

***William Szymczak, et al. v. Patrick Girgis, Natural Healing Center, LLC, et al., 20CV-0436***

**Hearing: (1) Demurrer, and (2) Motion to Strike**

**Date: January 27, 2021**

**Procedural History**

On August 17, 2020, Plaintiffs William Szymczak, 998 & 1030 Partners LLC, Dayspring Farms LLC, and OG Investors LLC<sup>1</sup> filed this lawsuit against various Defendants. On October 20, 2020, Plaintiffs filed a first amended complaint (FAC) against Defendants Helios Dayspring; Helios Management Group LLC; 7510 LOVR LLC; HS AG Holdings LLC; AG Investment Holdings, LLC; Patrick Adel Girgis; Adel Girgis; Innovative Investments PBK LLC; Sarwar Payind; Shayan Payind; 8901 PB, LLC; VMG Holdings, LLC; and Valnette Garcia.

The FAC sets forth causes of action for (1) breach of contract, (2) anticipatory breach of contract, (3) declaratory relief, (4) breach of manager’s fiduciary duty/duty of loyalty, (5) breach of manager’s duty of care, (6) breach of member’s duty of good faith and fair dealing, (7) fraud (concealment), (8) accounting, (9) fraud (misrepresentation), (10) fraud (concealment), (11) aiding and abetting, (12) civil conspiracy, (13) removal of managers, (14) appointment of receiver and injunctive relief, (15) breach of contract, (16) breach of contract, (17) breach of contract, (18) breach of fiduciary duty, and (19) financial elder abuse.

The parties’ dispute arises out of cannabis business ventures. Plaintiffs allege that, in early 2018, Mr. Szymczak met Mr. Dayspring, the latter of whom claimed he was a capable professional in the cannabis industry with experience and knowledge of the business at all levels. Mr. Dayspring allegedly represented to Mr. Szymczak that he was “specially situated in the local community to work effectively with the appropriate regulatory, permitting and licensing committees and officials in order to effectively grow and run legal cannabis businesses.” (FAC, ¶ 139.)

Mr. Dayspring allegedly told Mr. Szymczak that he had access to and could obtain conditional use permits (CUPs) for legal cannabis businesses, which were hard to obtain, and of limited availability. Mr. Szymczak alleges that Mr. Dayspring also represented that he needed money and investors for the cannabis businesses, and that Mr. Dayspring would “legally, ethically, and properly run the day-to-day business operations” of those businesses. (FAC, ¶ 139.) Plaintiffs allege that Mr. Dayspring made these representations with the intent to induce Mr. Szymczak, “personally and through OG Investors,” to go into the business with Mr. Dayspring.

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<sup>1</sup> OG Investors asserts it is suing on behalf of itself and derivatively on behalf of Dayspring Farms Cultivation LLC; 6860 Dayspring LLC; 6860 Cultivation LLC; 530 Dayspring LLC; 530 Cultivation LLC; 8901 Dayspring LLC; 8901 Cultivation LLC; NHC Grover Beach LLC; Natural Healing Center LLC; and 13350 River Road LLC. OG asserts it is a member of these entities, which are named as Nominal Defendants in the first amended complaint and referred to as “the Companies” in the instant motions before the Court. (FAC, ¶ 31.)

Plaintiffs allege that, based on Mr. Dayspring's representations, Mr. Szymczak contributed \$17 million to acquire the land and fund the Companies' operations. (FAC, ¶ 140.)

Plaintiffs allege that, on or about July 31, 2020, Mr. Szymczak and OG Investors discovered that Mr. Dayspring had used the Companies "for his own personal benefit," and that he had misappropriated millions of dollars from the Companies, diverting the funds to Mr. Dayspring's separate businesses in which Mr. Szymczak and OG Investors have no interest. (FAC, ¶ 142.) Plaintiffs allege they have identified over \$4.5 million in funds that Mr. Dayspring diverted from the Companies into his own personal businesses, and that the Companies' business has been "jeopardized" as a result. (*Ibid.*) Plaintiffs further allege that Mr. Dayspring's actions have caused Mr. Szymczak and OG Investors to "part with millions of dollars that they otherwise would not have invested but for their reliance upon Dayspring's representations." (*Ibid.*)

Plaintiffs allege that other individuals have "aided and abetted" Mr. Dayspring in his scheme, including Defendants Valnette Garcia, Shayan Payind, and Patrick Girgis. (FAC, ¶ 14.)

