the following Monday, Hone's counsel stated: "Hone Capital's document production in response to request for production set 1 is now complete. No privilege log was produced."

C. Discussion

According to the allegations of the operative Sixth Amended Complaint ("6AC"), from July 2018 to August 2020, Ms. Terheggen and her firm, NDB, were corporate counsel for Hone Capital and its affiliates, including CSC Group. The claims being asserted against the NBD Defendants arise out of work performed by them between July 30, 2018, when NBD was retained to provide counsel and advice to Hone, and related entities of Hone, until August 14, 2020, when NBD terminated the representation. Hone alleges that the NBD Defendants "shepherded a series of self-dealing deals for" Ms. Wu and Ms. Gandhi, to Hone's detriment, while owing fiduciary duties to Hone and the CSC Group.

After the termination, Hone demanded that NBD produce all documents constituting "client file(s)" pursuant to Rule of Professional Conduct 1.16. NBD was unable to produce or rely on many of these documents to assist in its defense because they contain attorney-client communications with employees of Hone or its sister entities.

According to the NBD Defendants, Hone has produced a total of 35,434 pages of documents through its multiple partial productions, of which just 5,828 pages were produced between the time that RPD, Set One, was served on January 21, 2022 and October 27, 2023. The final production on December 8, 2023, encompassed 20,329 pages, and a significant percentage of this production, NBD explains, consisted of documents that it produced to Hone in November 2021 after it demanded the production of client files.

The thrust of the NBD Defendants' motion is: (1) Plaintiff's responses are non-compliant because they fail to state whether responsive documents will be produced or improperly defer responsibility for producing documents which are indisputable in Hone's "possession, custody or control"; (2) Hone failed to actually produce the documents that its written responses stated it would; and (3) Plaintiff failed to produce a privilege log despite conceding that it is withholding documents on the basis of privilege.

In its opposition, Hone maintains that the instant motion is "improper and a waste of judicial resources" for the following reasons: NBD has not met and conferred on all of the RPD that it seeks to compel further responses to; many of the RPD at issue are impermissible overbroad, irrelevant, or seek documents that are not within Hone's possession, custody or

control; and if the NBD Defendants know what responsive documents are missing from Hone's production, which they claim to given their allegations that Hone is withholding documents, NBD should be able to identify them to allow Hone to search and review those items and produce them if they are responsive and not privileged or, if they are, produce a privilege log.

1. *Sufficiency of Meet and Confer Efforts*

As an initial matter, Hone asserts in its opposition that the NBD Defendants have failed to satisfy their meet and confer obligations as to RPD Nos. 3-8, 10-13, 15-19, 26-29, 33 and 46-48. A motion to compel further responses to a demand for inspection "shall be accompanied by a meet and confer declaration" (Code Civ. Proc., § 2031.310, subd. (b)(2)) that "state[s] facts showing a reasonable and good faith attempt at an informal resolution of *each* issue presented by the motion" (Code Civ. Proc., § 2016.040, emphasis added.). Hone maintains that the NBD Defendants have failed to proffer evidence that the parties have met and conferred on the *specific* deficiencies raised with respect to the foregoing requests, outside of statements by their counsel as to the timing of Hone's production of responsive documents. (See Opp. at 3:2-6, citing Declaration of Bruce D. MacLeod in Support of Motion to Compel, Exhibit D ["Indeed, the Response indicated that Hone has agreed to produce documents responsive to [Request Nos. 3-8, 10-13, 15-19, 26-29, 33 and 46-48]. Please confirm a date certain by which documents responsive to [this] Request will be produced."].) As such, Plaintiff asserts, the Court should deny the motion as to these requests.

In their reply, the NBD Defendant insists that they have adequately met and conferred over the requests at issue, directing the Court to the numerous meet and confer correspondence exchanged between their counsel and Hone's former counsel, as well as various phone calls and several IDCs that were only minimally documented. The NBD Defendants emphasize that the entire reason behind the November 2023 IDC was Plaintiff's failure to have produced responsive documents in line with its responses stating that it would do so. The scope of their motion relative to these requests, the NBD Defendants continue, is simply to compel Plaintiff's "long-promised" production or confirm that no additional responsive documents exist.

