SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Northwest District, Van Nuys Courthouse East, Department A

20VECV01406 August 16, 2023
FRANCINE SHULMAN, et al. vs TODD KAPLAN, et al. 8:30 AM

Judge: Honorable Huey P. Cotton
Judicial Assistant: R. Redmond
Courtroom Assistant: A. Ataryan

CSR: Howard Torch
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Cheryl Ann Cauley Via LaCourtConnect; Sterling Marchand Via LaCourtConnect

For Defendant(s): Julio Soto-Kim & Melissa Grace Fulgencio Via LaCourtConnect

Other Appearance Notes: Smoke Wallin (defendant)/Via LaCourtConnect

NATURE OF PROCEEDINGS: Trial Setting Conference; Hearing on Motion for Summary Judgment (13 motions in one); Hearing on Motion for Summary Judgment (pltf); Hearing on Motion for Leave to Amend Motion for Leave to File Second Amended Cross-Complaint

Pursuant to Government Code sections 68086, 70044, California Rules of Court, rule 2.956, and the stipulation of appearing parties, Howard Torch, CSR 11248, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The matter is called for hearing.

The Court has read and considered the moving papers, opposition, reply and supporting documents.

All counsel and self represented parties are in receipt of the Court's tentative ruling.

The matter is argued.

The Court adopts its tentative ruling on the Motion for Summary Judgment filed by Defendants.

The Court amends its tentative ruling on the Motion for Summary Judgment filed by Plaintiff as to the Cross Complaint to deny Summary judgment and grant Summary Adjudication as to the Third, fourth and sixth cause of action.

The Court adopts its tentative ruling on the Motion for Leave and includes that the third cause of action may not be added to the amended cross complaint.

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Judge: Honorable Huey P. Cotton
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ERM: None
Deputy Sheriff: None

The Motion for Summary Adjudication filed by Medical Investor Holdings LLC dba Vertical Companies, Todd Kaplan on 03/13/2023 is Granted in Part.

The Motion for Summary Judgment filed by FRANCINE SHULMAN, INDIVIDUALLY AND AS TRUSTEE OF THE SHULMAN FAMILY TRUST DATED DECEMBER 24, 2001 on 03/13/2023 is Granted in Part.

The Motion for Leave to Amend Motion for Leave to File Second Amended Cross-Complaint filed by NCAMBA9, INC, Todd Kaplan, Medical Investor Holdings LLC dba Vertical Companies, IRON ANGEL II, LLC on 05/17/2023 is Granted.

MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION ON PLAINTIFFS' COMPLAINT; CROSS MOTION FOR SUMMARY JUDGMENT MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION ON CROSS COMPLAINT; AND MOTION FOR LEAVE TO FILE A SECOND AMENDED CROSS COMPLAINT

Date of Hearing: June 27, 2023 c/t 8 16 23 Trial Date: January 29, 2024
Department: A Case No.: 20VECV01406

1) MSJ to FAC
Moving Parties: Defendants Todd Kaplan, Medical Investor Holdings LLC dba Vertical Companies; Vertical Wellness, Inc.; Charles Houghton; Mathew Kaplan; Drew Milburn; Courtney Dorne; Smoke Wallin; Robert Scott Kaplan Aka Robert Scott; Elyse Kaplan; Jeff Silver; Iron Angel II, LLC; Ncamba9, Inc. (Collectively "Defendants" unless specified individually)
Responding Parties: Plaintiffs Francine Shulman, individually and as Trustee of the Shulman Family Trust dated December 24, 2001, Iron Angel, LLC, 3F, Inc., and Emerald Sky, LLC (collectively, "Plaintiffs")

2) Smoke Wallin filed an individual reply which the court opted to treat as a cross motion for summary judgment.

3) MSJ TO FAXC
Moving Party: Cross Defendants Francine Shulman, individually and as Trustee of the Shulman Family Trust dated December 24, 2001, Iron Angel, LLC, 3F, Inc., and Emerald Sky, LLC (collectively cross defendants))

Responding Party: Cross-Complainants NCAMBA 9, Inc., Iron Angel II, LLC, Medical Investor Holdings, LLC dba Vertical Companies ("MIH" or "Vertical"), and Todd Kaplan

4) MTA – SAXC
Moving Party: Cross-Complainants NCAMBA 9, Inc., Iron Angel II, LLC, Medical Investor Holdings, LLC dba Vertical Companies ("MIH" or "Vertical"), and Todd Kaplan
Responding Party: Cross Defendants Francine Shulman, individually and as Trustee of the Shulman Family Trust dated December 24, 2001, Iron Angel, LLC, 3F, Inc., and Emerald Sky, LLC (collectively cross defendants)

[TENTATIVE] RULING:
1) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS DENIED. MOTION FOR SUMMARY ADJUDICATION IS GRANTED ONLY AS TO THE MALICIOUS PROSECUTION CAUSE OF ACTION.

2) SMOKE WALLIN'S MOTION FOR SUMMARY JUDGMENT IS DENIED WITHOUT PREJUDICE.

3) CROSS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS DENIED. MOTION FOR SUMMARY ADJUDICATION AS TO THE FOURTH AND SIXTH CAUSES OF ACTION IS GRANTED.

4) MOTION FOR LEAVE TO FILE SECOND AMENDED CROSS COMPLAINT IS GRANTED.

BACKGROUND

Plaintiffs allege that defendants defrauded Ms. Shulman out of her interest in a marijuana cultivation operation. Plaintiffs leased certain property, Iron Angel, for the purpose of medical cannabis cultivation. Shulman later purchased the property. She grew marijuana and other crops. After marijuana became legal for recreational use in California, plaintiff decided to expand her business by leasing adjoining land to expand available growing space. She leased a property known as Sisters and another property called Wellsprings. She was in negotiations to purchase Wellsprings from her neighbors and old friends.

Plaintiffs entered an agreement with defendants based on their representations of experience and success in the cannabis industry. Plaintiffs allege that defendants also misrepresented that they had financial backing and misled her regarding marketing and branding her product. Once the

agreement was made, defendants misrepresented to the general public their interest and involvement with plaintiff's property and business. Defendants attempted to steal her interest in the Wellspring property. Defendants allegedly replaced plaintiff with themselves on regulatory licenses.

According to plaintiffs, in January 2018 plaintiff Shulman and other owners of the Iron Angel property, signed a lease which they were told was a formality. Defendants used the lease to breach the earlier agreement.

Plaintiffs allege defendants failed to pay operating expenses as promised and failed to give plaintiffs their share of the profit from the crops.

As mentioned above, there are three properties involved in this matter. Iron Angel, owned by Schulman and others was purchased from the Luglis and was used for medical marijuana growing before the parties began their transaction. Sisters was a nearby property owned by a religious order and leased to plaintiffs for a grow site. According to the parties, Sisters was smaller than Iron Angel but had more cultivatable land. The grow operation eventually had to be abandoned at Sisters due to some citations by the California Dept of Fish and Wildlife. The final property is known as Wellspring. Wellspring was adjacent Iron Angel and owned by the Luglis. Schulman and Luglis had some sort of tentative agreement for plaintiff to purchase the Wellspring property, an agreement that went through several modifications during the events in the case. At some point, the parties were leasing Wellsprings for their grow operation, but the purchase was never completed. Sometimes the three properties are referred to collectively as Santa Rita.

Plaintiffs filed their complaint on November 30, 2020. Plaintiffs filed the first amended complaint on April 6, 2021, alleging:

1. Intentional Misrepresentation
2. Concealment
3. Negligent Misrepresentation
4. Breach of Contract
5. Breach of Implied Covenant of Good Faith and Fair Dealing
6. Violation of B&P § 17200
7. Violation of B&P § 17500
8. Common Law Unfair Competition
9. Intentional Interference with Contractual Relations
10. Intentional Interference with Prospective Economic Advantage

11. Intentional Infliction of Emotional Distress
12. Elder Financial Abuse
13. Breach of Fiduciary Duty
14. Malicious Prosecution
15. Rescission
16. Constructive Trust

Defendants filed a cross complaint on July 14, 2021. Defendants filed a first amended cross complaint on November 9, 2021, alleging:

1. Breach of Contract
2. Breach of Covenant of Good Faith and Fair Dealing
3. Breach of Contact
4. Tortious Interference with Contractual Relations
5. Intentional Interference with Contractual Relationship
6. Intentional Interference with Contractual Relations
7. Tortious Interference with Contractual Relations
8. Conversion
9. Fraud

By way of the cross complaint, cross complainants allege that they spent millions of dollars to get the cannabis business operating. They allege cross defendants or their employees concealed issues with the properties, that resulted in obstacles to obtaining cultivation licenses. Cross complainants allege cross defendants improperly locked them out of the properties, seized control of the crops and sold the crops without giving cross complainants their share. The cross defendants were also unhappy with the deal struck for the purchase of the Wellspring property and caused the Luglis to back out of the deal.

