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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PNY TECHNOLOGIES, INC.,
Plaintiff,
v.
MILLER, KAPLAN, ARASE & CO., LLP,
Defendant.

Case No. [15-cv-01728-MMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT**

Re: Dkt. Nos. 82, 141

Before the Court are two motions filed by defendant Miller, Kaplan, Arase & Co., LLP ("Miller Kaplan"), each titled "Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment," filed, respectively, February 26, 2016, and July 22, 2016, the former based on the statute of limitations and the latter on various other grounds. Both motions have been fully briefed. Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.¹

BACKGROUND

In its complaint, plaintiff PNY Technologies, Inc. ("PNY") alleges that, in 2008, it entered into a license agreement with SanDisk Corporation ("SanDisk"), and that, in 2010, SanDisk retained Miller Kaplan to "undertake [an] audit" of PNY's "compliance with its royalty obligations." (See Compl. ¶¶ 1, 8-9, 12.) According to PNY, Miller Kaplan "represented [to PNY] that it was an independent third party auditor," when it was not, and Miller Kaplan "produced an audit report" that was "biased and flawed." (See Compl. ¶¶ 1, 14.) PNY alleges that SanDisk "commenced a lawsuit against PNY in California

¹By order filed August 23, 2016, the Court took the motions under submissions.

1 state court based on the defective and biased royalty audit." (See Compl. ¶ 30.)
2 Additionally, PNY alleges, Miller Kaplan "shared confidential PNY information with
3 SanDisk and its outside counsel" in violation of the terms of a non-disclosure agreement.
4 (See Compl. ¶ 26.) Based on said allegations, PNY asserts five causes of action, titled,
5 respectively, "Breach of Contract - Non-Disclosure Agreement," "Fraud," "Intentional
6 Misrepresentation," "Negligent Misrepresentation," and "Tortious Interference with
7 Contract."

8 **LEGAL STANDARD**

9 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, a "court shall grant
10 summary judgment if the movant shows that there is no genuine issue as to any material
11 fact and that the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P.
12 56(a).

13 The Supreme Court's 1986 "trilogy" of Celotex Corp. v. Catrett, 477 U.S. 317
14 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric
15 Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), requires that a party seeking
16 summary judgment show the absence of a genuine issue of material fact. Once the
17 moving party has done so, the nonmoving party must "go beyond the pleadings and by
18 [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on
19 file, designate specific facts showing that there is a genuine issue for trial." See Celotex,
20 477 U.S. at 324 (internal quotation and citation omitted). "When the moving party has
21 carried its burden under Rule 56[], its opponent must do more than simply show that
22 there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.
23 "If the [opposing party's] evidence is merely colorable, or is not significantly probative,
24 summary judgment may be granted." Liberty Lobby, 477 U.S. at 249-50 (citations
25 omitted). "[I]nferences to be drawn from the underlying facts," however, "must be viewed
26 in the light most favorable to the party opposing the motion." See Matsushita, 475 U.S. at
27 587 (internal quotation and citation omitted).

28 //

1 **DISCUSSION**

2 Miller Kaplan asserts it is entitled to summary judgment on each cause of action
3 alleged in the complaint. The Court addresses those claims, in turn.

4 **A. Breach of Contract Claim: First Count**

5 In the First Count, PNY alleges it entered into a non-disclosure agreement with
6 Miller Kaplan and that Miller Kaplan breached the agreement by disclosing to SanDisk
7 confidential information Miller Kaplan had obtained during the course of the audit.

8 PNY identifies one such disclosure in the complaint, specifically, the disclosure of
9 allegedly confidential "cost, price, and sales information" contained in an attachment to
10 an email sent on July 20, 2011, by an employee of Miller Kaplan to SanDisk's "outside
11 counsel" (see Compl. ¶ 27; see also Compl. Ex. A); additionally, in its opposition to the
12 first of the two motions for summary judgment, PNY identifies a second disclosure,
13 specifically, the disclosure of allegedly confidential "sales and purchase data," as well as
14 names of "PNY's vendors and the quantity and types of product that PNY purchased from
15 those vendors," which information assertedly was emailed by an employee of Miller
16 Kaplan to SanDisk's outside counsel on approximately June 13, 2011 (see Pl.'s Opp.,
17 filed June 3, 2016, at 8:21-27).

18 Miller Kaplan seeks summary judgment as to the First Count on several grounds,
19 which the Court next considers.

20 **1. Statute of Limitations**

21 Under California law, a four-year statute of limitations applies to claims for breach
22 of a written agreement. See Cal. Civ. Proc. Code § 337(1) (providing "action upon any
23 contract, obligation or liability founded upon an instrument in writing" must be brought
24 "[w]ithin four years" of date of accrual).² PNY filed its complaint on May 30, 2014, a date
25 within four years of the disclosures PNY asserts were made in violation of the non-

26 _____
27 ²The parties agree that, in light of a choice of law provision in the non-disclosure
28 agreement, California law applies to the breach of contract claim. (See Def.'s Mot., filed
February 26, 2016, at 3:2-5, 8:25-26; Pl.'s Opp., filed June 3, 2016, at 13:26-27.)