The Court believes that the NBD Defendants have demonstrated that they have satisfied their statutory meet and confer obligations given the various correspondence exchanged and the IDCs engaged in over the last two years. While the Court recognizes that Plaintiff's new counsel only substituted into this case recently (March), and that they may be more amendable than prior counsel with regards to informally resolving the parties' outstanding issues concerning RPD, Set One, it is also cognizant of the fact that this set of discovery has been a contested issue for nearly *two-and-a-half* years. At this point in the proceedings, the Court believes that the most prudent thing to do would be to rule on the NBD Defendants' motion in its entirety so that the dispute (at least concerning RPD, Set One) can be finally resolved.

1. *RPD Nos. 1 and 48*

These requests seek all documents: constituting, containing or referring to the document identified in paragraph 2 of the Complaint which Hone contends assigned any and all interests in the claims asserted in the Complaint from CSC Group to Hone; and concerning or describing the relationship between Hone and CSC Group (No. 48).

In its amended response to RPD No. 1, Hone asserts various objections (vagueness and ambiguity, seeks information protected by the attorney-client privilege and attorney work product doctrine, implicates third-party privacy rights, seeks confidential and proprietary business information, unduly burdensome and oppressive because no time period is specified, assumes facts not in evidence, disjunctive) and then states, subject to the objections, "[a]fter a diligent search and reasonable inquiry, Responding Party is unable to comply with this request as the requested documents have never existed." This departs from Hone's initial response to this request where, subject to the same objections, Hone responded "Responding Party is conducting a diligent search and reasonable inquiry and will produce non-privileged documents in its possession, custody or control, if any are located pursuant to the terms of the Stipulated Protective Order." Hone's response to RPD No. 48 is similar.

The NBD Defendants challenge the veracity of Hone's responses to these requests based on prior representations made to the Court. In this action, Hone claims that CSC Group is a "de-facto co-plaintiff" (6AC at 1:12-16) and that CSC Group "assigned all of its rights and interest to Hone." In response to special interrogatories propounded by Ms. Wu, when asked to provide a copy of the assignment, Hone responded "No document exists. It was an inter-company oral arrangement." At the August 24, 2023 hearing for the NBD Defendants' motion for a protective order, Hone's counsel told the Court that the assignments are "oral." However, when pressed further by the Court, counsel affirmed that while there was no written assignment, there were internal memos and emails concerning it. Then, at the September 2024 deposition of Chenxi Xie, Hone's witness, Ms. Xie indicated that the assignments were in fact *written*. Following the deposition, Hone produced an undated Claim Assignment Agreement (Bates #5797-5799) and four written consents (Bates #5800-5828) providing authorizations for certain of the parties (but not all of the parties) to enter into the undated Claim Assignment Agreement. To date, Hone has not produced any of the memos or emails regarding the assignment that were referenced by counsel to the Court. As such, the NBD Defendants urge, Hone should be compelled to produce such items and, to the extent any are withheld on the grounds of privilege, a privilege log.

The Court agrees. Hone represented to this Court (via its counsel) that there were "internal emails and memos" concerning the assignment, yet none have been produced. Considering this purported assignment forms the entire basis of Hone's standing to bring this action, the aforementioned materials are undoubtedly critical to this case and the NBD Defendants are entitled to them, unless they are protected from production by a claim of privilege. If this is the case, a privilege log which provides sufficient detail to allow a determination of whether each withheld item is or is not privileged *must* be provided. (Code Civ. Proc., § 2031.240, subd. (a); *Hernandez v. Super. Ct.* (2003) 112 Cal.App.4th 285, 291-292.) Further, the only documents produced concerning the relationship between CSC Group and Hone are structure charts, but given Hone's allegations regarding its role in managing assets for CSC Group, there is some merit to the NBD Defendants' contention that not all responsive documents have been produced. Hone either must produce these items or revise its response to affirm that no such documents exist. Therefore, further production to RPD Nos. 1 and 48 is warranted,

2. *RPD Nos. 2-13, 15-19, 26-30, 33, 46, 47 and 50*

With these requests, the NBD Defendants seek all documents: discussing, demonstrating or relating to Hone's ownership of or financial interest any other entities