This Court previously denied Plaintiffs' request for an order appointing a Receiver to take possession, custody, and control of the assets and operations of three of the relevant entities. This Court also denied Plaintiffs' request for injunctive relief.

Now before the Court is a demurrer to and motion to strike the FAC filed by Defendants Helios Dayspring, Helios Management Group LLC, and 7510 LOVR LLC (hereinafter referred to as the Moving Parties). Joinders to the demurrer and motion to strike have been filed by Defendants Valnette Garcia and VMG Holdings, LLC, and by the Nominal Defendants.

### **Demurrer.**

#### Legal Authority.

A demurrer tests the legal sufficiency of the allegations in a complaint. It raises issues of law, not fact, regarding the complaint's form or content. (Code Civ. Proc., §§ 422.10, 589; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994; *Lewis v. Safeway* (2015) 235 Cal.App.4th 385, 388.) A demurrer "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." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.)

Moving Parties demur to the 1<sup>st</sup> through 14<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, and 19<sup>th</sup> causes of action of the FAC.

Plaintiffs' claims regarding NHC.

Before addressing the causes of action individually, the Court notes Moving Parties' argument that Plaintiffs cannot maintain derivative causes of action relating to Natural Healing Center LLC (NHC) because "OG Investors has falsely claimed that it is a party to an operating agreement with nominal plaintiff NHC and is a 'member' of" NHC." (Dem., p. 3, ll. 4-6.) Moving Parties further argue that Plaintiffs' allegations that 7510 LOVR breached a written operating agreement for NHC fail as a matter of law, because the NHC operating agreement shows that the parties to that agreement are "NHC Grover Beach LLC" and "Natural Healing Center LLC." In support of this statement, Moving Parties cite to an exhibit to Mr. Szymczak's declaration in support of the earlier motion for an order appointing a receiver. (Request for Judicial Notice<sup>2</sup> [RFJN], Exs. A, B.) Because OG Investors is not a party to this particular operating agreement, Moving Parties argue, its claim for breach of contract of the Operating Agreement fails, as does the other derivative claims Plaintiffs bring on behalf of NHC<sup>3</sup>.

In response, Plaintiffs argue their FAC appropriately identifies their ability to pursue derivative claims on NHC's behalf:

Defendant Natural Healing Center LLC was formed to operate a cannabis dispensary in the City of Grover Beach . . . Defendant Dayspring, as well as the Chief Financial Officer of Natural Healing Center, LLC, Jim Clancy, admit that Natural Healing Center and NHC Grover Beach LLC are linked, having the same members owning the same percentages of each . . . Therefore, since OG Investors is a member of NHC Grover Beach, LLC, it is also a member of Natural Healing Center, LLC. Moreover, OG Investors is also a beneficiary of Natural Healing Center, LLC because it stands to profit, benefit or advantage from an interest in Natural Healing Center, LLC.

(FAC, ¶ 56.)

Elsewhere in the FAC, Plaintiffs identified the members of NHC Grover Beach, LLC (NHC Grover) as 7510 LOVR, **OG Investors**, AG Investment Holdings, LLC and VMG Holdings LLC. (FAC, ¶ 55, emphasis added.) According to Plaintiffs, these entities "are linked" and are the "same members" with the "same percentages" of ownership in NHC. In support of these allegations, Plaintiffs cite to Mr. Dayspring and Mr. Clancy's declarations submitted in support of Moving Parties' opposition to Plaintiffs' earlier request for a receiver. (Plaintiffs' Request for Judicial Notice<sup>4</sup> [PRFJN], Exs. 1, 2.) The Court specified NHC's makeup in its earlier order denying Plaintiffs' request for a receiver, noting that NHC's "sole member is NHC Grover, in which OG Investors is a member."

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<sup>2</sup> The Moving Parties' request for judicial notice is granted. (Evid. Code, § 452(d).)

<sup>3</sup> Those causes of action are the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, and fourteenth causes of action.

<sup>4</sup> Plaintiffs' request for judicial notice is granted. (Evid. Code, § 452(d).)

In other words, Plaintiffs concede they are not parties to the NHC Operating Agreement. Plaintiffs claim they can still bring a derivative claim on NHC's behalf, and base this claim entirely on statements made by Mr. Dayspring and Mr. Clancy in earlier declarations filed with the Court. The Court is not persuaded that this theory is legally tenable.