1 disclosure agreement. Miller Kaplan argues the claim nonetheless is time-barred, based
2 on the statute of limitations set forth in § 339(1), which provides that "[a]n action upon
3 any contract, obligation or liability not founded upon an instrument in writing" must be
4 brought "[w]ithin two years" of its accrual. See Cal. Civ. Proc. Code § 339(1).

5 In support of its argument, Miller Kaplan relies on a case holding that where the
6 "gravamen of [a] breach of contract" claim is "accounting malpractice," the contract claim
7 is subject to the two-year statute of limitations set forth in § 339(1), the statute applicable
8 to claims for professional malpractice, see Curtis v. Kellogg & Andelson, 73 Cal. App. 4th
9 492, 499, 503 (1999), as well as a case in which the plaintiff conceded his breach of
10 contract claim was subject to a two-year statute of limitations where the breach was
11 based on professional negligence in connection with an audit, see Czajkowski v. Haskell
12 & White, LLP, 208 Cal. App. 4th 166, 174 (2012) (noting parties agreed "two-year
13 limitations period of section 339, subdivision (1) applie[d]" to claim for breach of written
14 contract, as said claim was "intertwined with . . . professional malpractice allegations").
15 The cited cases are distinguishable, however, as the gravamen of PNY's breach of
16 contract claim is not malpractice. PNY's First Count is based on a claim that Miller
17 Kaplan engaged in conduct expressly precluded by a contractual term, not on a claim
18 that Miller Kaplan did so in a manner that fell below a professional standard of care. PNY
19 does not assert, nor could it assert, a claim for professional negligence or malpractice
20 against Miller Kaplan. Indeed, as Miller Kaplan itself points out, albeit for another
21 purpose, an accounting firm cannot be sued for "general negligence in the conduct of an
22 audit" except by its client, see Bily v. Arthur Young & Co., 3 Cal. 4th 370, 406-07 (1992),
23 which client, in the instant case, was SanDisk, not PNY (see Tully Decl. Ex. 13).

24 Accordingly, Miller Kaplan has not shown the First Count is barred by the
25 applicable statute of limitations.

26 **2. Waiver**

27 Miller Kaplan argues that, at the time the parties entered into the non-disclosure
28 agreement, PNY "waived" its right to seek compensation in the event of a subsequent

1 breach by Miller Kaplan. (See Def.'s Mot., filed July 22, 2016, at 23:23-27; see also
2 Def.'s Reply, filed June 10, 2016, at 12:16-21.) In support of such argument, Miller
3 Kaplan relies on a provision contained in a section of the agreement titled "Mutual
4 Disclaimers," which provision states as follows: "The parties shall have no obligation to
5 compensate each other for disclosures of any information or Confidential Information
6 under this Agreement and shall also have no obligation to enter into any further
7 agreement with each other." (See Tully Decl. Ex. 35.)

8 As PNY points out, however, the parties, in an introductory section of the
9 agreement, contemplated they would "disclose to each other Confidential Information"
10 (see id.) and the cited provision pertains to disclosures made "under" the agreement (see
11 id.). The provision on which Miller Kaplan relies thus appears to clarify that, when a
12 disclosure is made "under" the agreement, neither party would be required to pay the
13 other in order to obtain such information.

14 Miller Kaplan fails to explain why the provision on which it relies should be
15 interpreted to bar any claim for relief in the event of a breach. Indeed, given that the
16 primary purpose of the agreement is to limit disclosures of confidential information to
17 persons other than the contracting parties, an interpretation allowing one party to disclose
18 to third parties the other's confidential information without consequence would not be
19 reasonable. See Cal. Civ. Code § 1643 (providing "[a] contract must receive such an
20 interpretation as will make it . . . reasonable, and capable of being carried into effect, if it
21 can be done without violating the intention of the parties").

22 Accordingly, Miller Kaplan has failed to show PNY, by the terms of the agreement,
23 waived its right to seek relief for a breach thereof.

24 **3. Failure to Mark**

25 Miller Kaplan argues that, under the terms of the agreement, no material can be
26 deemed "confidential" unless it is marked as such by the disclosing party, and, it asserts,
27 "PNY failed to comply" with said provision. (See Def.'s Mot., filed July 22, 2016, at 25:4-
28 7.)

1 The provision on which Miller Kaplan relies, found in a section of the agreement
2 titled "Manner of Disclosure," states as follows: "Confidential information made available
3 in written form by one party or its affiliates to the other will be marked 'Confidential' or
4 similarly legended before being turned over to Recipient, or at any reasonable time
5 thereafter." (See Tully Decl. Ex. 35.) Assuming, arguendo, the cited provision allows
6 Miller Kaplan to disclose to others material it obtains from PNY unless such material is
7 marked in some manner as confidential, Miller Kaplan has failed to show such provision
8 bars PNY's claim. Specifically, although Miller Kaplan offers evidence to show that only
9 some of the material it received from PNY was marked as confidential (see id. Ex. B at
10 423:5-22, Ex. C at 77:13 - 78:5), Miller Kaplan offers no evidence to support a finding that
11 the material PNY asserts Miller Kaplan disclosed in violation of the agreement was not so
12 marked.

13 Accordingly, Miller Kaplan has failed to show it is entitled to summary judgment as
14 to the First Count based on any failure by PNY to mark documents as confidential.