Defendants have filed a joint motion for summary judgment or adjudication as to plaintiffs' complaint.

Cross defendants move for summary judgment or adjudication on the cross complaint.

Cross complainants move to file a Second Amended Cross Complaint

DISCUSSION

Judge: Honorable Huey P. Cotton
Judicial Assistant: R. Redmond
Courtroom Assistant: A. Ataryan

CSR: Howard Torch
ERM: None
Deputy Sheriff: None

MSJ/MSA TO COMPLAINT

At the outset, the court notes that defendants submit a brief that is very difficult to analyze. Defendants set forth a long, convoluted story detailing Todd Kaplan's business victories and acumen, MIH's origin story including the alleged credentials and experience of its management, how they all met, who introduced who to whom, Kaplan's disclosure of previous criminal convictions, how the relationship began with plaintiffs, the two original properties, the attempt to purchase Wellspring, the loss of the Sisters property and the termination of the cultivation contract. One of the reasons the brief is difficult to analyze is because defendants essentially make no references to these specific facts or identify which facts and evidence on the separate statement of material facts support which cause of action or issue. The defendants make a show of compliance with CRC Rule 3.1350(d) in their nearly 1700-page Separate Statement of Undisputed Material Facts but that Separate statement is of no value because for each issue and cause of action defendants repeat the same 150 facts. The defendants' legal discussion is devoid of real analysis. In most cases defendants cite the rule and then make some generalized conclusory statements in support of their position without reference to specific facts or evidence. There is little to no discussion regarding how the evidence demonstrates plaintiff cannot establish an element of her cause of action or that a complete defense exists to the cause of action. There is very little effort to apply the law to the evidence submitted in support of the motion. In fact, in their entire 50 page brief there is not a single citation to the Separate Statement. With such lengthy briefing the defendants would have helped the court a great deal if they had made the effort to directly connect which evidence supports their argument as to which cause of action or issue. Instead for every fact defendant asserts the court was required to comb through the 150 facts asserted in the separate statement and attempt to match up an Undisputed Material Fact with a factual assertion made in the points and authorities. This is an unnecessarily laborious task and profound waste of court time and resources.

The Separate Statement that was filed (and never referenced once in the points and authorities) failed to even address the relevant allegations of the complaint as it should have done. See Teselle v. McLoughlin (2009) 173 Cal.App.4th 156, 160.

The court must assume that each of the same 150 facts that purportedly support each of the 28 issues are material since defendants fail to discuss the evidence as it relates to each issue. Of the 105 facts supporting each issue, plaintiffs dispute Nos. 1, 4, 5, 10, 13, 16, 17, 18, 21, 25, 26, 28, 32, 33, 34, 36, 37, 39, 42, 44, 45, 46, 47, 48, 51, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 68-95, 97-110, 112-150. It is clear to the court just from a review of the separate statements and responses thereto, there are triable issues of material fact.

Further, even though defendants represented to the court that consolidating 13 motions in one was appropriate because all the defendants would make the same arguments and focus on the same issues, defendant Smokey Wallins individual submitted a 20 page reply briefing his individual arguments which led to plaintiff's individual briefing replying to the Wallins briefing to which reply Wallin's sur-replied, and defendant Medical Investors et al. chimed in with a briefing on its own on the points made by Wallin. Plaintiff then filed a separate motion asking the court to disregard Medical Investor et al's briefing.

Economic Loss Rule

Defendants argue that the Economic loss rule ELR bars all of plaintiffs' claims except for breach of contract and rescission.

There is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage." Sheen v. Wells Fargo Bank, N.A. (2022) 12 Cal. 5th 905, 922. The economic loss rule bars tort claims that merely restate contractual obligations. See Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal. 4th 979, 988, (the economic loss rule prevent[s] the law of contract and the law of tort from dissolving one into the other)

The rule applies to bar negligence claims for economic losses in deference to a contract between the parties. Sheen, at 922. The rule doesn't apply to claims of fraudulent inducement. Dhital v. Nissan No. America, Inc. (2022) 84 Cal. App. 5th 828, 840-841(court declines to apply economic loss rule at the demurrer stage, where plaintiffs allege that defendant intentionally concealed facts about the car's defective transmission, which fraudulently induced them to purchase the car); Robinson Helicopter Co., Inc. v. Dana Corp., supra, 34 Cal. 4th at 989. "But such claims are barred when they arise from—or are not independent of—the parties' underlying contracts." Sheen, 12 Cal. 5th at 924 (plaintiff-borrower's claim that mortgage lender owed a duty to process, review, and respond carefully and completely to borrower's loan modification application is barred by the economic loss rule where plaintiff's claim was "not independent of the original mortgage contract, not because his claim merely relates to the subject of that agreement, but because it is based on an asserted duty that is contrary to the rights and obligations clearly expressed in the loan contract"). Presently the question of whether concealment claims are exempt from the economic loss rule is under consideration by the California Supreme Court. See for Rattagan v. Uber Technologies, Inc. (9th Cir. 2021) 19 F.4th 1188, 1193; See also Dhital, supra at 842-843.

According to defendants, the alleged harms causing economic loss are based upon Defendants'

alleged failures to perform under contractual obligations, despite Plaintiffs' rephrasing liability under tort, statutory, or common-law theories. Defendants argue the harms are not independent of a breach of contracts themselves. Plaintiffs' theories, while creatively reworded as torts and statutory claims, remain claims for non-performance under the Cultivation Agreement, agreements with the Luglis or the other alleged amendments which are in actuality assertions of contractual rights not performed causing pure economic harm.

A concrete example defendants cite is "the ground lease between the owners of the Iron Angel property and Iron Angel II, LLC was alleged to have been obtained improperly, but the alleged inducement claim is premised on the provision for needing licensing in Section 7.14 of the Cultivation Agreement. Moreover, in excess of 100 licenses were obtained by Mr. Houghton and Ms. Kaplan." Defendants fail to point to the complaint to show which cause of action is grounded on this inducement to enter the lease. Defendants offer no analysis discussing how the economic loss rule applies to claims against defendants with whom plaintiff has no contract. Plaintiffs' complaint alleges contract claims against only four defendants - Todd Kaplan, NCAMBA9, Iron Angel II, and Vertical (MIH).

Plaintiff's fraud claims against contracting defendants involve misrepresentations and concealments made to induce the contract, which are exempt from the economic loss rule under the foregoing authorities. For example, Todd Kaplan is alleged to have represented he was innocent of criminal charges, misrepresented his experience with the cannabis industry, and misrepresented the health and funding of Vertical. These representations were not contractual promises but rather concealments and representations made to induce the contract.

Defendant raises the intentional infliction of emotional distress claim as another example of a claim based on disappointed contractual expectations. However, in that cause of action, plaintiff describes stalking, an incident on the freeway between defendants and plaintiff, name calling, etc. It is true that certain facts supporting the claim may be related to or arise from frustrated contractual expectations, but the entire claim is not. Further, the cause of action is brought against defendants who are not parties to the agreement and the economic loss rule has no application.

Defendants have not met their burden on the economic loss argument.

Fraud

Defendants argue plaintiff cannot show scienter to support a fraud claim. Defendants argue they performed on their obligations and went over and above. Defendants argue plaintiff had

unrealistic expectations. Defendants further argue that predictions regarding future income are not actionable as fraud. Defendants argue plaintiffs have no evidence of reliance.

According to defendants, each individual Defendant completely or substantially performed on the promises made to the Plaintiffs going into and during the business relationship: 1. Mr. Kaplan put together a team of experienced people to start, develop, manage, and grow MIH; 2. Mr. Kaplan raised millions of dollars for MIH's business plans and managed the spending of millions of dollars on the business relationship with Plaintiffs as well as MIH's other ventures; 3. Mr. Wallin and Ms. Dorne put together promotions and branding for Plaintiffs, MIH's other products and partners; 4. Mr. Silver brought financial structure and accountability to Plaintiffs' already existing cannabis cultivation farm and to the business relationships as they rapidly developed between Plaintiffs and Defendants and MIH's other Ventures; 5. Mr. Houghton and Ms. Kaplan obtained licensing and provided guidance and legal documentation to further business relationships of Plaintiffs and MIH and MIH's other ventures; 6. Mat Kaplan resided on and provided on-site operational management for the 3 properties where Plaintiffs and Defendants operated; 7. Mr. Milburn provided oversight to MIH's operations as the COO including, but not limited to the operations pursued by Plaintiffs and MIH; 8. Robert Kaplan provided technology as CTO for all operations.

Notably defendants fail to tie these arguments or factual statements to any particular evidence or Undisputed Material Fact from their separate statement.

Plaintiff disputes the corresponding facts. For example, DUMF No. 10 states:

In order to participate in the economic opportunity offered by California's anticipated adult use recreational cannabis model, Mr. Kaplan began assembling a team of experts and other people experienced in the cannabis industry, as well as other areas of business to form an organization to operate in the legalized cannabis space.