identified in the Complaint (No. 2) in HC Investments, LLC (Nos. 3), Hone Capital, GP, LLC (No. 4), KTHL SMA, L.P. (No. 5), KTHL SMA GP, LLC (No. 6), Horton Holdings, LP (No. 7), Koolearn Technology Holding Limited (aka New Orient Online) (No. 8), SFR Fund (aka Single-Family Residences fund) (No. 9), Stripe, Inc. (No. 10), CSC Stripe Holdco, LLC (No. 11)[2], CSC Upshot Ventures I, L.P. (No. 12), Whitehorse Liquidity Partners I, LP (No. 13); evidencing or supporting the allegation that NBD concealed material facts (No. 15), made any false statement of fact in any communications with Hone (No. 16), knew that anything contained in any communications between NBD and Hone were false or incorrect (No. 17), made misrepresentations (No. 18), engaged in self-dealing (No. 19); concerning any claim by Hone that NBD intentionally acted against its interests (No. 26), acted against the interest of CSC Group (No. 27), violated any fiduciary duty owed to Plaintiff (No. 28), damage Hone claims it suffered as a result of NBD actions or inactions (No. 29), engaged in any "self-dealing" that caused damage to Hone (No. 33), to income generated by Hone, including income generated by the "SV Team"[3] (No. 50); sufficient to show an itemized calculation of any and all damages that Hone contends were proximately caused by NBD's conduct (No. 30); related in any way to the events described in the Complaint (No. 46); and that evidence, support or undermine the allegations of the Complaint (No. 47).

In its responses to these requests, Hone asserts numerous objections[4] and then responds, subject to the objections, "pursuant to the terms of the Stipulated Protective Order, Responding Party will produce all non-privileged documents in Responding Party's possession, custody or control." In the instant motion, the NBD Defendants maintain that Hone has not produced all responsive documents that it stated it would in its responses, and urges that Hone should either be compelled to produce these items or, to the extent that none exist, provided amended responses to that effect. The NBD Defendants explain that the documents produced by Hone reveal the "deficiencies" of their production because, with very limited exceptions, these documents do not discuss, demonstrate or relate to *Hone's* ownership or financial interest in entities whose transactions are the subject of this litigation and these requests. Plaintiff's lack of ownership or financial interest, they continue, is relevant to its claim to have standing in this action as well as its claim for damages. The NBD Defendants continue that while Plaintiff has produced portions of email strings and a cooperation agreement, the emails were produced out of context, with the full chain not provided, and if the full chain was not provided due to privilege, no privilege log has been produced.

The NBD Defendants additionally argue that it is clear that items are being withheld on the basis of privilege, and in support of this contention, they cite to communications exchanged

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[2] The NBD Defendants state that they will withdraw their request for Plaintiff to amend its response to RPD No. 11 if it can confirm that no other responsive documents exist.

[3] The Court does not find meritorious Plaintiff's objection that this request is overbroad is vague and ambiguous and overbroad given the NBD Defendants' representations that the meaning of this request was clarified in prior meet and confer efforts with Plaintiff's former counsel.

[4] These include the following: vague and ambiguous, seek information protected by the attorney-client privilege and attorney work product protection, third-party privacy rights (financial and taxpayer privilege), unduly burdensome and oppressive, seeks confidential or proprietary business information, overbroad and unduly burdensome because no time period is specified, assumes facts no in evidence, is disjunctive, requested materials are already in the possession, custody or control of the propounding party, duplicative.

with Hone's former counsel in which Hone "clawed back" specified documents because they were "inadvertently produced with privileged attorney-client communications." It continues that Hone is withholding additional responsive items that the NBD Defendants are aware exist but they are not permitted to produce themselves due to the Court's prior order, the Rules of Professional Conduct, and the Business and Professions Code, yet no privilege log has been produced identifying any of these documents.

With respect to several of the subject requests, Hone responds that it has produced all responsive documents, that such items are in the possession of other parties or, if it is the NBD Defendants' contention that certain documents are missing, they can identify and ask for those specific items. But as the NBD Defendants respond, it is *Hone's* burden to search its own records, and not the NBD Defendants' to identify particular documents, especially when Hone is being asked to produce evidence which supports its allegations against the NBD Defendants in this action, and to the extent it either has not or has not located responsive documents upon performing such a search, it must amend its responses to clarify as much. Consequently, the Court finds that further production and/or responses to these requests are warranted.

3. *RPD Nos. 20, 35-38*

These requests seek all documents: concerning any communications between Hone and NBD (No. 20), Qi Su and NBD (No. 35), NBD and Chenxi Xie (No. 36), NBD and Li Li (No. 37) and NBD and Xiangshuang Shan (No. 38).

In its responses to these requests, Hone responds solely with objections, including that the requests: are vague and ambiguous, seek information protected by the attorney-client privilege and work product protection, implicate third-party privacy rights (financial and taxpayer privilege), are unduly burdensome and oppressive, seek confidential or proprietary business information, are overbroad and unduly burdensome because no time period is specified, seek materials that are already in the possession, custody or control of the propounding party or are equally available to them through other sources.