15 **4. Disclosures by PNY**

16 Miller Kaplan argues it is entitled to summary judgment for the asserted reason
17 that PNY disclosed to SanDisk material "similar to that which it accuses Miller Kaplan of
18 disclosing" (see Def.'s Mot., filed July 22, 2016, at 24:7-8), and that PNY also disclosed
19 to SanDisk "much" of the information Miller Kaplan allegedly wrongfully disclosed to
20 SanDisk (see id. at 24:17-22).

21 Miller Kaplan fails to explain how such a showing would entitle Miller Kaplan to
22 summary judgment on the First Count. Although it would appear that, with respect to
23 confidential material voluntarily disclosed by PNY to SanDisk prior to disclosure of the
24 same material by Miller Kaplan, PNY may be unable to establish it incurred actual
25 damages by reason of Miller Kaplan's disclosure, a showing of actual damages is not
26 required to establish a breach of contract, as a party may obtain nominal damages for a
27 breach. See Sweet v. Johnson, 169 Cal. App 2d 630, 632-33 (1959) (holding "plaintiff is
28 entitled to recover nominal damages for the breach of a contract, despite inability to show

1 that actual damage was inflicted upon him, since the defendant's failure to perform a
2 contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages");
3 see also Raiser v. Ventura College of Law, 488 Fed. Appx. 219, 222 (9th Cir. 2012)
4 (holding, "under California law, inability to show actual damages does not preclude
5 recovery for breach of contract") (citing Sweet v. Johnson).

6 In any event, Miller Kaplan has not identified the specific material assertedly
7 disclosed by PNY to SanDisk, let alone compared it with the material alleged to have
8 been disclosed by Miller Kaplan to SanDisk, and, consequently, the Court is unable to
9 determine whether there exists an overlap of such significance as to bar any claim for
10 actual damages. See Fed. R. Civ. P. 56(a) (providing movant has burden to "show[] that
11 there is no genuine dispute as to any material fact").

12 Accordingly, Miller Kaplan has failed to show that, based on disclosures made by
13 PNY to SanDisk, Miller Kaplan is entitled to summary judgment as to the First Count.

14 **B. Fraud Claims: Second, Third and Fourth Counts**

15 The Second, Third and Fourth Counts assert claims of, respectively, "fraud,"
16 "intentional misrepresentation" and "negligent misrepresentation," based on allegations
17 that Miller Kaplan represented that "it could act as an independent third party auditor" and
18 further represented that its reports "reflected an unbiased, independent, third party
19 evaluation." (See Compl. ¶¶ 41, 50; see also Compl. ¶¶ 58-59.) According to PNY,
20 such representations were "false." (See Compl. ¶¶ 44, 53; see also Compl. ¶ 60.)

21 Before addressing Miller Kaplan's argument as to whether it is entitled to summary
22 judgment on the fraud claims, the Court first addresses the parties' dispute as to whether
23 California law applies to those claims, as Miller Kaplan argues, or New Jersey law
24 applies, as PNY argues.

25 PNY's complaint initially was filed in New Jersey state court and subsequently was
26 removed by Miller Kaplan to the District of New Jersey, based on diversity of citizenship.
27 Thereafter, Magistrate Judge Michael A. Hammer, upon motion filed by Miller Kaplan,
28 transferred the matter to this District, pursuant to 28 U.S.C. § 1404(a). (See Order, filed

1 March 24, 2015 (Document No. 38).)

2 Although, in diversity cases, district courts ordinarily must apply the "conflict of
3 laws rules prevailing in the states in which they sit," see Klaxon Co. v. Stentor Electric
4 Mfg. Co., 313 U.S. 487, 494, 496 (1941), an "exception" exists "for § 1404(a) transfers,
5 requiring that the state law applicable in the original court also apply in the transferee
6 court," see Atlantic Marine Construction Co. v. United States District Court, 134 S.Ct.
7 568, 582 (2013). Such exception does not apply, however, "when a [§ 1404(a)] transfer
8 stems from enforcement of a forum-selection clause"; in such cases, "[t]he court in the
9 contractually selected venue should not apply the law of the transferor venue." See id. at
10 583.

11 In the instant case, Magistrate Judge Hammer transferred the action based on a
12 forum selection clause selecting the "Northern District of California" (see Opinion, filed
13 March 24, 2015, (Document No. 37) at 7-17), and, alternatively, "[f]or the convenience of
14 parties and witnesses, [and] in the interest of justice" (see id. at 17 (alterations in
15 original); see also id. at 17-29). Under such circumstances, the Court finds the rule
16 applicable to transfers based on forum selection clauses applies. As explained by the
17 Supreme Court, where a plaintiff files suit in a venue contrary to that selected in the
18 forum selection clause, "it [would] be inequitable to allow the plaintiff to fasten its choice
19 of substantive law to the venue transfer" and, additionally, it "would also encourage
20 gamesmanship" were the law of the transferor court to apply. See Atlantic Marine
21 Construction, 134 S.Ct. at 583.