Plaintiffs also argue they can maintain their NHC-related claims because OG Investors is a "beneficiary" under Corporations Code section 1779.02. The Moving Parties dispute that OG Investors is a "beneficiary" of NHC. Again, this legal argument's premise is based upon the statements made by Mr. Dayspring and Mr. Clancy. (See Opp., p. 3, l. 24 – p. 4, l. 1 ["Given Defendants' admission as alleged in ¶ 56 (of the FAC), this Court should not narrowly define "beneficiary" to preclude OG Investors from suing derivatively on behalf of NHC."].)

"[I]n considering the merits of a demurrer, 'the facts alleged in the pleading are deemed to be true, however improbable they might be.'" (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, quoting *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) At this juncture, Plaintiffs have a legal theory, which they should be permitted to explore. If discovery reveals that Plaintiffs' claims on behalf of NHC are not supported by the law, Moving Parties are free to move to summarily adjudicate those claims, or bring any other motion they deem proper.

#### Plaintiffs' derivative claims.

The fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, and fourteenth causes of action in the FAC are derivative claims, wherein OG Investors sues derivatively on behalf of the Companies. (Corp. Code, §17709.02.) Moving Parties allege these claims fail to state facts to constitute causes of action because Plaintiffs have not satisfied the demand futility requirements of the Corporations Code.

"An action is derivative if 'the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance of distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.'" (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107.) Shareholders may bring a derivative suit to, for example, enjoin or recover damages for breaches of fiduciary duty directors and officers owe the corporation. (Citation.)" (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 313.)

Corporations Code section 17709.02(a)(2) (Section 17709.2) requires a limited liability company<sup>5</sup> derivative suit to allege in the complaint, with particularity:

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<sup>5</sup> "A limited liability company is a hybrid business entity formed under the Corporations Code and consisting of at least two "members" [citation] who own membership interests [citation]. The company has a legal existence separate from its members. Its form provides members with limited liability to the same extent enjoyed by corporate shareholders [citation], but permits the members to actively participate in the management and control of the company [citation]." [Citation.]" (*PacLink Communications Internat., Inc. v. Sup. Ct.* (2001) 90 Cal.App.4th 958, 963.)

[T]he plaintiff's efforts to secure from the managers the action the plaintiff desires or the reasons for not making that effort, and alleges further that the plaintiff has either informed the limited liability company or the reasons for not making that effort, and alleges further that the plaintiff has either informed the limited liability company or the managers in writing of the ultimate facts of each cause of action against each defendant or delivered to the limited liability company or the managers a true copy of the complaint that the plaintiff proposes to file.

Moving Parties contend that Plaintiffs did not comply with Section 17709.02. A failure to comply with this section will only be excused if the demand outlined in the section would be futile: "In order to be excused from the demand prerequisite to a derivative action, a shareholder must demonstrate through his or her pleading that a demand would have been futile." (*Leyte-Vidal v. Semel* (2013) 220 Cal.App.4th 1001, 1007.) General averments of "misconduct" or "wrongful acts" are insufficient to satisfy the "demand futility" requirements. (*Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1621-1622 [affirming order sustaining demurrer without leave to amend where plaintiff failed to specifically plead why demand on the board would have been futile]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 174 [conclusory allegations against corporate directors insufficient].)

Here, Plaintiffs have specified why demand would be futile. Plaintiffs allege that Mr. Dayspring and/or his 7510 LOVR entity control the Companies' operations. Plaintiffs allege that Mr. Dayspring and 7510 LOVR are "the ones in control" and "have diverted millions of dollars in revenue from the Companies" for their own benefit (FAC, ¶¶ 60, 63), and have no incentive to act to rectify their own breaches of fiduciary duty to the Companies (FAC, ¶ 62). (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 790 ["a demand typically is deemed futile when a majority of the directors have participated in or approved the alleged wrongdoing . . . or are otherwise financially interested in the challenged transaction."]; see also *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1259 ["The objective of encouraging intracorporate resolution of disputes and protecting managerial freedom is entirely meaningless where the defendants constitute the entire complement of the board of directors and all the corporate officers."].)

Accordingly, Moving Parties' demurrer to the derivative causes of action on the basis that Plaintiffs fail to establish demand futility will be overruled.

Moving Parties also allege that Plaintiffs have improperly asserted both individual and derivative claims for the same conduct in the seventh, tenth, eleventh, and twelfth causes of action. Moving Parties allege this creates an irreconcilable conflict because Plaintiffs are "simultaneously litigating for their own personal benefit, while alleging identical or related damages for the limited liability companies or on behalf of which [Plaintiffs are] suing derivatively." (Dem., p. 7, ll. 13-16, citing *Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 311-313.)