Defendants reference Todd Kaplan's own declaration and deposition.

Plaintiff properly disputes this fact. In part, plaintiff responds:

Todd Kaplan did not assemble a "team of experts and other people experienced in the cannabis industry:" Smoke Wallin had no experience in cannabis prior to MIH. (Ex. 5, S. Wallin Aug. 31, 2022 Dep. Tr. at 35:5-19 ["I had zero experience in even knowing which flower would be good or not™]; id. at 39:9-24 ["I don't know anything about it."'].)

Courtney Dome had no experience in cannabis prior to MIH. (Ex. 6, C. Dorne Jul. 21, 2022 Dep. Tr. at 68:6-15.)

Jeff Silver had no experience in cannabis prior to MIH. (Ex. 7, J. Silver Nov. 7, 2022 Dep. Tr. at 23:4- 10 ["Q. And did you have any experience in cannabis before MIH? A. No."].)

Matt Kaplan had no experience in cannabis prior to IMIH. (Ex. 8, M. Kaplan Aug. 4, 2022 Dep. Tr. at 24:20-25:2.)

Elyse Kaplan had no experience in cannabis prior to IMIH. (Ex. 9, E. Kaplan Oct. 6, 2022 Dep. Tr. at 15:2- 16:9

Additionally, Mr. Wallin admitted that the cannabis industry was not similar to other industries, (Ex. S, S. Wallin Aug. 31, 2022 Dep. Tr. at 134:6-17 ["[N]Jobody knew exactly what to do"]; id. at 133:4- 134:5 [and that "it turned out to be a much steeper learning curve to make finished products and make hemp compliant" due to "problems manufacturing," 'everything that goes into getting a product ready to sell," and "a tremendous bottleneck in testing facilities.").)

See also response to DUMF No. 47 and 51.

Plaintiffs also dispute DUMF No. 13 which goes to work Wallin and Dorne did on branding. Plaintiffs dispute DUMF No. 32 which goes to the financial structure Mr. Silver allegedly brought to business. Plaintiff response to DUMF No. 32 notes that:

While Jeff Silver testified that he tried to "bring some semblance of order" to the financial aspects of the Santa Rita properties that he described as "very much out of control," he also testified that it never got to the place where I felt it wanted to be . . .. wanted to get everything done very properly . . .. So it was -- it was always a challenge." (Ex. 7, J. Silver Nov. 7, 2022 Dep. Tr. at 52:9-53:9.)

Additionally, Jeff Silver testified that Todd Kaplan made the decisions as to most of the financial issues related to MIH, including when a check would be disbursed, disbursements of monies from MIH's accounts, signing checks, and whether and when expenses would be reimbursed at the Santa Rita properties. (Ex. 7, J. Silver Nov. 7, 2022 Dep. Tr. at 28:21-25 ["Todd had final say on most -- most aspects of the business as it related to areas that I was involved in."]; id. at 26:16-18 [was not involved at all when deciding when a check would be disbursed. (That would -- that would have been Todd Kaplan."]; id. at 31:5-8 ["Q. Okay. Other than salaries, all other disbursements from bank accounts were approved by [Todd Kaplan? A. Correct."]; id. 58:9-16

[testifying that reimbursement requests related to the Santa Rita properties would require Todd Kaplan approval for actual disbursement]; id. at 59:2-22 [testifying that [Todd Kaplan held weekly meetings to discuss the nature of all expenditures, and that "[Todd] was quite involved with a lot of detailed questions about accounts payable expenditures™]; id. at 113:8-9 ["Todd was the only signer of the checks."]; id. at 174:3-14 ["Q. Did Todd Kaplan have the final say in terms of what MIH would reimburse at the Santa Rita properties? . . .. A. Todd -- Todd, you know, made all the -- he was the decision-maker in the company. . .. So it's a yes."].)

Defendant further argues that damages claims from projections of future income are not actionable. Defendant characterizes the events as a "gamble that did not pan out" but fails to point to any specific damages claims that are projections of future income. Here again, connecting the evidence cited in the separate statement, plaintiffs' pleadings and the legal authorities may have assisted defendants here.

Concealment

According to defendants, Plaintiffs cannot show concealment because they failed to do their own due diligence. They cannot show concealed material facts or reliance. Defendants also argue tort damages cannot be recovered for non-performance.

The basis of the concealment claim is Todd Kaplan's concealment of facts relating to his felony convictions, his expertise or lack thereof experience with cannabis industry, that "investors" were in truth lenders and other facts related to Vertical's funding, that a lease plaintiff was told was just a formality was actually intended as a means to claim rights to Iron Angel property, and that Vertical planned to make inside sales at below market prices. See Complt at 263. Plaintiffs also detail specific concealment of attorney Charles Hughton (including that he was not acting as plaintiffs' attorney, and the purpose of the Iron Angel lease), Courtney Dorne (including concealments about the capitalization and experience of Vertical, and that she would not be developing a brand for plaintiffs) Smoke Wallin (including concealments regarding intent to develop Schulman's brand, and concealments regarding Vertical's capitalization, health and expertise), and Jeff Silver (including concealment re the Iron Angel lease, his inability or unwillingness to provide quarterly financial reports and properly documented Operational Expenses and that he kept two sets of books). Plaintiffs allege still more similar concealments from Matt Kaplan, Drew Milburn, Robert Scott, and Elyse Kaplan,

Defendant responds without citation to any evidence:

Plaintiffs falsely claim concealment, but Mr. Kaplan disclosed his felony conviction and Plaintiffs had the ability to research it and did not. Defendants brought investors to the properties and gave them tours where Frannie and Brandon often joined, thus the fact Defendants were raising funds was not concealed. Defendants had the cannabis dispensary in Studio City where Ms. Dorne worked. Defendants had the funds to close Wellsprings, and the lease of Iron Angel was used for its intended purposes. Defendants attest they had the deal with the investors from Mexico who failed to perform not Defendants with no evidence from Plaintiffs to oppose it. Plaintiffs cannot show they justifiably or relied upon the absence of information, because they cannot show that they did any due diligence. Even if they had done the requisite due diligence, it would have shown that what Defendants represented was true at the time of the representations. The authority and analysis in the First Cause of Action, including the Economic Loss Rule all applies equally to negate the same elements in the Second Cause of Action.

First as to the representations being true, defendants cite no evidence and fail to refer to their separate statement to allow this court to determine what evidence is relied upon. Second, by “due diligence” what defendants are actually arguing is that plaintiffs’ reliance on the concealments was not reasonable or justified. However, a party generally has no duty to investigate another's statements. Manderville v. PCG & S Group (2007) 146 Cal. App. 4th 1486, 1502 (buyers could accept sellers' statement that property could be subdivided without checking zoning laws); Murphy v. BDO Seidman, LLP (2003) 113 Cal. App. 4th 687, 705 (investors entitled to assume auditor's statements were truthful)

The exception to this rule is where plaintiffs have actual knowledge of circumstances suggesting defendant’s statement may be false or not the whole truth. Alfaro v. Community Housing Improvement System & Planning Assn., Inc. (2009) 171 Cal.App.4th 1356, 1389, as modified on denial of reh'g (Mar. 18, 2009). Defendants cite no evidence that shows plaintiffs were on inquiry notice that defendants were withholding facts or misrepresenting facts.

Defendants do not even address the alleged concealments by each defendant and try to demonstrate how “due diligence” would have revealed the truth or the allegations were not concealments at all.

Negligent Misrepresentation

According to defendants, plaintiff cannot show that defendants had no reasonable grounds to believe the representations made to plaintiffs were true. Defendants argue they reasonably believed their representations were true.

As is the pattern in defendants' motion, defendants fail to cite to any specific evidence. Even the inability of plaintiffs to establish an element can be demonstrated by factually void discovery responses. Defendants make no attempt to establish the lack of evidence on any point. They simply make a bald statement that they believed representations were true.

Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing

Defendants argue Plaintiffs cannot show a breach because defendants performed their obligations under the contract. According to defendant, Plaintiffs terminated the contract and prevented defendants' performance.

At paragraph 420 of the complaint plaintiff sets forth Vertcal's obligations under the contract and its breaches at paragraph 421 and 422.