22 Accordingly, the Court will apply California conflict of laws rules.

23 Under California conflict of laws rules, California law applies unless the party
24 seeking application of the law of a "foreign state" shows, inter alia, the "foreign law . . .
25 materially differs from the law of California" and that the "other state[]" has an "interest in
26 having its own law applied." See Washington Mutual Bank, FA v. Superior Court, 24 Cal.
27 4th 906, 919-20 (2001). Here, although PNY points to one material difference,
28 specifically, that the statute of limitations applicable to fraud claims is longer under New

1 Jersey law, compare N.J. Stat. Ann. § 2A:14-1 (providing six-year limitations period) with
2 Cal. Civ. Proc. Code § 338(d) (providing three-year limitations period), PNY has failed to
3 identify any interest on the part of New Jersey in having its laws applied in the instant
4 action.

5 Accordingly, the Court will apply California law to the fraud claims, and now turns
6 to the question of whether Miller Kaplan is entitled to summary judgment on those claims.

7 **1. Statement Re: Miller Kaplan's Independence**

8 To the extent the Second, Third and Fourth Counts are based on the theory that
9 Michael Quackenbush ("Quackenbush"), who worked on the subject audit and is a
10 "partner of Miller Kaplan" (see Quackenbush Decl. ¶ 1), falsely represented that Miller
11 Kaplan was independent, Miller Kaplan, as discussed below, seeks summary judgment
12 on several grounds.

13 **a. Statute of Limitations**

14 Under California law, a fraud claim must be filed within three years of the date the
15 claim accrues. See Cal. Civ. Proc. Code § 338(d). Miller Kaplan again argues that the
16 two-year statute of limitations set forth in § 339(1) applies, in this instance for the
17 asserted reason that the gravamen of the fraud claims is professional malpractice. As
18 discussed above with respect to the First Count, however, PNY cannot base, and has not
19 based, any claim on professional negligence, as PNY was not a client of Miller Kaplan.
20 Moreover, as the California Court of Appeal has explained, even where the gravamen of
21 other claims asserted in an action is "accounting malpractice," a joined claim
22 "adequately" pleading the elements of fraud is subject to the three-year limitations period
23 set forth in § 338(d). See Curtis, 73 Cal. App. 4th at 492, 499, 503. Here, although Miller
24 Kaplan contends PNY cannot establish the merits of its fraud claims, it has not argued
25 that those claims, if proved, would not support a finding of fraud.

26 Accordingly, the fraud claims are subject to a three-year limitations period, as set
27 forth in § 338(d).

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1 As noted, the complaint was filed on May 30, 2014, and, consequently, to be
2 timely, the claims must have accrued no earlier than May 30, 2011. In that regard, Miller
3 Kaplan contends the fraud claims accrued in December 2010, relying on evidence that,
4 prior to that date, Mark Ciano ("Ciano"), PNY's Vice President of Finance and Controller,
5 as well as Heidi Stuto, PNY's Treasurer, believed Miller Kaplan was not independent in
6 light of certain facts acknowledged by Quackenbush prior to the audit. (See Compean
7 Decl. Ex. D at 93:7-16, 94:19-22, 97:4-18; Tully Decl. Ex. H at 202:16-17, Ex. I at 36:16 -
8 38:14.) Given the circumstances under which Quackenbush's statements were made,
9 set forth below,³ the Court finds a triable issue of fact remains as to the date of accrual.

10 On August 31, 2010, SanDisk retained Miller Kaplan to conduct a "Royalty Audit."
11 (See Quackenbush Decl. ¶¶ 3, 4.) Shortly thereafter, PNY learned that Quackenbush
12 had "done audits" for SD-3C, LLC ("SD-3C"), an entity that "controlled the SD licensing"
13 and of which SanDisk was both "a founding member" and "one of its primary members."
14 (See Compean Decl. Ex. D at 94:9-18; Tully Decl. Ex. C at 36:21 - 38:14; Ciano Decl.
15 ¶ 13.) Quackenbush, when subsequently asked by PNY whether he had done so,
16 acknowledged he had conducted audits for SD-3C (see Tully Decl. Ex. B at 202:15-19),
17 but stated PNY was "ridiculous for being concerned" and that Miller Kaplan was
18 "independent" (see Compean Decl. Ex. D at 95:12-19). Given that assurance, PNY,
19 albeit with some reluctance, decided not to raise with SanDisk the issue of Miller Kaplan's
20 independence (see Tully Decl. Ex. B at 203:8 - 204:4), and the audit went forward with
21 Miller Kaplan.

22 Prior to the date on which Miller Kaplan began the audit, Quackenbush's primary
23 client was SD-3C and approximately 60% of the work he performed was on behalf of said
24 client (see Robertson Decl. Ex. 1 at 59:19 - 60:1), facts he did not disclose to PNY (see
25 Compean Decl. Ex. G at 3:7-12). In addition, prior to the date on which Miller Kaplan
26

27 ³The following facts are undisputed or, if disputed, stated in the light most
28 favorable to PNY.