Plaintiffs respond by noting that only OG Investors brings derivative claims; Mr. Szymczak and the other Plaintiffs only bring direct claims, and there is nothing precluding them from asserting those direct claims against the Moving Parties.

As to OG Investors, Plaintiffs argue that it may maintain its individual and derivative claims in one lawsuit. Plaintiffs cite to *Jones, supra*, wherein the California Supreme Court held that a single course of action by a majority shareholder may give rise to derivative and individual claims where “damages to the shareholders were not incidental to damages to the corporation.” (*Schuster, supra*, 127 Cal.App.4th at p. 313, citing to *Jones, supra*, 1 Cal.3d 93, 106-107.) As set forth in *Jones*, “if the injury is not incidental to an injury to the corporation, an individual cause of action exists.” *Jones, supra*, at p. 107.)

The Court agrees that the facts, as Plaintiffs have alleged them, involving limited liability companies with “very few members” and in which OG Investors is a minority member, are analogous to the facts in *Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1221-1222, and *Jara, supra*, 121 Cal.App.4th 1238, 1258. Plaintiffs’ FAC sets forth facts alleging both derivative harm to the Companies, as well as individual harm to OG Investors. (See FAC, ¶¶ 12, 13, 15-18, 20-21, 58, 63, 142, 147, 148, 155, 152, 159.) If discovery in this action reveals that Plaintiffs’ claimed individual harm is not distinct from the claimed harm to the Companies, the Moving Parties may bring any motion deemed necessary.

#### First cause of action for breach of contract.

The first cause of action for breach of contract is asserted by OG Investors against 7510 LOVR, LLC. Moving Parties demur to this cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f).)

The elements of a breach of contract cause of action are: (a) the contract; (b) the plaintiff’s performance or excuse for non-performance; (c) the defendant’s breach; and (d) resulting damages. (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830.)

Here, the first cause of action alleges that OG Investors is a member of the Companies (i.e., the Nominal Defendants), and that 7510 LOVR is also a member of the Companies, acting through its manager, Mr. Dayspring. (FAC, ¶ 67.) Plaintiffs allege several breaches of the Companies’ operating agreements allegedly made by 7510 LOVR. (FAC, ¶ 71.) Plaintiffs allege that OG Investors has performed all conditions, covenants, and promises as required under the Companies’ Operating Agreements. (FAC, ¶ 72.)

The Moving Parties allege that, while the first cause of action alleges breaches “of at least ten different written operating agreements of limited liability companies,” the FAC does not “attach any of the operating agreements” or “allege the terms of the operating agreements verbatim.” (Dem., p. 7, l. 26 – p. 8, l. 1.) However, Plaintiffs are not required to attach the operating agreements, or set out the terms of the agreements verbatim. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 199.)

That said, the Court notes that OG Investors has not alleged that it is a party to any of the Operating Agreements at issue. In its opposition, Plaintiffs argue that paragraph 67 of the FAC identifies both

OG Investors and 7510 LOVR as members of the Companies, “and therefore parties to the Operating Agreements.” (Opp., p. 9 ll. 13-15.)

Paragraph 67 states:

Plaintiff OG Investors is a member of the Companies. 7510 LOVR is also a member of the Companies, and as alleged in more detail herein, acts through its manager, Dayspring.  
(FAC, ¶ 67.)

While this paragraph states that OG Investors is a member of the Companies, it does not state that OG Investors is a party to any of the Companies’ Operating Agreements via its membership. This makes the first cause of action unclear, particularly where Plaintiffs mean to allege breaches of multiple agreements relating to multiple entities (i.e. the Companies), rather than just one company or one operating agreement.

The Court is also concerned with the fact that, with one breach of contract cause of action, Plaintiffs seek redress for multiple breaches of multiple contracts. As noted, there are several Operating Agreements at issue, and Plaintiffs allege a multitude of breaches of those Agreements, generally. The parties apparently agree that the language of those Operating Agreements is identical. However, Plaintiffs’ attempt to lump multiple breaches of multiple contracts into a single cause of action is confusing and ambiguous.

Plaintiffs must amend their complaint to state a single cause of action for breach of contract for each Operating Agreement at issue, the parties to those Operating Agreements, and what actions allegedly violated the Operating Agreements.