The NBD Defendants assert that further responses to these requests are warranted because Hone only stated objections but did not indicate whether it would produce any responsive documents in its possession, custody and control, and to the extent it intends to stand on the objections, no privilege log has been produced. In opposition, Hone stands by its objection that these requests are overbroad as to time, but states that it will agree to produce responsive, non-privileged documents in its possession, custody or control to the extent that the parties can agree on a narrowed scope.

Code of Civil Procedure section 2031.210, subdivision (a), provides that a party responding to a requests for production must respond separately to each item in the demand by one of the following: (1) "[a] statement that the party will comply with the demand for inspection by the date set for inspection"; (2) "[a] representation that the party lacks the ability to comply with the demand for inspection of a particular item or category of item"; or (3) "[a]n objection to the particular demand." Thus, the responses to these requests are not non-compliant merely by failing to indicate whether responsive items will be produced, as the NBD Defendants suggest. However, the burden rests with Hone to justify its objections, and the only one it attempts to justify is overbreadth. Accordingly, the remaining objections, excluding privilege, are overruled.

As for the overbreadth objection itself, in their reply, the NBD Defendants state their willingness to stipulate that for RPD No. 20, only communications related to the actions waged against them in the Complaint need be produced. The Court believes that this represents an appropriate limitation on the scope of this request. As for RPD Nos. 35-38, beyond again asserting that the requests are overbroad as to time, Hone does not substantiate the objection with any significant explanation, and even if it did, the Court does not find the objection meritorious. As the NBD Defendants explain, a narrower scope does not appear to be necessary given how limited their interactions were with these individuals and Plaintiff's allegations that they were eyewitnesses to the alleged misconduct.

Therefore, the Court finds that further responses to these requests, without objection, except for those based on privilege, and accompanying production is warranted. If any responsive items are withheld due to privilege, Hone *must* produce a privilege log which provides sufficient detail to allow a determination of whether each withheld item is or is not privileged. (Code Civ. Proc., § 2031.240, subd. (a); *Hernandez v. Super. Ct.* (2003) 112 Cal.App.4th 285, 291-292.)

4. *RPD Nos. 32, 43 and 49*

These requests seek all documents concerning: communications between Qi Su and any individuals related to Wealth Industrials, Ltd. (No. 32), Xianghsuang Shan and Purvi Gandhi related in any way to the events described in the Complaint (No. 43); the ownership of Wealth Industrials Limited (No. 49). Plaintiff states that it is willing to provide documents responsive to this request and a privilege log to the extent that it withholds any items on the basis of privilege. As such, the Court need not compel a further response or production.

Hone responds No. 32 solely with objections (vague and ambiguous, seek information protected by the attorney-client privilege and attorney work product protection, third-party privacy rights (financial and taxpayer privilege), unduly burdensome and oppressive, seeks confidential or proprietary business information, overbroad and unduly burdensome because no time period is specified, assumes facts no in evidence, is disjunctive, requested materials are already in the possession, custody or control of the propounding party, duplicative, lack of relevance). In its amended response to No. 49, Plaintiff asserts similar objections, and then states "[a]fter a diligent search and reasonable inquiry, Responding Party is unable to comply with this request because the requested documents have never been in Responding Party's possession, custody, or control. Responding Party believes that such documents may be in the possession, custody, or control of Paul Su who can be contacted through his counsel."

The NBD Defendants assert that Hone should be compelled to produce responsive items because Qi Su was an officer of CSC Group and at relevant times, members of Hone's board of managers, and facts pertaining to Wealth Industrials Limited relate to the MOU allegations in the Complaint. Hone should be compelled to get the requested items from Qi Su, NBD argue, or alternatively, Hone should be compelled to revise their responses that no such documents exist.

The Court is not persuaded, merely because Qi Su was an officer of CSC Group and part of Hone's board of managers, that Hone has control over communications between Qi Su and Wealth Industrials Limited, an entity that is apparently (NBD has not shown otherwise)

separate and distinct from Hone, CSC Group and other related entities. As such, the Court will not order further responses to these requests.

III. CONCLUSION

The NBD Defendants' motion to compel is MOOT as to RPD No. 43, DENIED as to RPD Nos. 32 and 43, and otherwise GRANTED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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