1 began the audit, Miller Kaplan had, "for a number of years," performed audits for
2 SanDisk's "401(k) plan" (see Robertson Decl. Ex. 2 at 382:25 - 383:21), a fact
3 Quackenbush did not disclose to PNY (see Tully Decl. Ex. B at 202:19-22; Compean
4 Decl. Ex. D at 99:6-9). PNY first learned of such additional facts in the course of another
5 lawsuit⁴ (see Ciano Decl. ¶¶ 15-16),⁵ on a date no earlier than September 14, 2012, the
6 date on which Miller Kaplan first produced documents in response to a "business records
7 subpoena" served by PNY (see Asimow Decl. ¶¶ 3-4).⁶

8 A fraud claim does not accrue "until the fraud is discovered" by the plaintiff. See
9 Pashley v. Pacific Electric Co., 25 Cal. 2d 226, 228 (1944). Here, the fraud claims are
10 based on the theory that, although Quackenbush disclosed, prior to the audit, one fact
11 that pertained to Miller Kaplan's independence or lack thereof, specifically, his having
12 performed audits for SD-3C, he did not disclose other facts, specifically, the extent of the
13 work Miller Kaplan had performed for SD-3C and the fact that Miller Kaplan had
14 performed audits for SanDisk's 401(k) plan. As PNY has offered evidence to support a
15 finding that it did not learn of such additional facts until a date no earlier than September
16 14, 2012 (see Ciano Decl. ¶¶ 15-16; Asimow Decl. ¶¶ 3-4), PNY has shown that a trier of
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18 ⁴On July 26, 2011, SanDisk filed a lawsuit against PNY (see Compean Decl. Ex. D
19 at 160:22-280), in which it alleged PNY had "not paid all the royalties due under the
20 [license] [a]greement" (see Tully Decl. Ex. F ¶ 15) and sought to recover "the unpaid
royalties and other amounts due" thereunder (see id. Ex. F ¶¶ 18, 23).

21 ⁵Miller Kaplan's objection to Ciano's statement as to when he first learned such
22 facts is overruled. Contrary to Miller Kaplan's argument, the cited testimony is not
23 irrelevant, should not be excluded as more prejudicial than probative, is not expert
24 testimony, is not hearsay and is not barred by the best evidence rule, nor does Ciano
25 lack personal knowledge as to the timing of such disclosure. Moreover, Miller Kaplan's
26 argument that such declaration is contradicted by deposition testimony is unpersuasive,
27 as Miller Kaplan cites no portion of Ciano's deposition suggesting he learned such facts
28 at a time different from that set forth in his declaration.

⁶Miller Kaplan's objection to Asimov's declaration, specifically, his statement that
PNY sought and obtained discovery from Miller Kaplan during said litigation, is overruled.
Contrary to Miller Kaplan's argument, such testimony is not irrelevant, should not be
excluded as more prejudicial than probative, is not hearsay and is not barred by the best
evidence rule, nor is there any showing that the declarant, who was counsel of record
during the subject litigation, lacks sufficient personal knowledge of those proceedings.

1 fact could reasonably find PNY discovered the alleged fraud within the applicable
2 limitations period.

3 Accordingly, to the extent the Second, Third and Fourth Counts are based on the
4 theory that Quackenbush falsely stated Miller Kaplan was independent, Miller Kaplan has
5 failed to show the claims are barred by the statute of limitations.

6 **b. Reliance**

7 In its complaint, PNY alleges it relied on Quackenbush's assertion of
8 independence when it "acquiesced in the commencement of the audit by Miller Kaplan,"
9 which it allegedly did because, at that time, it "lacked concrete support for its position that
10 Miller Kaplan was not independent." (See Compl. ¶ 15.) As clarified at Ciano's
11 deposition, although PNY was not "satisfied" that Miller Kaplan was independent at the
12 time Quackenbush claimed it was (see Tully Decl. Ex. B at 207:22-25), Ciano believed
13 that, "technically[,] he could not go back to [SanDisk] and say [Miller Kaplan] is not an
14 independent auditor because [it] works on SD-3C," as "[t]hat in itself wasn't enough" (see
15 id. Ex. B at 203:23 - 204:1).

16 Miller Kaplan argues PNY cannot establish the element of reliance. See Bily, 3
17 Cal. 4th at 413, 415 (holding claims for intentional misrepresentation and for negligent
18 misrepresentation require showing of "justifiable reliance" on misrepresentation).
19 Specifically, Miller Kaplan asserts, PNY "did not, and could not, actually and justifiably
20 rely on Miller Kaplan's alleged representations because PNY believed from day one that
21 Miller Kaplan was not independent." (See Def.'s Mot., filed July 22, 2016, at 17:19-21.)
22 At the time PNY decided not to raise with SanDisk the issue of Miller Kaplan's
23 independence, however, PNY was relying on the only relationship bearing on
24 independence of which it was aware, one that a trier of fact could find was not of such
25 significance as to require a reasonable person to challenge Miller Kaplan's appointment.
26 As set forth above, PNY has offered evidence to support a finding that, until 2012, it was
27 unaware of additional information bearing on the issue of independence, and there is no
28 argument by Miller Kaplan, let alone evidentiary showing, that such additional information

1 was known to PNY at the time of the asserted act of reliance.

2 Accordingly, to the extent the Second, Third and Fourth Counts are based on the
3 theory that Quackenbush falsely stated Miller Kaplan was independent, Miller Kaplan has
4 failed to show PNY cannot establish the element of reliance.