Plaintiff also alleges:

424. Plaintiffs were never paid for the crops removed from Iron Angel and Wellsprings despite the Cultivation Agreement requiring a 50/50 split of profits. Section 6 of the Cultivation Agreement required NCAMBA9 to share equally the balance of the net income from the 2017 Iron Angel cultivation activities (after deducting some revenue for a reserve and to make payments to identified third parties). Section 6 also required NCAMBA9 to pay the collectives 50 percent of the net income from post-2017 crops on each of the properties. Vertical harvested at least 22,000 pounds of cannabis from Wellsprings and never compensated Plaintiffs or provided any accounting. Vertical (through its agent Drew Milburn) sold cannabis to its affiliates in Needles, California for below market prices and without the involvement of Plaintiffs. For example, Vertical (again through Milburn) sold flower (the bud) to a Vertical Needles affiliate from both the remaining 2017 and 2018 harvests for just $150 per pound (when market value was clearly $250 to $300 or more per pound) without involving Ms. Shulman, as they were obligated to do. Defendants also sold product to other distributors, without involving Ms. Shulman or disclosing the sales price. As alleged above, two licensed distributors inspected the product sold by Defendants and stated that Kaplan (as agent of Vertical) could have obtained at least twice the price at which product was being sold to Kaplan's Needles affiliate.
425. Plaintiffs were owed at least $650,000 from the 2017 harvest due to impermissible deductions made by Jeff Silver (as agent of Vertical). As described above, Vertical it had been recording impermissible expense deductions, such as compensation, transportation, and professional services for non-agricultural personnel (which adversely affected the net income payable to the collectives). These improper deductions resulted in at least $650,000 of damages to Plaintiffs.

Despite these allegations defendants argue plaintiffs fail to identify specific breaches, and instead any alleged breaches were excused by conduct of Plaintiffs/Cross-Defendants, the Luglis or Mr. Housefield. Defendants fail to set forth what conduct and what evidence of such conduct.

In its separate statement, defendant attributes much of the failure to profit to the citations at he Sisters property from the California Department of Fish and Wildlife. However, plaintiff raises an issue of fact regarding whether Vertical had some responsibility for at least some of the violations. See DUNF Nos 91- 100 and responses thereto. Defendants admit at DUMF No. 107 that they could not pay operating expenses and that they had to prioritize which bills to pay even though the cultivation agreement obliged them to pay all Operating Expenses.

Defendants point to the February 25, 2019 termination of the contract by plaintiffs. But clearly the complaint alleges breaches that occurred prior to the termination and cannot be attributed to plaintiffs' termination. Plaintiff argues termination was a last resort after attempting resolution. Response to DUMF No. 121.

In short defendants have failed to illuminate for the court who failed to perform and whether performance was excused. They may have performed some obligations exactly as promised but that has no effect on other obligations that were not fulfilled. Their burden is not met. Moreover, plaintiff submits Additional Material Facts, (some of which are admittedly disputed) that demonstrate triable issues of fact as to breach of contract.

As to the breach of implied covenant of good faith claim, defendants assert Plaintiffs cannot show bad faith on the part of defendant and also tort relief on a contract is barred by the ELR. First, defendants point to no allegation showing that plaintiffs seek tort damages. Further, there are issues of fact regarding bad faith. For example, there are issues of fact regarding bad faith in making inside deals to sell the grow at less than market prices, failing to provide accurate financial statements, etc.

Violations of B&P §s 17200 and 17500

Plaintiff cannot show an unfair, unlawful or fraudulent business practice or that the public are likely to be deceived, according to defendant. In keeping with its trend in this motion defendants fail to analyze plaintiffs' pleading and reference any evidence that shows they did not engage in any of the practices listed in the complaint, why the practices listed in the complaint cannot be a predicate for an unfair business practice as a matter of law, or point to factually devoid discovery responses.

The predicate wrong underlying a B&P § 17200 claim can be an unfair, unlawful or fraudulent business practice. Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal.App.4th 1235, 1254. Only claims for fraudulent business practices require a showing that members of the public are likely to be deceived. See Id. (stating that, while a fraudulent business practice under the UCL is one in which "members of the public are likely to be deceived," an "unlawful business practice under the UCL is anything that can properly be called a business practice and that at the same time is forbidden by law"); see also Bardin v. DaimlerChrysler Corp. (2006) 136 Cal.App.4th 1255, 1263 (stating that an "'unfair' business practice occurs when the practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers").

Plaintiff identifies in the complaint a number of business practices that fall into one category of the three categories, such as the submission of fraudulent affidavits to the County of Santa Barbara to procure operator licenses, thwarting and stealing Plaintiffs' licensing rights, self-dealing, and infringement of Ms. Shulman's rights in the Iron Angel trademark. (The use of plaintiff Francine Shulman's likeness and land after the parties were no longer in business together may deceive the public. Defendants ignore this issue other than to note there was no trademark.)

Common Law UCL

Plaintiffs cannot establish defendants fraudulently represented plaintiffs' goods as their own, according to defendant. According to defendants:

Plaintiffs cannot establish that product harvested from Iron Angel or with Iron Angel Logos or Farm Girl Logos were put on shelves or advertised to the public. Plaintiffs had never sold any products bearing the Iron Angel name. Plaintiffs have never registered the Iron Angel name, or any other name. As a threshold, there is nothing a consumer can be confused about, because nothing ever existed. There cannot be confusion if the product does not reach the consumers and Defendants never put an Iron Angel or Farm Girl product on the shelves. After terminating the Cultivation Agreement and locking the Defendants out, Plaintiffs admittedly commandeered and sold any product harvested from Iron Angel themselves on or shortly after February 25, 2019. As a result, if any product was put on the shelves, it was put there by Plaintiffs, thus, there is no confusion.

Defendants fail to cite any evidence to support these assertions other than the February 2019 lock out and subsequent sale of the product. See DuMF No. 134. Plaintiffs note that the product had

been improperly handled by defendants' employees and was contaminated. Plaintiffs sold it at a discount. The proceeds were used to pay off a bill for construction work defendants had hired, according to plaintiff. In fact, plaintiffs 'position is that defendants attempted to trademark the Iron Angel brand after the contract was terminated and used the brand at tradeshows. See Response to DUMF No. 148.

As discussed above, the complaint alleges defendants continued to use the Iron Angel and Wellspring property photos after the relationship had terminated. Plaintiff further alleges that defendants gave tours of the properties to investors as if the property belonged to defendants and that defendants used the Iron Angel name for a company solely controlled by Kaplan, Defendants fail to address these allegations or present evidence related to them.

Intentional Interference with Contractual Relations and Interference with Prospective Economic Advantage

Both of these claims are based on the failed attempt to purchase the Wellspring Property from the Luglis.

Plaintiffs allege:

after the Wellsprings Purchase Agreement (which was between Ms. Shulman and the Lugli Trust only), Defendants convinced Ms. Shulman to orally amend the Cultivation Agreement on July 21, 2017 so that Ms. Shulman, Todd Kaplan, Vertical, and the collectives would jointly conduct a cannabis business on Wellsprings. Early on, multiple Defendants falsely represented that they would provide the financing to close the transaction and that they had the financial ability to do so, to lure Ms. Shulman into allowing them to "help" her. As described above, Defendants desired Wellsprings and secretly worked to strip Ms. Shulman of her rights in Wellsprings from the very beginning. In part due to Defendants' lie that they had the ability to close escrow on Wellsprings, Defendants convinced Ms. Shulman to execute a sham "assignment" of rights under the Wellsprings Purchase Agreement, which they did with the express intent of interfering with and preventing the consummation of the sale thereunder. They further engaged in efforts to prevent Ms. Shulman from being able to close, so they could seek to take title to the property for themselves and exclude Ms. Shulman. Kaplan, on behalf of Vertical, attempted to negotiate directly with the Luglis, without Ms. Shulman's knowledge or presence, to purchase Wellsprings solely for Kaplan and Vertical with the goal of ensuring Ms. Shulman would not have an ownership interest in the Wellsprings property once the original Wellsprings Purchase Agreement failed. As part of the parties' Cultivation Agreement and Wellsprings Amendment,

Kaplan and Vertical agreed to pay the venture's operational expenses, which included lease and mortgage payments. Defendants made some payments but ultimately defaulted on the parties' agreement, rendering Ms. Shulman in default on the Wellsprings Purchase Agreement, as amended. The Luglis evicted Ms. Shulman and terminated the Wellsprings Purchase Agreement, stripping Ms. Shulman of her right to purchase Wellsprings Ranch and to expand her business. As a direct and proximate result of Defendants' misconduct, Ms. Shulman has suffered harm as alleged above.

According to defendants, Plaintiffs cannot establish defendants' acts were intended or designed to induce breach or disrupt contractual relationship. Defendants assert they did all they could to complete the purchase of Wellsprings. Plaintiffs could not come up with their share of the purchase price, and income from the Sisters operation became unavailable through no fault or act of the Defendants. Any future economic benefit is speculative, at best, and is demonstrated by the Plaintiffs' inability to create a successful cannabis business after the Defendants were removed. Defendants also blame the February 2019 lockout as a cause of the failure to complete the Wellspring transaction.

According to plaintiffs, in exchange for obtaining a right to jointly own the property, (Resp. to DUMF No 125, 129, 130), Todd Kaplan agreed that he/MIH would advance the purchase price of the property. Resp. to DUMF No. 102, 103. Plaintiffs assert they were unable to close only after it was clear Kaplan would not. Plaintiffs later discovered Kaplan was working with the Luglis to cut Schulman from the deal completely. AMF 43.