Moving Parties further allege that the first cause of action is defective because the gravamen of alleged damages is to the Companies, not to OG Investors. However, OG Investors has alleged direct harm to itself, inasmuch as it alleges that 7510 LOVR has taken excess distributions that were supposed to be directed to OG Investors. (FAC, ¶¶ 12, 71.)

The demurrer to the first cause of action will be sustained with leave to amend.

#### Second cause of action for breach of contract.

The second cause of action for breach of contract (stylized as “anticipatory breach of contract” in the caption) is asserted by OG Investors and Dayspring Farms against 7510 LOVR LLC and other Defendants. Moving Parties demur to the second cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

Moving Parties allege that this cause of action fails as a matter of law because it does not attach any of the Operating Agreements or amendments thereto, and does not allege the terms of the Agreements verbatim.

As noted above, Plaintiffs are not required to attach the Operating Agreements. However, as with the first cause of action, Plaintiffs attempt to state a breach of contract claim that alleges breaches of six different written Operating Agreements. Plaintiffs' pleading is confusing and ambiguous. Plaintiffs must amend the complaint to allege a single breach of contract cause of action for each Operating Agreement allegedly violated, as set forth above.

The demurrer to the second cause of action will be sustained with leave to amend.

Third cause of action for declaratory relief.

The third cause of action for declaratory relief is asserted by OG Investors against 7510 LOVR LLC and other Defendants. Moving Parties demur to this cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

Moving Parties allege that this cause of action fails as a matter of law because it does not attach any of the Operating Agreements or amendments thereto, and does not allege the terms of the Agreements verbatim.

As noted above, Plaintiffs are not required to attach the Operating Agreements. The demurrer to the third cause of action will be overruled.

Fourth cause of action for breach of manager's fiduciary duty/duty of loyalty; fifth cause of action for breach of manager's duty of care; and sixth cause of action for breach of member's duty of good faith and fair dealing.

The fourth cause of action is asserted by OG Investors, derivatively on behalf of the Companies<sup>6</sup>, against Mr. Dayspring and 7510 LOVR LLC. The fifth cause of action is asserted by OG Investors, derivatively on behalf of the Companies, against Mr. Dayspring and 7510 LOVR LLC. The sixth cause of action is asserted by OG Investors, derivatively on behalf of the Companies against 7510 LOVR.

Moving Parties demur to these three related causes of action on the grounds that they fail to state causes of action and are uncertain. (Code Civ. Proc., § 430.10(e), (f)). Moving Parties allege, in a conclusory fashion, that the claims fail to include "the facts constituting the various breaches [of] fiduciary duty as to the ten limited liability companies which the causes of action are being brought derivatively, or the damages sustained by any specific limited liability company." (Dem., p. 9, ll. 4-8.)

Contrary to Moving Parties' assertion, the FAC makes several allegations supporting Plaintiffs' breach of fiduciary causes of action. Those paragraphs are outlined in Plaintiffs' opposition and

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<sup>6</sup> The Companies refer to the Nominal Defendants. (FAC, ¶ 96.)

the Court will not recite them here. (See Opp., p. 11, l. 19 – p. 12, l. 5.) The demurrer to the fourth, fifth, and sixth causes of action will be overruled.

Seventh cause of action for fraud (concealment).

The seventh cause of action is asserted by OG Investors, derivatively on behalf of the Companies, against Mr. Dayspring and LOVR. Moving Parties demur to the seventh cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

The elements of cause of action for fraud based on concealment or suppressed a material fact are: (1) the defendant must have concealed or suppressed a material fact; (2) the defendant must have been under a duty to disclose the fact to the plaintiff; (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.

*(Bank of America Corporation v. Sup. Ct. (2011) 198 Cal.App.4th 862, 870.)*

Moving Parties allege that the FAC “does not specifically state the alleged ‘material facts’ that were concealed.” (See Dem., p. 9, ll. 18-24.)

In opposition, Plaintiffs list several references to their FAC that allegedly support their fraud claim. The Court has reviewed the several paragraphs cited by Plaintiffs that allegedly state facts to support their concealment claim. The majority of these paragraphs do not allege a material fact that was concealed with the intent of defrauding Plaintiffs.

For example:

Without regard to the fiduciary duties Dayspring and 7510 LOVR owed as managers of the Companies to the other members, including OG Investors, Dayspring **intentionally failed to disclose material facts** to OG Investors and its member and manager Szymczak including, but not limited to, the fact that Dayspring and/or 7510 LOVR were wrongfully misappropriating millions of dollars from the Companies and their members, including OG Investors, and that Dayspring would refuse to assign 7510 LOVR’s interest in the Assignment Companies to OG Investors if 7510 LOVR failed to comply with the Permitting Requirements by the Permitting Deadline.