5 **c. Waiver**

6 Miller Kaplan argues the fraud claims are barred by the affirmative defense of
7 "waiver," which defense requires the defendant to establish "the intentional
8 relinquishment of a known right after knowledge of the facts." See Wienke v. Smith, 179
9 Cal. 220, 225-26 (1918). Specifically, Miller Kaplan asserts, the fraud claims are barred
10 because, "from the beginning of Miller Kaplan's engagement, PNY had knowledge of its
11 claims that Miller Kaplan was not independent." (See Def.'s Mot., filed July 22, 2016, at
12 21:4-6.) Although not clearly expressed, Miller Kaplan appears to contend that PNY
13 waived any right it had to bring to SanDisk's attention its concerns about Miller Kaplan's
14 lack of independence and to request appointment of a different auditor.

15 Here, give the evidence discussed above as to the element of reliance, and, in
16 particular, Miller Kaplan's failure to disclose what arguably were the most significant facts
17 bearing on its independence, the Court finds Miller Kaplan has not shown that, as a
18 matter of law, PNY waived any right it had to raise with SanDisk its concerns about Miller
19 Kaplan's independence. See Wienke, 179 Cal. at 226 (holding, for intentional waiver,
20 plaintiff, after obtaining "knowledge of the facts," must have had "an opportunity for
21 choice between the relinquishment and the enforcement of the right").

22 Accordingly, to the extent the Second, Third and Fourth Counts are based on the
23 theory that Quackenbush falsely stated Miller Kaplan was independent, Miller Kaplan has
24 failed to show the claims are barred by the affirmative defense of waiver.

25 **d. Collateral Estoppel**

26 Miller Kaplan argues that PNY is "collaterally estopped to pursue its claims" in light
27 of findings made in the prior proceeding filed in state court by SanDisk against PNY.
28 (See Def.'s Mot., filed July 22, 2016, at 22:11.) Specifically, Miller Kaplan asserts that the

1 judgment entered on a jury verdict in the prior action indicates [t]he jury determined that
2 SanDisk corrected Miller Kaplan's claimed non-independence by proposing a second
3 examination by another accounting firm." (See Def.'s Mot., filed July 22, 2016, at 22:23-
4 25.) Although not clearly expressed, Miller Kaplan appears to argue that said
5 determination constitutes, in the instant action, a bar to PNY's establishing it suffered any
6 injury or loss as a result of Quackenbush's assertedly false representation as to Miller
7 Kaplan's independence.

8 A district court must "afford the same full faith and credit to state court judgments
9 that would apply in the State's own courts." See Kremer v. Chemical Construction Corp.,
10 456 U.S. 461, 462-63 (1982). Under California law, an issue decided in a prior action
11 may not be relitigated in a second action, where (1) "the issue decided in the prior
12 adjudication [was] identical with the one presented in the [second] action," (2) a "final
13 judgment on the merits" was entered in the first action, and (3) "the party against whom
14 the [defense of issue preclusion] is asserted [was] a party or in privity with a party in the
15 prior adjudication." See Bernhard v. Bank of America Nat'l Trust & Savings Ass'n, 19
16 Cal. 2d 807, 813 (1942).

17 With respect to the first element, "the party asserting the estoppel" has the burden
18 of "proving the identity of issues." See Hernandez v. City of Los Angeles, 624 F.2d 935,
19 937 (9th Cir. 1980). "To sustain this burden, a party must introduce a record sufficient to
20 reveal the controlling facts and pinpoint the exact issues litigated in the prior action." See
21 id.; see also Clark v. Bear Stearns & Co., 966 F.2d 1318, 1321 (9th Cir.1992) (holding
22 "party asserting preclusion bears the burden of showing with clarity and certainty what
23 was determined by the prior judgment").

24 In its complaint, PNY alleges it was damaged by its reliance on Quackenbush's
25 representation because it "submitted to the burdensome, time-consuming, and costly
26 process of an audit, and some of PNY's most highly sensitive and confidential information
27 was directed to PNY's direct competitor, SanDisk, and SanDisk's outside counsel." (See
28 Compl. ¶ 47.) As noted above, for collateral estoppel to apply, the issue decided in the

1 prior action and the issue presented in the later action must be "identical." See Bernhard,
2 19 Cal. 2d at 813. For the reasons discussed below, the Court finds it cannot make such
3 a determination on the record presented here.

4 The judgment entered on the jury verdict indicates the jury was asked to, and
5 answered, a number of questions on five different "topics" (see Tully Decl. Ex. 26), the
6 first four of which are not asserted to have any bearing on the instant action. In the fifth
7 section, titled "Jury Interrogatories," the jury answered seven questions (see id. Ex. 26 at
8 6-7), the sixth of which, Miller Kaplan asserts, supports its collateral estoppel defense.
9 Specifically, the jury was asked, and answered "Yes" to, the following interrogatory: "If
10 you found that Miller Kaplan was not an independent third party accounting firm, did
11 SanDisk correct this non-independence by proposing another independent third party
12 accounting firm?" (See id. Ex. 26 at 7.)⁷

13 Miller Kaplan has not shown, with the requisite "clarity and certainty," see Clark,
14 966 F.2d at 1321, that the jury, in answering the interrogatory on which Miller Kaplan
15 relies, necessarily found the damages claimed in the instant action were not incurred as a
16 result of Quackenbush's asserted misrepresentation. Indeed, it is unclear from the
17 limited record presented why the jury in the state court proceedings was asked to answer
18 said interrogatory; there is no showing as to what claim(s) for relief or defense(s) were
19 implicated thereby or what use, if any, the trial court made of the jury's answers to the
20 subject interrogatories in rendering judgment in favor of SanDisk.