A triable issue of fact exists as to why the Wellspring transaction did not close and whether defendants intentionally interfered.

IIED

According to defendants, Plaintiffs cannot establish defendants' acts were outrageous, intended to cause emotional distress, or done with reckless disregard.

On the complaint, plaintiff Schulman asserts the outrageous conduct as ousting her from her own home, destroying the farm she had worked to build, thwarting the property she was contracted to buy, trying to ruin her reputation with industry players who trusted her, forcing her to lose her security by spending her life savings on their failed obligations, stealing vital income she was counting on from their "partnership," making her fear for her life both on a freeway and by ominously staking out her property, destroying her home and left her with no toilet or shower, and threatening to bury her in litigation.

Defendants argue they treated plaintiff Schulman like family by going over and above the contract requirements, funding the remodel of her home on Wellsprings and funding the build out of the Wellsprings apartment so that her son Brandon would have a place to stay; only to have her lock MIH off Iron Angel, take harvested cannabis for herself and try and implement Plan B to oust MIH without repaying any of the millions of dollars MIH invested.

Defendants go on the state (without citation to evidence or their 150 material facts) that the allegations of the FAC have no merit because:

1. Frannie voluntarily and wanted to move to Wellsprings which MIH paid for.
2. Frannie used her home on Iron Angel for a processing center before June 2017.
3. Frannie had to move from Wellsprings, because she did not have her own funds to complete the purchase of Wellsprings from the Luglis.
4. Frannie did not have the funds to buy Wellsprings at any time.
5. The portions of Iron Angel used for cultivation operations by Defendants was not destroyed prior to February 25, 2019, rather any destruction took place after Defendants were locked out of Iron Angel and control was solely with Frannie and her sons.
6. There is no evidence that industry players trusted Frannie.
7. There is no evidence that Defendants stole income.
8. There is no evidence that her life was threatened by Defendants. In fact, MIH's prior attorneys have provided supporting declarations stating that they were with Todd Kaplan and Robert Scott Kaplan when the alleged driving incident with Frannie happened and they have no recollection of the events as alleged in the FAC.
9. The only evidence of harassment by security is Brandon shining his flashlight in the eyes of the security guards like Jerry Garcia and yelling at them.
10. There is no evidence of any threats made to Frannie by any of the Defendants, except the allegation that Defendants threatened to bury her in litigation. Threats do not constitute outrageous conduct under Cochran, and it is undisputed that Frannie had experience with prior business litigation related to her prior businesses and partners. 11. There is no evidence that Defendants sought out to destroy Frannie's property or steal her home. They spent huge sums to better her property and home as she dreamed of.

Defendant fails to provide evidence on several of these points. For example, the court has reviewed the 150 material facts from the separate statement. There is no reference to nos. 6, 8, 9, 10, 11 and nos. 1, 2 and the last sentence of 11 are disputed by response to DUMF Nos. 78, 79, no. 7 is disputed by response to DUMF. No. 83 and 84.

The words "processing center," "industry players" "driving" "freeway" "car" "flashlight", and "Garcia" do not appear in the defendants Separate Statement. Defendants fail to meet their burden on this point.

Financial Elder Abuse

W & I Code § 15610.30 provides
a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.
(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.
(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult.
(d) For purposes of this section, "representative" means a person or entity that is either of the following:
(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.
(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.:

According to defendants, Plaintiffs cannot establish defendants took, hid, or appropriated property for wrongful use, intent to defraud or by undue influence.

Section 15610.70 defines "undue influence" as "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity." (§ 15610.70, subd. (a).) In determining whether a result was produced by undue influence, section 15610.70 directs courts to consider: (1) the victim's vulnerability; (2) the influencer's apparent authority; (3) the tactics used by the influencer; and (4) the inequity of the result. (§ 15610.70,

subd. (a)(1)–(4); see also Mahan v. Charles W. Chan Ins. Agency, Inc. (2017) 14 Cal.App.5th 841, 867, 222 Cal.Rptr.3d 360.) Because perpetrators of undue influence rarely leave any direct evidence of their actions, plaintiffs typically rely on circumstantial evidence and the reasonable inferences drawn from that evidence to prove their case. (In re Cheryl E. (1984) 161 Cal.App.3d 587, 601, 207 Cal.Rptr. 728 [because direct evidence of undue influence is rarely obtainable, "[t]he court is often obliged to infer undue influence from the totality of the circumstances" (italics omitted)].)

Keading v. Keading (2021) 60 Cal.App.5th 1115, 1125–1126, reh'g denied (Mar. 9, 2021), review denied (June 9, 2021)

Defendants argue this is simply a case of a bad investment. They state (without citation to the evidence) that Schulman made a knowing deliberate choice with the guidance of her son Brandon, a medical doctor, to invest into a venture with substantial inherent risk and that Defendants spent millions of dollars and went to extraordinary efforts to build the project and make it work. Ms. Schulman also had access to her private counsel, according to defendant. Plaintiff is an experienced businesswoman according to defendants. Defendants argue:

Her tactics of locking out Defendants off Iron Angel right when the cannabis was harvested and ready to sell, then selling the cannabis without sharing the revenue shows Frannie and her sons are every bit as conniving as she portrays Defendants to allegedly be. MIH spent in excess of $9.4 million dollars on the venture and after locking MIH out of Iron Angel, Frannie retained the infrastructure MIH paid for. That was a sophisticated maneuver. MIH paid for Frannie to move out of her rather squalid home on Iron Angel into the home she wanted on Wellsprings. Again, she gets the benefits. Her mortgages were paid for, her cars were paid for, the workers she had before were paid by MIH. The list that MIH paid for and that Frannie paid nothing for goes on. Her life was improved by MIH not hurt by it. However, at the end of the day, whatever MIH did was never enough for her and her sons. She, her sons, her attorney, Housefield and Luglis planned for and then intentionally destroyed the possibility of making the ventures with Defendants work. To date, Frannie has achieved nothing further on her own since undoing the Parties' relationship on February 25, 2019.

There are no facts or evidence cited supporting these assertions. Defendants have not met their burden.

Breach of Fiduciary Duty

According to defendants, Plaintiffs can't establish an attorney client relationship, or any duty owed to them, or a breach of any duty.

Plaintiff offers evidence in the form of her Additional Material Facts Nos. 108-112, that she believed and had reason to believe that Mr. Houghton was acting as her attorney. It is true defendants dispute those facts, but plaintiffs demonstrate triable issue of fact regarding whether Houghton owed her a fiduciary duty.

Malicious Prosecution

Plaintiffs' malicious prosecution action is based on an Unlawful Detainer and Forcible Detainer action brought by defendants in Santa Barbara County.

The elements of malicious prosecution are:

1. Action commenced by or at the direction of defendant;
2. pursued to a legal termination favorable to the plaintiff;
3. brought without probable cause; and
4. initiated with malice.

Van Audenhove v. Perry (2017) 11 Cal. App. 5th 915, 918–19 (applying usual demurrer rules to malicious prosecution, including giving complaint a reasonable interpretation in context, assuming the truth of the properly pled fact, considering reasonable inferences of allegations, and liberally construing the pleading); Paiva v. Nichols (2008) 168 Cal.App.4th 1007, 1018, 1031 ("a nonattorney client who has probable cause to file suit may be chargeable with the subsequent knowledge of facts--and thereby be potentially liable for malicious prosecution…."); Siebel v. Mittlesteadt (2007) 41 Cal. 4th 735, 740; Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 292

Defendant argues that plaintiffs cannot establish the forcible detainer action brought in Santa Barbara County was brought with malice or that it has terminated in favor of plaintiffs.

Defendants admit they dismissed the UD matter. A voluntary dismissal is presumed to be a termination favorable to the dismissed party, unless otherwise proved to the jury. The rationale is that one does not abandon a case one believes will succeed. Sycamore Ridge Apts. LLC v. Naumann (2007) 157 Cal. App. 4th 1385, 1399-1400. Defendants offer the declaration of Todd Kaplan and explain pursuing the UD action would be "putting good money after bad. " Generally, the phrase "good money after bad" means to incur further loss in pursuing a hopeless

cause. See e.g. Carr v. Sacramento Clay Products Co. (1917) 35 Cal.App. 439, 448; Lasalle v. Vogel (2019) 36 Cal.App.5th 127, 139; Nutt v. Nutt (1966) 247 Cal.App.2d 166, 168. This sentiment does not necessarily rebut the presumption if defendant recognized the UD action was a hopeless cause. .

The malice element relates to the underlying plaintiff's subjective intent or purpose in initiating the prior action. Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 224 However, the malice required need not amount to actual hostility or ill-will toward plaintiff. Malice also exists when the proceedings are instituted primarily for an improper purpose (subjective test)—i.e., to misuse the legal system for something other than enforcing legitimate rights. Drummond v. Desmarais (2009) 176 Cal. App. 4th 439, 451-452. Because malice concerns the underlying plaintiff's state of mind it is usually a fact issue for the jury. DUMF 148 states that defendants had a good faith belief that they had a right to be on the property and that the court agreed by granting the TRO.