(FAC, ¶ 125, emphasis added.)

The problem with this allegation is that Mr. Dayspring did not allegedly intentionally fail to disclose his misappropriation with an intent to defraud. The plain language of the FAC indicates that the alleged failure to disclose the misappropriation of funds occurred after Mr. Szymczak had already invested those funds.

The paragraph excerpted above does, however, reference Mr. Dayspring's alleged failure to advise Plaintiffs that he would refuse to assign 7510's interest in the Assignment Companies<sup>7</sup> to OG Investors if 7510 LOVR failed to comply with the Permitting Requirements<sup>8</sup> by the Permitting Deadline. (See also FAC, ¶¶ 78-89.) So far as the Court can tell, this is the only failure to disclose a material fact alleged in the FAC.

The demurrer to the seventh cause of action will be overruled.

Eighth cause of action for accounting.

The eighth cause of action is asserted by OG Investors, derivatively on behalf of the Companies, against the Moving Parties. Moving Parties demur to the eighth cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

Moving Parties specifically argue that there is no "stand alone" cause of action for an accounting. The authority cited in support of this statement does not stand for this proposition. (See *Union Bank v. Sup. Ct.* (1995) 31 Cal.App.4th 573, 593-594.)

An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing. [Citations.] Equitable principles govern, and the plaintiff must show the legal remedy is inadequate.... Generally, an underlying fiduciary relationship, such as a partnership, will support an accounting, but the action does not lie merely because the books and records are complex. [Citations.] Some underlying misconduct on the part of the defendant must be shown to invoke the right to this equitable remedy.

(*Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 442-443, quoting *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136-1137.)

The demurrer to the eighth cause of action will be overruled.

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<sup>7</sup> The Assignment Companies are identified as Nominal Defendants 6860 Dayspring LLC, 6860 Cultivation LLC, 530 Dayspring LLC, 530 Cultivation LLC, Dayspring Farms LLC, Dayspring Farms Cultivation LLC, 8901 Dayspring LLC, and 8901 Cultivation LLC. (FAC, ¶ 77.)

<sup>8</sup> According to the FAC: "The Operating Agreements for the Assignment Companies provide at Article X that each company had a specified deadline (the "Permitting Deadline") to obtain the necessary land use permits for growing and cultivating cannabis on the real property owned by certain of the Assignment Companies (the "Permitting Requirements"). (FAC, ¶ 79.)

Ninth cause of action for fraud (misrepresentation).

The ninth cause of action is asserted by all four Plaintiffs against Mr. Dayspring. Moving Parties demur to the ninth cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

The elements that must be pled with specificity for a cause of action for fraud based on a misrepresentation are: (1) a false representation; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363; *Lazar v. Sup. Ct.* (1996) 12 Cal.4th 631, 638.)

Again, Plaintiffs refer the Court to several paragraphs they allege support the fraud claims, misrepresentation included. With their ninth cause of action, Plaintiffs allege:

139. In or around the Spring of 2018, Szymczak met Dayspring, who claimed that he was a capable professional in the cannabis industry with experience and knowledge of the business at all levels. Dayspring assured Szymczak that he was meticulous and ethical in his business dealings. Moreover, Dayspring assured Szymczak that he was specially situated in the local community to work effectively with the appropriate regulatory, permitting and licensing committees and officials in order to effectively grow and run legal cannabis businesses. Dayspring told Szymczak that he had access to and could obtain CUP's for legal cannabis businesses, which were hard to obtain, and of limited availability. However, Dayspring told Szymczak that he needed money and investors for the cannabis businesses. Dayspring represented to Szymczak that he had special knowledge of the cannabis industry, and could and would legally, ethically and properly run the day-to-day business operations. Dayspring made the above representations with the intent to induce Szymczak, personally and through OG Investors, to go into business with him and provide substantial funds to start and grow the businesses.

140. Based upon his representations that he could run the businesses properly and had special access to the CUP's, Dayspring convinced Szymczak, personally and through his company OG Investors, to invest over \$17 million into acquiring the land and funding the operations for the Companies. Dayspring further promised Szymczak and OG Investors that he would be responsible for running the Companies, and that he would do so in a legal and transparent manner, and in accordance with the Operating Agreements for the Companies.