21 Moreover, even assuming the Court were in a position to find that the damages
22 issues presented in the instant case are identical to an issue or issues decided in the
23 state court proceedings, there is an insufficient showing as to the second element,
24 namely that a final judgment has been entered.

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27 ⁷In response to the fourth and fifth interrogatories, the jury found, respectively, that
28 Miller Kaplan was not "an independent third party auditor" and that SanDisk was not
"excused from this requirement." (See id.)

1 First, Miller Kaplan's reliance on the judgment entered on the jury's verdict is
 2 unavailing. Miller Kaplan acknowledges PNY filed an appeal from that judgment, and,
 3 under California law, an action remains "pending from the time of its commencement until
 4 its final determination upon appeal, or until the time for appeal has passed, unless the
 5 judgment is sooner satisfied." See Cal. Civ. Proc. Code § 1049; see also Intel Corp. v.
 6 Advance Micro Devices, Inc., 12 F.3d 908, 915 (9th Cir. 1993) (holding, under California
 7 law, "judgment of a state trial court from which an appeal is pending has no res judicata
 8 effect on the issues in another case"). Although Miller Kaplan asserts PNY "abandoned
 9 its appeal" (see Def.'s Mot., filed July 22, 2016, at 23:4-5), Miller Kaplan offers no
 10 evidence to support such assertion.

11 Second, to the extent Miller Kaplan, either additionally or alternatively, relies on a
 12 "stipulated judgment" entered after the judgment on the jury verdict (see Def.'s Mot., filed
 13 July 22, 2016, at 23:5-7; see also Def.'s Reply, filed August 12, 2016, at 14:15-17), such
 14 argument likewise fails, as Miller Kaplan has not shown such other judgment exists. In
 15 particular, the document on which Miller Kaplan relies is not a judgment, but, rather, a
 16 stipulation, signed by SanDisk and PNY, setting forth the terms of a post-judgment
 17 settlement agreement, which document, even if filed in state court by the signatories, has
 18 not been signed by a judicial officer. (See Tully Decl. Ex. 89.)⁸

19 Accordingly, to the extent the Second, Third and Fourth Counts are based on the
 20 theory that Quackenbush falsely stated Miller Kaplan was independent, Miller Kaplan has
 21 failed to show the claims are barred by the affirmative defense of collateral estoppel.

22 **2. Figures in Reports Issued by Miller Kaplan**

23 To the extent the fraud claims are based on the theory that the figures set forth in
 24 Miller Kaplan's reports were false, Miller Kaplan argues it is entitled to summary judgment
 25

26 ⁸Indeed, under the terms of the settlement agreement attached to the stipulation,
 27 the parties agreed to "move the state court," on or after October 1, 2017, "to enter
 28 judgment pursuant to the terms of [that] agreement." (See id. Ex. 89, attachment thereto
 at ¶¶ 3.c., 2.b.)

1 for the reason that PNY lacks evidence to establish it relied on such figures. Having
2 considered the evidence offered in connection with that issue,⁹ the Court agrees.

3 On March 29, 2011, Miller Kaplan issued its first report, in which it stated PNY
4 owed SanDisk either \$66,800,000 or \$40,889,000, depending on the accounting method
5 used. (See Compean Decl. Ex. D at 104:9 - 105:3, 105:12-14.) When PNY received the
6 first report, Ciano "knew" Miller Kaplan's figures were "not correct" (see id. Ex. D at
7 105:22-25), sent "written objections" to Miller Kaplan (see id. Ex. D at 134:6-14), and
8 advised SanDisk the figures were "incorrect" (see id. Ex. D at 106:8-9). Next, on May 11,
9 2011, Miller Kaplan issued "revised schedules," in which it stated PNY owed San Disk
10 either "49 million" or "21.4 million." (See id. Ex. D at 115:19 - 116:17.) Ciano believed
11 said revised figures were "wrong" (see Tully Decl. Ex. B at 326:4-9), and he so advised
12 SanDisk (see Compean Decl. Ex. D at 118:24 - 119:10). Lastly, on June 16, 2011, Miller
13 Kaplan issued its "final audit report" (see id. Ex. D at 134:26 - 135:10) in which it stated
14 PNY owed SanDisk either \$30,344,829 or \$22,900,598 (see Tully Decl. Ex. 9). Ciano
15 believed the final report was "wrong and incorrect and fraudulent" (see id. Ex. B at 350:4-
16 8), and he advised SanDisk the figures were not accurate (see Compean Decl. Ex. D at
17 135:19-27).

18 In sum, in each instance when Miller Kaplan issued a report, PNY, upon receiving
19 the report, believed the figures stated therein were not correct and advised SanDisk of
20 such belief. Further, PNY points to no evidence that, in spite of its belief that the figures
21 were incorrect, it nonetheless took some action in reliance on the figures, for example, by
22 making a payment to SanDisk.