Plaintiff disputes that the Santa Barbara court agreed that the lease was valid. It is true that the order granting the TRO does not specify that the lease was valid. That said, a judge must find some possibility that plaintiff will ultimately prevail on the merits of the claim to grant the TRO application. Jamison v. Department of Transp. (2016) 4 Cal. App. 5th 356, 362. Issuance of a preliminary injunction after a contested hearing implies probable cause because it requires a judicial determination that the moving party is likely to prevail on the merits. Paiva v. Nichols (2008) 168 CA4th 1007, 1022.

Plaintiffs are unlikely to be able to show malice because there is evidence of probable cause. Plaintiffs provide no responsive evidence of malice.

Rescission

In the FAC, plaintiffs seek to rescind the Iron Angel lease that allegedly leased the Iron Angel property to Iron Angel II, a Todd Kaplan controlled entity. According to plaintiffs, Houghton represented to Schulman that the lease was just a formality for licensing purposes and would not actually be enforced. The FAC alleges, defendants assured plaintiffs the parties' relationship would still be governed by the Cultivation Agreement. Based on these representations and assurances and relying on Kaplan's and Houghton's professed "expertise" in the regulatory arena—and, critically, believing that Houghton represented their interests—the Shulmans directed that the Iron Angel landowners sign the purported lease for licensing purposes only.

Plaintiffs assert the lease was not needed for licensing purposes and after plaintiffs terminated the cultivation agreement defendants attempted to enforce the lease.

Defendants argue, plaintiffs cannot establish that defendants did not have possessory rights to the property; thus, the fifteenth cause of action for recission has no merit. Regardless of whether the court relied on the lease or the Cultivation Agreement in the Santa Barbara action, Defendants received a TRO granting them possessory rights on Iron Angel. Therefore, Plaintiffs cannot establish the lease was entered into based upon mistake, fraud, undue influence, duress, or menace perpetrated by another party. Civil Code §1689(b)(1)].

A victory on a TRO, later withdrawn has no res judicata effect on whether plaintiff has grounds to rescind the lease because it is not a final ruling on the merits. At most it is a recognition that defendants had some possibility of prevailing on their UD and forcible detainer claims.

Constructive Trust

To be entitled to the remedy of a constructive trust, a plaintiff must prove:

1. Wrongful act (underlying claim incorporated into the cause of action);
2. specific, identifiable property or property interest, or excuse for inability to describe it;
3. plaintiff's right to the property; and
4. defendant has title thereto.

Stansfield v. Starkey (1990) 220 Cal.App.3d 59, 76;

The FAC essentially asserts that through wrongful acts described in the complaint, Kaplan and Vertical fraudulently siphoned the money owed to Ms. Shulman under the Cultivation and Wellsprings Agreements and diverted that money to other Vertical endeavors and to various Defendants.

Defendants argue with no citation to the evidence:

First, Plaintiffs cannot establish underlying wrongful conduct under the Civil Code. Second, Plaintiffs cannot establish the acquisition or detention of any funds apart from what would be non-performance under contract. Thus, the cause of action is barred under the economic loss rule. Third, Plaintiffs cannot establish the existence of any profits traceable back to any of the Defendants due to the massive losses incurred by MIH.

This is insufficient to meet defendants' burden.

Punitive Damages

Since the Fraud claims have survived the present motion, the court cannot find there is no chance plaintiffs will be able to establish fraud oppression or malice.

Defenses

With one exception defendant spends a paragraph or two on the following defenses: failure to state a claim; plaintiffs made performance impracticable or impossible; plaintiff caused their own damage; third parties caused plaintiffs' damages; intervening acts caused plaintiffs' damages; defendants exercised just and proper discretion under the contract; and frustration of purpose. Defendants discussion of these defenses contain little to no application to the facts herein and there is no reference to evidence or the separate statement.

Smoke Wallin's Reply/Cross Motion For Summary Judgment

Even though Wallin apparently agreed to allow his individual defenses and arguments on summary judgment to be advanced by the Uplift Law, Wallin filed in pro per a reply to plaintiffs' opposition to defendants' summary judgment. He had previously filed a substitution of attorney on March 16, 2023. By way of his document captioned a "reply" Wallin moves for Summary Judgment and/or Summary Adjudication as to Counts I (intentional misrepresentation), II (fraud/concealment), III (negligent misrepresentation), VI and VIII (statutory and common law unfair business competition), IX (interference with contractual relations), X (intentional interference with prospective economic advantage), XII (elder abuse), as alleged to Mr. Wallin as an individual in Plaintiffs First Amended Complaint.

Wallin sought no leave of court to file his 25 page reply. In response to an ex parte filed by plaintiff to disregard the reply, this court opted to treat Wallin's motion as a standalone summary judgment motion. Mr. Wallin has not paid the fee for a summary judgment motion. Wallin has also failed to file a separate statement of material facts in dispute which alone is grounds to deny the "motion" CCP 437c(b)(1).

Wallin argues in his submission that plaintiffs fail to plead or discuss in their opposition the basis of Wallin's individual liability. He notes that plaintiffs failed to plead individual liability on the basis of alter ego. He states he did not even meet plaintiffs until after the cultivation agreement was executed and did not start working for Kaplan and Vertical until after the Wellspring purchase agreement and Iron Angel Lease were in place. He had no part in fraudulently inducing

plaintiff to sign a contract. Wallin alleges his involvement with the relationship between Kaplan and Schulman was to facilitate negotiations to prevent termination of the Cultivation Agreement in the last few months before termination.

Wallin argues he had no legal duty to plaintiffs as he was not a party to the cultivation agreement. He had no obligation to assist in building a brand.

He also argues there is no evidence that he as an individual engaged in any unfair business practice that caused plaintiff injury, had any role in interfering with any contract to which plaintiffs were parties or had any role in the financial abuse of Ms. Schulman.

Plaintiffs' burden in opposing a summary judgment motion is to show triable issues of fact as to issues raised by defendants. Naturally since no issues specific to Wallin were raised in defendants' opening briefing plaintiffs did not adduce evidence or argument showing the specific basis of their claims against Wallin.

In any event the submission by Wallin fails to address the allegations of civil conspiracy which is the basis for plaintiffs' claims against Wallin as set forth in the FAC at paragraphs 176-195.

Because of the complexity of the case, the voluminous pleading and briefing, the court is unable to evaluate Wallin's irregular motion. The summary judgment is denied without prejudice to Wallin filing another summary judgment motion complying with CCP § 437c and relevant court rules.

Cross Defendants Motion

Notably on January 6, 2022, this court sustained with leave the Cross defendants' demurrer as to the first three causes of action except as to Francine Shulman individually on the First and Second Causes of Action which are overruled. The court also sustained with leave the demurrer to the Ninth cause of action. Cross complainants declined to amend.

The first three causes of action are still being pursued against the Schulman Trust and Francine Schulman individually on the first and second causes of action.

There are two contracts in question in the first three causes of action. The first is the Cultivation Agreement attached to the First Amended Complaint. The Agreement purports to be between: NCAMBA9, INC., a California Non-Profit Mutual Benefit Company, ("NCAMBA9, " which term includes any Management Company NCAMBA9 may use to manage its operations),

FRANCINE SHULMAN TRUSTEES OF THE SHULMAN FAMILY TRUST DATED DECEMBER 24, 2001, KIM L. MARIENTHAL , TRUSTEES OF THE KIM L. MARIENTHAL AND BARBARA N. MARIENTHAL 2003 TRUST, (collectively the "Landowner"), THE SWEET AMBERGRIS COLLECTIVE, a California Not for Profit Medical Cannabis Collective, ("Sweet Ambergris") and 3F, INC., a California Mutual Benefit Corporation ("3F") as successor to BayLeaf, Inc., Sweet Ambergris and 3F are collectively referred to herein as, the "Collectives") and EMERALD SKY, LLC, a California limited liability company, ("Emerald Sky"). NCAMBA9 Landowner, Emerald Sky and the Collectives may be referred to individually as a "Party" and, collectively, as the "Parties.

The second contract is the Iron Angel Lease Agreement. According to the FAXC at paragraph 69:

Cross-Complainant Iron Angel II, LLC had a Lease Agreement dated December 20, 2017 whereby Iron Angel II leased certain real property located at 5930 Santa Rosa Road, Lompoc, CA 93436, (“the Iron Angel Property”) from Francine Shulman and Dr. Barry Shulman as Trustees of the Shulman Family Trust Dated December 24, 2001, Kim L. Marienthal and Barbara N. Marienthal as Trustees of the Kim L. Marienthal and Barbara N. Marienthal 2003 Trust, (collectively referred to as the “Landlord”).