141. Szymczak and OG Investors provided the money, and relied upon Dayspring to run the day-to-day operations of the Companies, and relied upon Dayspring's representations that he was an ethical businessperson, and that the businesses were legal, profitable, and appropriately managed.

Plaintiffs thereafter allege they discovered that Mr. Dayspring had allegedly misappropriated Mr. Szymczak's invested funds. (FAC, ¶ 142.) Plaintiffs also allege damages. (FAC, ¶ 143.)

Notably, nowhere in the above excerpts do Plaintiffs allege that Mr. Dayspring made a false statement that he knew or should have known was false with the intent to defraud. Plaintiffs allege that Mr. Dayspring represented himself as a capable and ethical businessman in the area of cannabis development. And while Plaintiffs insinuate Mr. Dayspring falsely made these claims, inferences are not allegations. Plaintiffs must amend their misrepresentation cause of action.

The demurrer to the ninth cause of action will be sustained with leave to amend.

#### Tenth cause of action for fraud (concealment).

The tenth cause of action is asserted by all four Plaintiffs against Mr. Dayspring. Moving Parties demur to the tenth cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

As with the other fraud-based causes of action, the tenth cause of action references two alleged "material facts" that were withheld – Mr. Dayspring's alleged misappropriation of Plaintiffs' investment, and his refusal to assign 7510 LOVR's interest in the Assignment Companies to OG Investors:

Without regard to the fiduciary duties he owed to OG Investors, Dayspring intentionally failed to disclose material facts to OG Investors and its member and manager Szymczak including, but not limited to, the fact that Dayspring was wrongfully misappropriating millions of dollars from the Companies and their members, including OG Investors, and that Dayspring would refuse to assign 7510 LOVR's interest in the Assignment Companies to OG Investors if 7510 LOVR failed to comply with the Permitting Requirements by the Permitting Deadline.

(FAC, ¶ 147.)

Again, the above paragraph refers to a failure to disclose something that occurred after Mr. Szymczak had already invested his funds, and therefore could not have been made with an intent for Mr. Szymczak to invest those funds. As before, apparently, the only alleged material fact that was not disclosed concerns Mr. Dayspring's alleged refusal to assign 7510 LOVR's interest in the Assignment Companies to OG Investors if 7510 LOVR failed to comply with the Permitting Requirements by the Permitting Deadline.

The demurrer to the tenth cause of action will be overruled.

#### Eleventh cause of action for aiding and abetting.

The eleventh cause of action is asserted by OG Investors on behalf of the Companies, and by Mr. Szymczak individually, against Mr. Dayspring and 7510 LOVR (and other Defendants). Moving

Parties demur to the eleventh cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

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.) (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343.)

A review of the eleventh cause of action indicates that Plaintiffs do not allege the “actual knowledge” or “substantial assistance and encouragement” elements of the cause of action. Plaintiffs must amend their complaint to allege all the elements of the cause of action.

The demurrer to the eleventh cause of action will be sustained with leave to amend.

#### Twelfth cause of action for civil conspiracy.

The twelfth cause of action is asserted by OG Investors on behalf of the Companies, and by Mr. Szymczak individually, against Mr. Dayspring and 7510 LOVR (and other Defendants). Moving Parties demur to the twelfth cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

Civil conspiracy is not an independent tort. Instead, it is ‘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.] 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. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.’ (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) The elements of a civil conspiracy are (1) the formation of a group of two or more persons who agreed to a common plan or design to commit a tortious act; (2) a wrongful act committed pursuant to the agreement; and (3) resulting damages. (*Ibid.*) (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 211-212, as modified (Aug. 24, 2011.))

The elements of a conspiracy claim have been alleged in the FAC. The Court will overrule the demurrer to the twelfth cause of action. (See *City of Industry, supra*, 198 Cal.App.4th 191, 212 [court noting it would “construe the fifth count for fraud and the tenth count for conspiracy together as a single count for fraud.”].)

Thirteenth cause of action for specific performance of contract: removal of managers.

The thirteenth cause of action is pled by OG Investors, derivatively on behalf of the Companies, against Mr. Dayspring and 7510 LOVR. Moving Parties demur to the thirteenth cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

Moving Parties specifically argue that specific performance is a remedy, not a stand-alone cause of action. (*Green Valley Landowners Assn., supra*, 241 Cal.App.4th 425, 433, fn. 8.) Plaintiffs offer no authority to the contrary, and instead appear to agree that they seek a remedy with this cause of action. (Opp., p. 14, ll. 4-7 [“Plaintiffs have pleaded a right to this remedy under the Operating Agreements...”].)