23 Accordingly, Miller Kaplan having offered evidence to show PNY never relied on
24 the figures in Miller Kaplan's reports and PNY having offered no evidence to the contrary,
25 Miller Kaplan is entitled to summary judgment on the Second, Third and Fourth Counts to
26

27 _____
28 ⁹The following facts are undisputed or, if disputed, stated in the light most
favorable to PNY.

1 the extent they are based on the theory that the figures in Miller Kaplan's reports were
2 false.¹⁰

3 **C. Tortious Interference with Contractual Relationship: Fifth Count**

4 In the Fifth Count, PNY alleges that Miller Kaplan "tortious[ly] interfere[d]" with the
5 "contractual relationship between PNY and SanDisk," identified in the complaint as the
6 "[l]icense [a]greement." (See Compl. ¶¶ 66-68.) The basis for the claim is further
7 clarified in PNY's opposition to Miller Kaplan's first motion for summary judgment, in
8 which PNY asserts that the "flawed" and "biased" report Miller Kaplan issued in June
9 2011 "caused PNY to become embroiled in the costly SanDisk litigation that spanned
10 several years" and "made it impossible for PNY to negotiate a resolution with SanDisk."
11 (See PNY's Opp., filed June 3, 2016, at 7:1-4.)

12 Under California law, "a stranger to a contract may be liable in tort for intentionally
13 interfering with the performance of a contract." See Pacific Gas & Electric Co. v. Bear
14 Stearns & Co., 50 Cal. 3d 1118, 1126 (1990).¹¹ "The elements [of the tort] are (1) a valid
15 contract between plaintiff and a third party; (2) defendant's knowledge of this contract;
16 (3) defendant's intentional acts designed to induce a breach or disruption of the
17 contractual relationship; (4) actual breach or disruption of the contractual relationship;
18 and (5) resulting damage." Id.

19 Here, assuming Miller Kaplan issued its June 2011 report with the intent to cause
20 a breach or disruption of the license agreement, there is no evidence to support a finding
21 that SanDisk breached the license agreement as a result of the issuance of said report.¹²

23 ¹⁰In light of this finding, the Court, to the extent the fraud claims are based on the
24 figures in Miller Kaplan's reports, does not consider herein Miller Kaplan's additional
arguments in support of summary judgment.

25 ¹¹For the reasons stated above with respect to the fraud claims, the Court finds
26 California law applies to this claim.

27 ¹²To the extent PNY suggests SanDisk breached the license agreement by
28 retaining an auditor that was not independent, any such breach occurred in August 2010,
when SanDisk retained Miller Kaplan (see Tully Decl. Ex. 13), and thus could not have
been caused by the issuance of Miller Kaplan's June 2011 report.

1 Although, as noted, SanDisk did file a lawsuit against PNY shortly after Miller Kaplan
2 issued its June 2011 report, SanDisk's lawsuit sought to enforce the terms of the license
3 agreement and included no claim seeking rescission or otherwise to be excused from
4 further performing thereunder. (See Tully Decl. Ex. F.) Further, as Miller Kaplan points
5 out, following the resolution of SanDisk's claims, SanDisk and PNY agreed to continue to
6 maintain a licensor/licensee relationship for a period in excess of that set forth in the
7 license agreement. (See id. Ex. 55 (license agreement) at §§ 1.6, 1.38, 6.1 (providing
8 agreement would terminate on January 15, 2015); id. Ex. 89 (settlement agreement)
9 § 2.c. (providing PNY, in exchange for specified consideration, "shall have a . . . license
10 . . . through January 15, 2020").¹³

11 Accordingly, Miller Kaplan is entitled to summary judgment as to the Fifth Count.

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24 ¹³In its opposition, PNY cites to evidence it asserts would support a finding that
25 Miller Kaplan's June 2011 report disrupted "discussions" between SanDisk and PNY
26 "related to possible transactions" involving products PNY hoped to purchase from
27 SanDisk. (See Pl.'s Opp. filed August 5, 2016, at 7:15-16, 7:21, 8:1-6.) PNY does not
28 contend, however, that SanDisk and PNY had entered into a contract of sale. Although
California recognizes a claim for "intentional interference with prospective economic
advantage," see Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153
(2003), such a claim has not been pleaded here.

1 **CONCLUSION**

2 For the reasons stated above:

3 1. Miller Kaplan's first motion for summary judgment is hereby DENIED.

4 2. Miller Kaplan's second motion for summary judgment is hereby GRANTED in
5 part and DENIED in part, as follows:

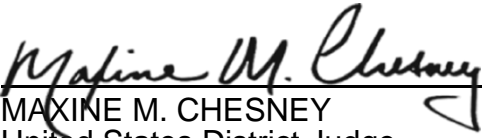
6 a. With respect to the Second, Third and Fourth Counts, the motion is
7 GRANTED to the extent said counts are based on the claim that the figures in Miller
8 Kaplan's reports were false;

9 b. With respect to the Fifth Count, the motion is GRANTED; and

10 c. In all other respects, the motion is DENIED.

11 **IT IS SO ORDERED.**

12
13 Dated: September 28, 2016

14 
15 MAXINE M. CHESNEY
16 United States District Judge

17 United States District Court
18 Northern District of California