The interference claims concern the “Lugli Agreements” as defined by Cross-Complainants to include an agreement to purchase Wellspring between Ms. Shulman and Mr. Lugli and related amendments and assignments to Todd Kaplan; as well as a separate alleged “subscription agreement” between Mr. Lugli and MIH, whereby Mr. Lugli would become an investor in MIH. Cross complainants also allege that certain cross defendants interfered with the Cultivation Agreement.

Cultivation Agreement claims

According to the cross defendants, claims related to the Cultivation Agreement (Nos 1,2 5, 7 and 8) fail because they are all in some way grounded on breach of the Cultivation Agreement. But according to cross defendant the events amounting to a claimed breach occurred after the Cultivation Agreement was terminated by cross defendants on February 125, 2019. The acts that allegedly make up the breach are the termination of the agreement, the subsequent exclusion of MIH from the Iron Angel property (and acts related to that exclusion); and (3) the disposition of property (including cannabis, equipment, etc.) on the Iron Angel property in the period following the exclusion.

Cross defendants argue the Cultivation Agreement provided cross complainant NCAMBA9 had the "sole[ ] responsib[ility] for timely paying all Operational Expenses with respect to the Cultivation Operations on the Properties." Cross Defendant's Undisputed Material Fact No. 10. The landowner was to have no responsibilities for payment of operational expenses. CDUMF No. 13. Cross defendants assert that cross complaints failed to pay the expenses as required or sometimes paid late. CDUMF No. 15, 16, 17 Cross defendants assert that because cross complainants lacked funds, Ms. Schulman paid over $300,000 of operational expenses herself. CDUMF No. 19. She has no been reimbursed according to cross defendants. CDUMF. 20.

Cross defendants assert they advised cross complainants of cross complainants' breach on January 24, 2019 and demanded reimbursement of the operational expenses they had paid. CDUMF No. 23 and 23. Cross complainants did not cure the breaches according to cross defendants. CDUMF No. 29.

Cross defendants also allege that cross complainants breached the contract by failing to provide timely and accurate financial accounting in breach of the agreement. CDUMF No. 30 and 31. Cross defendants also demanded compliance with the contract's requirement that they provide timely and accurate accounting by demanding 2018 financials. CDUMF No. 33.

Section 4.1 of the Cultivation Agreement allows unilateral termination if the other party is in breach and fails to cure the breach in 10 days of receipt of written notice, if the breach is failure to pay money or 20 days for non-monetary defaults. CDUMF No. 26 and 34.

According to cross defendants, cross complainants produce accounting records that underreported revenue. CDUMF No 38 Cross defendants' counsel sent another Notice requesting a cure of the alleged defaults. CDUMF No. 47. No accurate financial record was provided. CDUMF No. 51.

Cross defendants also argue cross complainants failed to use best efforts to manage cultivation operations as required by the agreement. As an example, they point to selling product to affiliates of cross complainants for under market. See CDUMF No. 57-71.

Cross defendants assert that due to these alleged breaches and failure to cure, on February 25, 2019, they gave notice to cross complainants that the cultivation agreement is terminated. CDUMF No. 73.

According to cross defendants, after the agreement was terminated, cross defendants had no reason to be on the Iron Angel property unless they lived there. CDUMF No. 79. Accordingly,

after the termination, any cross complainant who attempted to enter the property was turned away. CDUMF No. 80.

Cross defendants acknowledge that they harvested what was left on Iron Angel after termination and sold it at a reduced rate but used the proceeds to pay off a grading and excavation contractor who had done work on the property and had put a mechanics lien on the property. CDUMF No. 86-97.

Based on the above facts, cross defendants deny any breach of the cultivation agreement because they were within their right under the contract to terminate I.e., the termination was proper because cross complainants had already breached and failed to cure. Since the contract was terminated, refusal to allow cross complainants access was not a breach. Finally, according to cross defendants, the failure to provide cross complainants their share of the product or revenue from the product was not a breach because the proceeds were used to pay a partnership debt. Without a breach there is no bad faith. Further, cross defendants argue they did exactly what they were allowed to do under the circumstances and contract. See Brehm v. 21st Century Ins. Co. (2008) 166 Cal.App.4th 1225, 1241 ("The implied covenant of good faith and fair dealing cannot prohibit a contracting party from doing that which is expressly permitted by the agreement.");

Without a breach there is no interference claim which requires a breach or disruption of the contract, according to cross defendants. See Golden W. Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 50 (to show disruption, "[i]t is sufficient to show the defendant's conduct made the plaintiff's performance … under the contract more burdensome or costly."). The court incidentally agrees with cross defendants that there is no real difference between an intentional interference claim and a "tortious" interference claim.

There's no conversion according to cross defendants because the revenue from the product was used to pay off expenses for the benefit of all parties.

To the extent that cross defendants have carried their burden, cross complainants have demonstrated triable issues of fact. Cross complainants deny breaching the contract. They explain they paid $9.4 million in operating expenses and for personal expenses of Ms. Schulman such as her mortgage and car payment. See Response to CDUMF (Response) No. 15. They argue they substantially performed on the agreement.

According to cross complainants, Cross-Defendants ratified or consented to or gave NCAMBA 9, INC. management control over the operations under the Cultivation Agreement which made the decisions regarding when payments were made up to NCAMBA 9, Inc. NCAMBA 9, Inc.'s

authority was not dependent whether or not Cross-Defendants agreed with the decisions made by Cross Complainants. Response No. 16. They further assert that Schulman's expenditures were incurred prior to the execution of the cultivation agreement and cross complainants were not responsible for those payments. Response 20.

Cross complainants deny they breached the contract vis a vis the financial accounting. They argue MIH through Jeff Silver and Alan Bramson communicated regularly with Brandon Shulman and Frannie Shulman. No unusual accounting practices by Cross-Complainants were identified by Marcum, an independent accounting firm. Financial spreadsheets of IA/MIH were reviewable by Cross-Defendants. If the Cross-Defendants had a belief that the accounting records were inaccurate, they could have sought an independent audit and were required to have submitted any dispute to mediation and/or arbitration, prior to termination, which they failed to do. Response No. 30 and 42 (explaining the calculations).

Cross complainants assert that best efforts to manage cultivation operations were used. Mr. Milburn testified the amount he sold certain product he sold was reasonable and the best price available at the time. See Response No. 59.

Cross complainants also assert that the low quality of the product was not due to cross defendants mishandling but very likely due to the presence of cross defendants' dogs and their waste in permitted in the green house.

They argue they improperly paid for the work by Johnson Excavation with the proceeds of the post termination harvest because that debt was solely owed by Cross-Defendants for their improper grading in 2016. Response 97.

In short cross complainants argue they had not breached the contract in any material way and termination was not justified. Accordingly, the termination itself was a breach and the events that occurred after the improper termination were also breaches on the part of cross defendants. Triable issues of facts exist as to the breaches of the Cultivation Agreement.

Iron Angel Lease

The third cause of action is based on the Iron Angel lease. Cross defendants argue lease is unenforceable as it was fraudulently induced, not supported by consideration, no party performed on it, and it would be unconscionable to enforce. Cross defendants rely on the following facts and arguments.

The parties entered the Iron Angel lease in January 2018. CDUMF No. 111. According to cross defendants, attorney Charles Houghton presented the lease to Ms. Schulman as a formality for the county for Iron Angel II (a company founded and created by cross complainant Todd Kaplan) to obtain the licenses required to cultivate and sell marijuana. CDUMF No. 108 and 111. Mr. Houghton represented that the Lease was needed to demonstrate to the State of California and Santa Barbara County that Iron Angel II had a right to access the land but according to plaintiff a lease was unnecessary. CDUMF No. 113. Houghton made no attempt to involve cross defendants' personal counsel. CDUMF No. 116. The Ms. Schulman and her son Dr. Schulman believed Houghton acted as their attorney in the lease signing. CDUMF No. 118. Houghton made it seem as if the lease protected or benefitted the landowner, but it did not. See CDUMF Nos. 122-124.

The lease drastically changed how and when the parties could terminate their joint venture. See CDUMF 126-129. But cross defendants allege the Cultivation Agreement was to be the operative governing agreement. CDUMF No. 131. Defendants never paid the rent due under the lease, and only attempted to once. CDUMF No. 132, 133. The Santa Barbara County court issued a TRO giving cross complainants access after the termination of the Cultivation Agreement. CDUMF No, 135. MIH then had full access to the cultivation business at Iron Angel and utilized that access until it withdrew its application for an injunction in Santa Barbara court. CDUMF No. 137-140.

Fraudulent Inducement

Fraud is a defense to enforcement of a contract. CC § 1567. Fraud is a question of fact. CC § 1574. Cross complainants dispute the fraud. They dispute that a lease was not necessary. See Response No. 7. 100, 113. They also disagree that the lease presented as a formality. See Response No. 112. According to cross complainants, the lease was negotiated, which it would not have been had it been a simple formality.