The demurrer to the thirteenth cause of action will be sustained without leave to amend.

Fourteenth cause of action for appointment of receiver and injunctive relief.

The fourteenth cause of action is asserted by OG Investors, derivatively on behalf of the Companies, against the Companies. Moving Parties demur to the fourteenth cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

This Court has already ruled upon Plaintiffs’ request for a receiver and injunctive relief; those requests were denied without prejudice.

The demurrer to the fourteenth cause of action will be overruled.

Seventeenth cause of action for breach of contract.

The seventeenth cause of action is asserted by Mr. Szymczak against 7510 LOVR. Moving Parties demur to the seventeenth cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

It is unclear to the Court whether, with the seventeenth cause of action, Plaintiffs refer to one Operating Agreement, or several Operating Agreements. To the extent Mr. Szymczak means to allege a breach of more than one Operating Agreement, each breach of contract cause of action must be separately pled, as outlined earlier in this ruling.

The demurrer to the seventeenth cause of action will be sustained with leave to amend.

Eighteenth cause of action for breach of fiduciary duty.

The eighteenth cause of action is asserted by all four Plaintiffs against 7510 LOVR. Moving Parties demur to the eighteenth cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)). The Moving Parties allege, in a conclusory fashion, that this cause of action “fails to allege the elements of the breach of fiduciary duties with specificity...” (Dem., p. 14, ll. 7-9.)

As with the other breach of fiduciary claims, the eighteenth cause of action has adequately pled the elements of the cause of action. The demurrer to the eighteenth cause of action will be overruled.

Nineteenth cause of action for financial elder abuse.

The nineteenth cause of action is asserted by Mr. Szymczak against 7510 LOVR. Moving Parties demur to the nineteenth cause of action on the grounds that it fails to state a cause of action and is uncertain. (Code Civ. Proc., § 430.10(e), (f)).

A cause of action for financial elder abuse requires proof of the following elements: (1) the defendant took or appropriated an individual’s property; (2) the individual was 65 years of age or older, or a dependent adult at the time of defendant’s conduct; (3) the defendant took or appropriated an individual’s property for a wrongful use, with the intent to defraud or by undue influence; (4) the individual was harmed; and (5) the defendant’s conduct was a substantial factor in causing the individual’s harm. (Welf. & Inst. Code, § 15610.30.) Furthermore, a cause of action for Elder Abuse must be pled with particularity. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 410.)

Moving Parties contend that Plaintiffs have not sufficiently pled the elements of an elder abuse claim. The Court has reviewed Plaintiffs’ FAC and Plaintiffs have adequately pled a financial elder abuse claim.

The demurrer to the nineteenth cause of action will be overruled.

**Motion to Strike.**

Code of Civil Procedure section 436 authorizes a court to strike language that is “irrelevant, false, or improper” and “not drawn of filed in conformity with the laws of this state...” (Code Civ. Proc., § 436(a), (b).)

Here, Moving Parties seek to strike out all references to punitive damages, as well as Plaintiffs’ request for specific performance.

Punitive damages.

Punitive damages are recoverable where a plaintiff proves “by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.” (Civ. Code, § 3294.) “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of rights or safety of others. “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights. “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. (*Ibid.*)

Plaintiffs’ FAC is replete with allegations concerning the alleged fraudulent actions of the Moving Parties, including with respect to the fraud and financial elder abuse claims. At this juncture, Plaintiffs may maintain their claim for punitive damages.

Specific performance.

As outlined in the Court’s analysis of Moving Parties’ demurrer, specific performance is a remedy, not a cause of action. Plaintiffs are thus not prevented from seeing specific performance in their operative pleading. Whether that specific performance will ultimately be granted is not something the Court can decide at this time. But at this juncture, Plaintiffs will be entitled to seek specific performance as a potential remedy.

**Conclusion.**

Demurrer.

The demurrer is sustained in part as more fully set forth herein.

The demurrer to the first, second, ninth, eleventh, and seventeenth causes of action is sustained with leave to amend. The demurrer to the thirteenth cause of action is sustained without leave to amend. The demurrer is overruled in all other respects.

**Plaintiffs shall file a second amended complaint on or before February 17, 2021.**

Motion to Strike.

The motion to strike is denied.

Requests for Judicial Notice.

The parties’ requests for judicial notice are granted. (Evid. Code, § 452(d).)