Cross complainant further argues that the Shulmans did not express to Mr. Houghton their purported subjective belief that Mr. Houghton represented them as their attorney at the signing of Iron Angel lease. Mr. Houghton asked the Shulmans to "make sure that [they] review it carefully and agree to the terms." The claim by the Shulmans that Mr. Houghton acted as their attorney only became known to Defendants and Cross-Complainants when the Shulmans opposed Cross-Complainant's Application for the Temporary Restraining Order to regain access to the operational areas on Iron Angel after being excluded from the property on February 25, 2019. Response No. 118. Houghton denies representing that the lease would not be enforced. Response

No. 120.

There are triable issues of fact regarding the defense of fraudulent inducement. These issues of fact also go to the unconscionable arguments.

Consideration and Failure to Perform

While the contract recites consideration, according to cross defendants rent was never paid under the agreement. Cross complainants argue they paid mortgage for Ms. Schulman and made car payments in lieu of rent until the Cultivation Agreement was terminated, at which time they paid or tried to pay rent. Plaintiff argues the obligation to pay those items was an obligation under the Cultivation Agreement. It is true that the Cultivation Agreement requires the mortgage to be paid at 1.9. But Kaplan argues rent in addition to mortgage was never demanded and that cross complainants paid other expenses in excess of rent. See Response 132, 133. While it's a close call there are triable issues as to the enforceability of the Iron Angel Lease.

Interference with Lugli Agreements

The elements of a intentional interference with contract are:

1. Valid contract between plaintiff and third party;
2. defendant's knowledge of that;
3. defendant's intentional acts designed to induce disruption of the relationship;
4. actual disruption; and
5. resulting damage.

Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1148; Scripps Clinic v. Superior Court (2003) 108 Cal. App. 4th 917, 929;

The fourth and sixth causes of action are based on alleged interference with the Lugli Agreements. Cross complainants allege that cross defendants encouraged the Luglis to default and terminate the Lugli Agreements.

According to cross defendants, the "Lugli Agreements" were not interfered with as alleged in claims four and six because cross-defendants did not act in ways intended to induce a breach and any breaches resulted from cross-complainants or Mr. Lugli.

According to cross defendants, the Wellsprings Purchase Agreement, as amended, obligated the

purchasers to close on the property by January 15, 2019 by paying the $6 million outstanding on the purchase price. CDUMF No. 161. Ms. Shulman understood that Mr. Kaplan was going to provide the requisite funding. CDUMF No 149. In his deposition, Mr. Todd Kaplan testified that, while he had the funds to close on the Wellsprings Purchase Agreement, he chose not to. CDUMF No. 180. At that point, the purchasers had a 40-day cure period, ending on February 24, 2019, to complete the Wellsprings Purchase. CDUMF No 157-158. Contemporaneous documents show that Mr. Todd Kaplan was in direct discussions with Mr. Lugli 15. Again, Claim Four makes similar allegations to cut Ms. Shulman out of the deal by waiting until after the cure period ended and then purchasing the property alone. CDUMF No. 176, 190. Lugli did not like the deal anymore because of the $2m subscription agreement.

Furthermore, Schulman was a party to the purchase agreements and cannot be held liable on interfering with her own contract.

Cross defendants deny even knowing about the subscription agreement until after the agreement was terminated in November 2018. CDUMF No. 182, 196-198. Mr. Lugli specifically informed Mr. Todd Kaplan that he would not be moving ahead with the Vertical deal because of his "financial setback and [] moral obligations to pay [his] friends and family members some money so that they can go forward with their lives." CDUMF No 183. And each one of the Shulmans had no knowledge of the potential agreement until far after the fact. CDUMF No. 196-198.

Cross complainants wish the court to infer that because Schulman's sons encouraged her to not accept any offers from cross complainant to overcome Schulman's lack of funds. However, even if the court could make the inference that two son's counseling their mother on business dealings, it does not overcome that Kaplan declined to close on Wellspring and that Lugli backed out of the subscription deal. Cross complainants have no evidence that the deal fell apart through anything Brandon or Russell Schulman did. Further, cross complainants provide no evidence that cross defendants knew about the subscription agreement prior to the time in November 2018 that Lugli informed Kaplan he would not move forward with the agreement.

Cross defendants meet their burden on the interference claims as they relate to the Lugli agreements.

Motion for Leave to File Second Amended Cross Complaint

Cross complaints move for leave to file a Second Amended Cross Complaint to add the following: (1) Fraud; (2) Negligent Misrepresentation; (3) Common Count: Goods and Services Rendered; (4) Common Count: Money Had and Received; (5) Implied-in-Fact Contract; (6)

Violation of Business and Professions Code 17200; (7) Common Law Unfair Competition; (8) Anticipatory Breach; and (9) Constructive Trust. They also wish to amend amended the title to cause of action number four to be Intentional Interference with Prospective Economic Advantage (Lugli Agreements) and cause of action number seven to be Intentional Interference with Prospective Economic Advantage (Reciprocal Membership and Cultivation Agreement).

CCP § 473(a)(1) gives the Court discretion to allow a party to amend a pleading:

The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, 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; and may upon like terms allow an answer to be made after the time limited by this code.

California courts liberally grant the right to amend. “California is committed to the rule of liberal construction of pleadings, with a view to substantial justice between the parties.” Simons v. Kern County (1965) 234 Cal.App.2d 362, 367, citing Estate of Wickersham, 153 Cal. 603. “That trial courts are to liberally permit such amendments, at any stage of the proceeding, has been established policy in this state since 1901.” Hirsa v. Superior Court (1981) 118 Cal. App. 3d 486, 488-89, referencing Frost v. Whitter (1901) 132 Cal. 421, 424; Thomas v. Bruza (1957) 151 Cal. App. 2d 150, 155. It is an abuse of discretion for the court to deny leave to amend where the opposing parties are not misled or prejudiced by the amendment. Kittredge Sports Co. v. Sup. Ct. (1989) 213 Cal. App. 3d 1045, 1048.

In fact, even where a plaintiff has been dilatory in bringing the motion, the court should not deny the motion unless the opposing party can show prejudice. Kittredge Sports Company v. Superior Court (1989) 213 Cal. App. 3d 1045, 1048.

Moreover, ordinarily, the Court will not consider the validity of the proposed amended pleading in deciding whether to grant leave to amend. Grounds for demurrer or motion to strike are premature. After leave to amend is granted, the opposing party will have the opportunity to attack the validity of the amended pleading. However, the Court "undoubtedly" has discretion to deny leave to amend where a proposed amendment fails to state a cause of action or defense. California Casualty General Ins. Co. v. Sup. Ct. (Gorgei) (1985) 173 Cal.App.3d 274, 280 281 (disapproved on other grounds in Krasco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal.4th 390, 407, fn.11)). Such denial is "most appropriate" where the pleading is deficient as a

matter of law and the defect could not be cured by further appropriate amendment. California Casualty General Ins. Co. v. Sup. Ct. (Gorgei), (1985) 173 Cal.App.3d 274 at 281; Foxborough v. Van Atta (1994) 26 Cal.App.4th 217, 230. Likewise, where the amendments completely change the tenor of the case, the defendant is prejudiced and amendment can be denied. See Magpali v. Farmer's Group Inc. (1996) 47 Cal. App. 4th 1024.

Pursuant to Rules of Court Rule 3.1324:
(a) Contents of motion
A motion to amend a pleading before trial must:
(1) Include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments;
(2) State what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located; and
(3) State what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located.
(b) Supporting declaration
A separate declaration must accompany the motion and must specify:
(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.

Cross complainants explain they secured new counsel in June 2022. Throughout November and December, the parties participated in Document Production. Depositions moved forward in January 2023. This discovery showed evidence as to cross complainants' new claims. Cross complainants wish to amend the interference claims apparently agreeing that tortious interference and intentional interference are the same claim.

Cross complainants submitted with the attorney declaration a redlined copy.

Cross defendants argue that they are prejudiced by the delay in amending the complaint given the trial date is only around 6 months away. Given the massive number of documents that undoubtedly needed to be reviewed herein, the delay does not appear to this court dilatory. It is true that preparing the case for trial given the new claims will require diligence. The court may entertain requests to continue the trial if necessary.

Cross defendants also allege that certain claims are futile and should not be allowed. This court declines to resolve any of the potential claims on the merits via a motion for leave to amend with

one exception. This court has granted summary adjudication to interference claims relating to the Lugli agreements and as such will not allow the 4th cause of action to be included in the proposed Second Amended Cross Complaint.

Mr. Wallin still needs to pay first appearance fees prior to refiling his Summary Judgment.

On the Court's own motion, the Hearing on Motion - Other to Disregard MIH's Response to Smoke Wallin's Motion for Summary Judgment scheduled for 09/18/2023 is advanced to this date and vacated.

Plaintiff is to give notice.